DRN-4945369

The complaint

Mr C has complained about a transfer of his Standard Life personal pension to a small, self-administered scheme (SSAS) in 2015. Phoenix Life Limited (Phoenix) have since taken over Standard Life's personal pensions and are the respondent in this case. For simplicity I will refer to Phoenix when referring to the actions of the respondent business in this decision.

Mr C's SSAS was subsequently used to invest in The Resort Group (TRG). The investment now has nil value. Mr C says he has lost out financially as a result.

Mr C says Phoenix failed in its responsibilities when dealing with the transfer request. He says that it should have done more to warn him of the potential dangers of transferring, and undertaken greater due diligence on the transfer, in line with the guidance he says was required of transferring schemes at the time. Mr C says he wouldn't have transferred, and therefore wouldn't have put his pension savings at risk, if Phoenix had acted as it should have done.

What happened

On 7 October 2014, Mr C signed a letter of authority allowing Capital Facts to obtain details, and transfer documents, in relation to his pension. Mr C says this followed an unsolicited approach. Capital Facts then wrote to Phoenix, enclosing Mr C's letter of authority. It requested information on Mr C's pension and discharge forms to allow a transfer. Phoenix wrote to Mr C on 21 October 2014 and explained to him that Capital Facts wasn't authorised to give financial advice. Its letter said:

> "*Although they provided your signed permission to obtain access to your information, CAPITAL FACTS is not a regulated or otherwise legally authorised entity. In this case, the company does not appear on the Financial Services register. We take the security of your personal data seriously and as such, in order to protect you and your data, we have not disclosed your plan information to them.*"

On 24 October 2014 Phoenix then sent Mr C a transfer pack.

In November 2014, a company was incorporated with Mr C as director. I'll refer to this company as Firm A. On 21 November 2014, Mr C signed documents to open a SSAS with Rowanmoor. Firm A was recorded as the SSAS's principal employer. The SSAS documents also recorded that the SSAS was to be used to invest in The Resort Group – an investment in a fractional share of a development holiday property in Cape Verde.

On 22 December 2014 Phoenix received Mr C's transfer request from Rowanmoor via the Origo Options platform.

Mr C's pension was transferred on 7 January 2015. His transfer value was around £26,000. He was 53 years old at the time of the transfer. This transfer was made in addition to a second one to the SSAS from Prudential for about £50,000 that completed on 2 January 2015.

The investment in TRG was made on 6 January 2015 for £49,350. The remaining money in the SSAS was held in the SSAS bank account. Returns from the TRG investment were around £144 a month that was received into the SSAS bank account. In November 2016 Mr C took the maximum pension commencement lump sum from his SSAS, which then equated to a payment of £19,261.

The investment in TRG continued to return the monthly payments until April 2019 when they stopped. The investment has since completely failed and by 2022 had been transferred out of the SSAS for nil value. Mr C then transferred the remaining funds in the SSAS bank account – around £3,100 – to a SIPP in October 2023.

In November 2020, Mr C complained to Phoenix. Briefly, his argument is that Phoenix ought to have spotted, and told him about, a number of warning signs in relation to the transfer, including (but not limited to) the following: the SSAS was newly registered, there wasn't a genuine employment link to the sponsoring employer, the catalyst for the transfer was an unsolicited call, he had been advised by an unregulated business, and the investment was in a high risk overseas investment.

Phoenix didn't uphold the complaint. It said Mr C had a legal right to transfer and that none of the information it had about the transfer at the time gave it cause for concern. It was satisfied it had conducted an appropriate level of due diligence given the requirements of the time.

Our investigator was unable to resolve the dispute informally, so the matter was passed to me to decide. I issued a provisional decision to both parties to let them know what I thought a fair and reasonable outcome was and why. And offered them both the opportunity to respond with any arguments or evidence that they considered relevant prior to my reaching a final decision.

What I said in my provisional decision

"*I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.*

The relevant rules and guidance

Personal pension providers are regulated by the Financial Conduct Authority (FCA). Prior to that they were regulated by the FCA's predecessor, the Financial Services Authority (FSA). As such Phoenix was subject to the FSA/FCA Handbook, and under that to the Principles for Businesses (PRIN) and to the Conduct of Business Sourcebook (COBS). There have never been any specific FSA/FCA rules governing pension transfer requests, but the following have particular relevance here:

- *Principle 2 – A firm must conduct its business with due skill, care and diligence;*
- *Principle 6 – A firm must pay due regard to the interests of its customers and treat them fairly;*
- *Principle 7 – A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading; and*
- *COBS 2.1.1R (the client's best interests rule), which states that a firm must act honestly, fairly and professionally in accordance with the best interests of its client.*

The Pensions Schemes Act 1993 gives a member of a personal pension scheme the right to

transfer the cash equivalent value of their accrued benefits to another personal or occupational pension scheme if certain conditions are satisfied (and they may also have a right to transfer under the terms of the contract). This right came to be exploited, with people encouraged to transfer to fraudulent schemes in the expectation of receiving payments from their pension that they weren't entitled to – for instance, because they were below minimum retirement age. At various points, regulators issued bulletins warning of the dangers of taking such action. But it was only from 14 February 2013 that transferring schemes had guidance to follow that was aimed at tackling pension liberation – the "Scorpion" guidance.

The Scorpion guidance was launched by The Pensions Regulator (TPR). It was described as a cross-government initiative by Action Fraud, The City of London Police, HMRC, the Pensions Advisory Service (TPAS), TPR, the SFO, and the FSA/FCA, all of which endorsed the guidance, allowing their names and logos to appear in Scorpion materials.

The guidance was updated on 24 July 2014 (which was before Mr C's transfer). It widened the focus from pension liberation specifically, to pension scams – which it said were on the increase. I cover the Scorpion campaign in more detail below.

In late April 2014 the FCA had also started to voice concerns about the different types of pension arrangements that were being used to facilitate pensions scams. In an announcement to consumers entitled "Protect Your Pension Pot" the increase in the use of SIPPs and SSASs in pensions scams was highlighted, as was an increase in the use of unregulated and/or illiquid investments. The FCA further published its own factsheet for consumers in late August 2014. It highlighted the announcement to insurers and advisers in a regulatory round-up published on its website in September 2014.

The Scorpion guidance

The materials in the Scorpion campaign comprised:

- *An insert to be included in transfer packs (the 'Scorpion insert'). The insert warns readers about the dangers of pension scams and identifies a number of warning signs to look out for.*

- *A longer booklet issued by TPAS which gives more information, including example scenarios, about pension scams. Guidance provided by TPR said this longer leaflet was intended to be used in ongoing communications with members so that they could become aware of the scam risks they were facing.*

- *An 'action pack' for scheme administrators that highlighted the warning signs present in a number of transfer examples. It suggested transferring schemes should "watch out for" various warning signs of a scam. If any of the warning signs applied, the action pack provided a check list that schemes could use to help find out more about the receiving scheme and how the member came to make the transfer request. Where a transferring scheme still had concerns, they were encouraged (amongst other things) to contact the member to establish whether they understood the type of scheme they were transferring to and – where a member insisted on transferring – directing the member to Action Fraud or TPAS.*

In deciding on the appropriate actions to take when dealing with a transfer request, a ceding scheme needed to be mindful of the material in the Scorpion guidance in its entirety rather than treating the guidance as a series of discrete steps to be worked through in isolation.

TPR issued the guidance under the powers at s.12 of the Pension Act 2004. Thus, for the bodies regulated by TPR, the status of the guidance was that it provided them with

information, education and/or assistance, as opposed to creating any new binding rule or legal duty. Correspondingly, the communications about the launch of the guidance were predominantly expressed in terms that made its non-obligatory status clear. So, the tenor of the guidance is essentially a set of prompts and suggestions, not requirements.

The FSA's endorsement of the Scorpion guidance was relatively informal: it didn't take the form of Handbook Guidance, because it was not issued under s.139A of the Financial Services and Markets Act (FSMA), which enabled the FSA to issue guidance provided it underwent a consultation process first. Nor did it constitute "confirmed industry guidance", as can be seen by consulting the list of all such FSA/FCA guidance on its website.

I take from the above that the contents of the Scorpion guidance was essentially informational and advisory in nature and that deviating from it doesn't necessarily mean a firm has broken the Principles or COBS rules. Firms were able to take a proportionate approach to transfer requests, balancing consumer protection with the need to also execute a transfer promptly and in line with a member's rights.

That said, the launch of the Scorpion guidance was an important moment in so far as it provided, for the first time, guidance for personal pension providers dealing with transfer requests – guidance that prompted providers to take a more active role in assessing transfer requests. The guidance was launched in response to widespread abuses that were causing pension scheme members to suffer significant losses. And the guidance's specific purpose was to inform and help ceding firms when they dealt with transfer requests in order to prevent these abuses and save their customers from falling victim to them.

In those circumstances, I consider firms which received pension transfer requests needed to pay regard to the contents of the Scorpion guidance as a matter of good industry practice. It means February 2013 marks an inflection point in terms of what was expected of personal pension providers dealing with transfer requests as a matter of fulfilling their duties under the regulator's Principles and COBS 2.1.1R.

<u>What did personal pension providers need to do?</u>

For the reasons given above, I don't think personal pension providers necessarily had to follow all aspects of the Scorpion guidance in every transfer request. However, I do think they should have paid heed to the information it contained. And where the recommendations in the guidance applied, absent a good reason to the contrary, it would normally have been reasonable, and in my view good industry practice, for pension providers at least to follow the substance of those recommendations. With that in mind, I take the view that personal pension providers dealing with transfer requests needed to heed the following:

1. *As a first step, a ceding scheme needed to check whether the receiving scheme was validly registered.*

2. *The Scorpion insert provided an important safeguard for transferring members, allowing them to consider for* themselves *the scam threat they were facing. Sending it to customers asking to transfer their pensions was also a simple and inexpensive step for pension firms to take and one that wouldn't have got in the way of efficiently dealing with transfer requests. So, all things considered, I think the Scorpion insert should have been sent as a matter of good industry practice with transfer packs and direct to the transferring member when the request for the transfer pack had come from a different party.*

3. *I also think it would be fair and reasonable for personal pension providers – operating with the regulator's Principles and COBS 2.1.1R in mind – to ensure the warnings*

contained in the Scorpion insert were provided in some form to a member before a transfer even if the transfer process didn't involve the sending of transfer packs.

4. *The Scorpion guidance asked firms to look out for the tell-tale signs of scams and undertake further due diligence and take appropriate action where it was apparent their client might be at risk. The guidance points to the warning signs transferring schemes should have been looking out for and provides a framework for any due diligence and follow-up actions. Therefore, whilst using the action pack wasn't an inflexible requirement, it did represent a reasonable benchmark for the level of care expected of transferring schemes and identified specific steps that would be appropriate for them to take, if the circumstances demanded.*

5. *The considerations of regulated firms didn't start and end with the Scorpion guidance. If a personal pension provider had good reason to think the transferring member was being scammed – even if the suspected scam didn't involve anything specifically referred to in the Scorpion guidance – then its general duties to its customer as an authorised financial services provider would come into play and it would have needed to act. Ignoring clear signs of a scam, if they came to a firm's attention, or should have done so, would almost certainly breach the regulator's principles and COBS 2.1.1R.*

<u>The circumstances surrounding the transfer – what does the evidence suggest happened?</u>

Mr C has explained to us that he recalls being contacted by First Review Pension Service (FRPS) out of the blue and was offered a review of his pension to get better returns. Mr C said he was visited at home a number of times by the representative from FRPS who he says presented him with the recommendation about transferring his existing pensions in order to invest in a more rewarding way.

It is evident from the documentary evidence that Phoenix received a request for information and a signed letter of authority from Capital Facts in October 2014. This is not the same business that Mr C recalls having been cold-called and visited by. Having looked at both of these businesses their listed addresses were both in close proximity. And they both had a director in common, who was also listed as the Chief Operating Officer of TRG. So I think that it is likely that both Capital Facts and FRPS were operating interchangeably in order to recommend investments into TRG. And from Mr C's perspective, it's more likely than not that he considered that he was being advised at the time by FRPS to open a SSAS and transfer his existing pensions. FRPS wasn't authorised to give financial advice (neither was Capital Facts).

Mr C explains that he understood that his recommended investment was in overseas property. And that he was being promised that he would get much better returns from that than his existing pensions. He was not promised that he could access his pension earlier than age 55. I think that the purpose of the transfer was just to improve on the investment performance.

In the SSAS application of 21 November 2014 Strategic Alternatives Ltd were named as the trustees' adviser. In Mr C's testimony he provides no recollection of having contact with this business prior to transferring his pensions. In the context of the way it was listed on the SSAS application it appears that any involvement of Strategic Alternatives Ltd was likely to be limited to advice to the SSAS trustee rather than as a personal recommendation to Mr C regarding the transfer of his personal pensions.

I have seen that Phoenix wrote directly to Mr C in response to the request for transfer information. It sent its transfer pack directly to him. That transfer pack had a list of

documentation that was enclosed and included reference to the Scorpion insert. As the information had been sent directly to Mr C, I'm persuaded that Mr C received this information from Phoenix.

Mr C's testimony and the fact that the transfer requests from Phoenix and Prudential were simultaneously made by Rowanmoor persuade me that the most likely intention at the time of the transfer was to use the combined fund value of £76,000 to invest in the recommended way. That portfolio was invested by placing £49,350 in TRG, which equated to a share of a planned holiday apartment. The remainder of the portfolio – around £26,000 – was placed into the SSAS bank account. Given the fact that Mr C was within 2 years of reaching age 55 it appears likely that it was a deliberate decision to retain a liquid element of his portfolio to use to take benefits at age 55 and to ensure a sum to cover SSAS fees. Which is what he did. So I think it's reasonable to consider the investment portfolio in the SSAS as a whole, that was proportionately made up of the two transferred amounts from Prudential and Phoenix.

The TRG investment produced returns over the course of around four years that amounted to around £7,200. All of which went into the SSAS bank account. Ultimately though the TRG planned property development was not completed and the returns stopped and the investment had no value and was removed from the SSAS.

What did Phoenix do and was it enough?

The Scorpion insert:

For the reasons given above, my view is that personal pension providers should, as a matter of course, have sent transferring members the Scorpion insert or given them substantially the same information.

For the reasons given earlier, I'm satisfied that Mr C received this insert from Phoenix in its letter dated 24 October 2014.

Due diligence:

In light of the Scorpion guidance, I think Phoenix ought to have been on the look-out for the tell-tale signs of a pension scam and needed to undertake further due diligence and take appropriate action if it was apparent their customer might be at risk. Phoenix didn't undertake any further due diligence. It said that it was reassured by the involvement of Rowanmoor as an established and respected provider of SSASs.

Given the information Phoenix had at the time, one feature of Mr C's transfer would have been a potential warning sign of a scam: Mr C's SSAS was recently registered. Phoenix should therefore have followed up on it to find out if other signs of a scam were present. Given this warning sign, I think it would have been fair and reasonable – and good practice – for Phoenix to have looked into the proposed transfer and the most reasonable way of going about that would have been to turn to the check list in the action pack to structure its due diligence into the transfer.

The check list provided a series of questions to help transferring schemes assess the potential threat by finding out more about the receiving scheme and how the consumer came to make the transfer request. Some items on the check list could have been addressed by checking online resources such as Companies House and HMRC. Others would have required contacting the consumer. The check list is divided into three parts (which I've numbered for ease of reading and not because I think the check list was designed to be followed in a particular order):

1. *The nature/status of the receiving scheme*

   Sample questions: Is the receiving scheme newly registered with HMRC, is it sponsored by a newly registered or dormant employer, an employer that doesn't employ the transferring member or is geographically distant from them, or is the receiving scheme connected to an unregulated investment company?

2. *Description/promotion of the scheme*

   Sample questions: Do descriptions, promotional materials or adverts of the receiving scheme include the words 'loan', 'savings advance', 'cash incentive', 'bonus', 'loophole' or 'preference shares' or allude to overseas investments or unusual, creative or new investment techniques?

3. *The scheme member*

   Sample questions: Has the transferring member been advised by an 'introducer', been advised by a non-regulated adviser or taken no advice? Has the member decided to transfer after receiving cold calls, unsolicited emails or text messages about their pension? Have they applied pressure to transfer as quickly as possible or been told they can access their pension before age 55?

Opposite each question, or group of questions, the check list identified actions that should help the transferring scheme establish the facts.

I don't think it would always have been necessary to follow the check list in its entirety. And I don't think an answer to any one single question on the check list would usually be conclusive in itself. A transferring scheme would therefore typically need to conduct investigations across several parts of the check list to establish whether a scam was a realistic threat. Given the warning sign that should have been apparent when dealing with Mr C's transfer request, and the relatively limited information it had about the transfer, I think in this case Phoenix should have addressed all three parts of the check list and contacted Mr C as part of its due diligence.

I am aware that Phoenix explained that it didn't consider that a scheme administered by Rowanmoor presented a risk of pension liberation. But, as I have already explained pension liberation wasn't the only risk that was being highlighted through the Scorpion guidance by the time of Mr C's transfer request. So Phoenix should have been alert to more than just risks of pension liberation.

However, I note that at the time of the transfer Rowanmoor was a long established SSAS provider and had some repute in the industry. Rowanmoor Trustees Limited also had legal and fiduciary duties as a professional trustee. So I recognise the point Phoenix is making. But the Scorpion guidance gave ceding schemes an important role to play in protecting customers wanting to transfer a pension. It would defeat the purpose of the Scorpion guidance for a ceding scheme to have delegated that role to a different business – especially one that had a vested interest in the transfer proceeding. An important aspect in this is the fact that there is little regulatory oversight of single-member SSASs; they don't have to be registered with TPR. In the absence of that oversight, Phoenix was assuming, in effect, that Rowanmoor would want to maintain its standing in the industry and the trustee subsidiary would comply with its legal and fiduciary duties. In the context of guarding against pension scams – and an environment where providers and trustees clearly didn't always act as they should have done – I don't consider this to have been a prudent assumption.

The fact that a different part of the Rowanmoor Group was regulated by the FCA doesn't change my thinking on this. The key point is that Rowanmoor Trustees Limited wasn't *FCA-regulated so I see no reason why it would have operated with FCA regulations and Principles in mind – or why its actions would have come under FCA scrutiny. As such, I'm not persuaded Phoenix could, reasonably, have derived sufficient comfort about the Rowanmoor SSAS as a destination for Mr C's transfer.*

What should Phoenix have found out?

Enquiries under part 1 of the check list outlined above would mean that Phoenix were aware that the sponsoring firm for the SSAS had only recently been set up. It could easily have checked this at Companies House. It is likely that enquiries made of Mr C would have led Phoenix to conclude that Mr C wasn't meaningfully employed by Firm A. Investigations under part 2 would likely have discovered that the intended investment was in overseas property – another potential warning sign under the Scorpion guidance.

Under part 3 Phoenix would likely have identified that Mr C had been approached out of the blue and was being advised by a non-regulated adviser. I say this because any contact with Mr C would likely have led to his giving Phoenix the same account that he provided us. Which is that FRPS was the firm that called him out of the blue and was recommending that he transfer his pension. This ought to have been corroborated by the fact that setting up a firm – Firm A – with no intention that it would ever trade, in order to set up a SSAS, was something that Mr C was unlikely to have done without being advised to do so. Nor was it likely he would have considered an investment in TRG without being advised and guided through the process. As the only means he had of investing in TRG was his pension savings, that would indicate a recommendation to transfer out of those arrangements. So Phoenix should have concluded that Mr C was, most likely, being advised by FRPS to transfer out of his Phoenix personal pension.

The check list recommends that in order to establish whether its member has been advised by a non-regulated adviser, the ceding firm should "check whether advisers are approved by the FCA at www.fca.gov.uk/register". In other words, they should consult the FCA's online register of authorised firms. Phoenix should have taken that step, which is not difficult. Had it done this it would have established that FRPS was not regulated to provide Mr C with advice on transferring his personal pension.

Being advised *by an unauthorised firm to transfer benefits from a personal pension plan would have been a breach of the general prohibition imposed by FSMA, which states no one can carry out regulated activities unless they're authorised or exempt. Anyone working in this field should have been aware that financial advisers need to be authorised to give regulated investment advice in the United Kingdom.*

My view is that Phoenix should have been concerned by FRPS's involvement because it pointed to a criminal breach of FSMA. On the balance of probabilities, I'm satisfied such a breach occurred here.

What should Phoenix have told Mr C – and would it have made a difference?

Had it done more thorough due diligence, there would have been a number of warnings Phoenix could have given to Mr C in relation to a possible scam threat as identified by the action pack. Phoenix should also have been aware of the close parallels between Mr C's transfer and the warnings the FCA gave to consumers in August 2014 about transferring to SSASs (which was brought to the attention of pension providers the following month). But the most egregious oversight was Phoenix's failure to uncover the threat posed by a non-

regulated adviser. Its failure to do so, and failure to warn Mr C accordingly, meant it didn't meet its obligations under PRIN and COBS 2.1.1R.

With those obligations in mind, it would have been appropriate for Phoenix to have informed Mr C that the firm he had been advised by was unregulated and could put his pension at risk. Phoenix should have said only authorised financial advisers are allowed to give advice on personal pension transfers, so he risked falling victim to illegal activity and losing regulatory protections.

I'm satisfied any messages along these lines would have changed Mr C's mind about the transfer. The messages would have followed direct contact with Mr C so would have seemed to him (and indeed would have been) specific to his individual circumstances and would have been given in the context of Phoenix raising concerns about the risk of losing pension monies as a result of untrustworthy advice. This would have made Mr C aware that there were serious risks in using an unregulated adviser.

I think the gravity of any messages along these lines would prompt most reasonable people to rethink their actions. I've seen no persuasive reason why Mr C would have been any different. In coming to that conclusion, I have considered the fact that Mr C was in receipt of the Scorpion insert which warned about scams and the threat posed by cold callers and "too good to be true" investment opportunities. But I don't think the fact that Mr C ignored those warnings means he would have also ignored the warnings Phoenix should have given to him which, for the reasons given above, were of a different order of magnitude. I have also carefully considered the impact that Phoenix's warning about Capital Facts, in its letter of 21 October 2014, would likely have had on a reasonable person as it highlighted that Capital Facts was not regulated by the FCA. But the context of that was in safeguarding Mr C's personal data and gave no indication that there was any other risk in giving pension details to an unregulated party. And it was prior to any transfer request, and did not indicate that FRPS was unregulated. I think that a warning of the specific risks of following illegal unregulated advice would have been far more impactive than the letter Phoenix sent. So, I consider that if Phoenix had acted as it should, Mr C, on balance, wouldn't have proceeded with the transfer out of his personal pension or suffered the investment losses that followed. I therefore uphold Mr C's complaint.

I have given thought to whether Mr C should bear some responsibility for the losses he incurred as his complaint is similar to the type of claim that, in legal proceedings, would be treated as a claim for damages for negligent failure to act on information or advice that he was in possession of. In such cases, courts are able to reduce a defendant's liability for negligence, where the claimant shares responsibility for the damage they've suffered. Whilst I am not bound by this legislation in reaching a decision I consider it is fair and reasonable to take this into consideration in this case.

Mr C received some indication that some of the parties involved in his transfer may not be trustworthy and their presence was concerning enough for Phoenix to have refused contact with them. I have also set out above that I think Mr C, more likely than not, received a copy of the Scorpion insert. That Scorpion insert was produced by independent parties to the ceding scheme and warned of the potential for pension scams. I've considered the fact that it was sent with a letter that described it as warning of the dangers of early release pension liberation. But I think that the overall context is important. It was being sent to Mr C directly after Phoenix had informed him that it wasn't prepared to correspond about his pension with an unregulated third party, even though Mr C had provided a valid authority to. And it is in this context that I think it was negligent to have either not read it, or to have read it and ignored the information in it.

The Scorpion insert highlighted 'four tricks' that scammers may use, including: being

approached out of the blue; offering a free 'pension review' or 'one-off' investment opportunities. I think that Mr C ought to have considered these two warnings to have been relevant to his circumstances. The insert provided reference to places where more information could be obtained. It strikes me as negligent for Mr C to have not looked into this further, given the other warning he received from Standard Life about Capital Facts. Which may *ultimately have led him to the same conclusion that he would have reached had Phoenix done what it should have done, as it would also have led him to resources that would have highlighted the risk posed by following a recommendation from an unregulated adviser.*

Therefore, when considering fair compensation in this case, I think it would be reasonable to attribute some responsibility for the loss Mr C has suffered due to his own failure to act on information he received. I think that both Phoenix and Mr C should have done more during the process of the transfer to guard against the risk of a scam and that, if either of them had done what they should, Mr C's losses would have been avoided. But Phoenix were the professional party, operating a regulated pensions business in which dealing with members' transfer requests was an inherent feature; so it should have been more familiar with the risks than Mr C. In accordance with its duty under Principle 6 and COBS 2.1.1R, Phoenix should (as I have found above) have given a specific warning about risks inherent in Mr C taking financial advice from a third party that was not regulated to give it. So, I think its failings were worse than those of Mr C. In the circumstances of this complaint I think it is fair and reasonable to reduce Mr C's compensation by 30%. I think this is a fair and reasonable way to account for Mr C's own contribution to the loss he's suffered."

Responses to my provisional decision

Mr C responded via his CMC. It explained that Mr C agreed that Phoenix's due diligence was insufficient and that, if warned of the apparent risks that would have been identified as a result of that due diligence, Mr C would not have transferred. It disagreed that an adjustment should be made to any compensation as a result of any negligence on Mr C's part. I've read and considered the submission in full and summarise the reasons that Mr C disagrees as follows:

- Mr C doesn't agree that the communication that he received from Phoenix Life in October 2014 warned him of there being a risk of a scam with his subsequent transfer request. Phoenix explained that its decision not to share information with Capital Facts was for data protection reasons.

- The letter providing the Scorpion insert (of 24 October 2014) explained that it related to the dangers of early pension release. Which Mr C was not doing. Mr C explains that he cannot recall how he reacted to this letter after all this time. But that it is feasible he didn't read it as he wasn't releasing his pension early. And Mr C's CMC doesn't think that it would be negligent for Mr C to have ignored this letter in this context.

- It considered my decision to be inconsistent with other decision issued by our service, citing two cases that it considered to be relevant.

Phoenix responded to explain that it disagreed with my provisional decision. It said, in brief, that Mr C would have gone ahead with the transfer whatever actions Phoenix took because he demonstrably ignored both the Scorpion leaflet that warned him about overseas investments (amongst other things) and a letter it sent saying one of the parties he was dealing with was unregulated.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I have not been provided with any further evidence to consider in this case. The parts of the existing evidence that Mr C's CMC and Phoenix commented on are already things that I had considered and commented on in my provisional decision. Indeed, the main point of difference between the parties at this point derives from the same source. In my provisional decision I proposed reducing Mr C's compensation because he was warned that one of the parties he was working with was unregulated and because he was also given other warnings through the Scorpion insert – and yet he progressed with the transfer nonetheless. Mr C's CMC thinks it would be unfair to reduce compensation because there were specific reasons why Mr C overlooked those warnings. Whereas Phoenix thinks the reasons I gave for reducing Mr C's compensation are actually good reasons for rejecting the complaint in full on the grounds of causation – that is, he would have proceeded with the transfer whatever actions Phoenix took. I have taken consideration of the additional arguments and, whilst I certainly appreciate that there is disagreement on the outcome I have reached, my final decision is the same as my provisional decision for similar reasons.

I set out in that provisional decision what I thought Phoenix should have done in order to satisfy its responsibility to act in Mr C's best interests. There was guidance in place because of risks to consumers that were increasingly understood and highlighted. I set out what I thought would have been reasonable due diligence of Phoenix in my provisional decision given the obvious warning sign that ought to have been apparent to it – Mr C's SSAS was newly registered. I still think that was the case.

Without repeating everything I said in my provisional decision, my final decision is that Phoenix should have gone through the check list in the Action Pack as I set out in that decision. And I still think that it's more likely than not that it would have established enough information to identify a number of risks. The most significant being that Mr C was acting on the advice of a party not authorised to provide that advice. To be clear, it didn't identify any risks. So it didn't provide Mr C with the type of specific warning to his circumstances that I think it should have if it had followed the Scorpion guidance. Phoenix says that it would have sent the same information if it had identified the risks but, for the reasons I explained in my provisional decision, I don't think that would have been a fair and reasonable response to the additional warnings that it should have identified.

Causation

I have considered whether Phoenix's failure to react in a suitable way to an identified warning sign caused Mr C's loss. Whilst Phoenix clearly was not responsible for the choice of investment in the SSAS, its negligence denied Mr C key information about his pension transfer. Which could have included information about the warning signs Phoenix should have identified as well as the specific risk of acting on advice that appeared to have been given in breach of the general prohibition in FSMA. I will point out again here that I don't think that telling Mr C that the company that asked for transfer information in October 2014 wasn't regulated was the same thing. Requesting pension information or a transfer pack is not a regulated activity. So was not in itself a criminal breach of FSMA or a specific warning sign of a scam. It also did not follow that the same firm would provide advice. Phoenix didn't check this. And I think it should have. If it had I think it should have given a more specific warning, about the risks of acting on unregulated advice, in order to satisfy the obligations under COBS and PRIN that I set out in my provisional decision. This wasn't included in the letter of October 2014.

I have also carefully weighed the impact of the fact that Phoenix sent Mr C the Scorpion insert – which was specifically intended to highlight potential risks to consumers. This was intended to give consumers the information to be able to act to protect themselves from harm. And I don't think that Mr C acted on this information. However, for the same reasons that I gave in my provisional decision, I don't think the information in the Scorpion insert, or the other information that Mr C was sent, would have been as impactive as having the specific risks drawn to his attention in a more specific way. In this decision I am also adding weight to the fact that the Scorpion guidance clearly asked more of ceding schemes than just sending the Scorpion insert.

For the same reason that I explained in my provisional decision and summarised above, I'm persuaded that it's more likely than not that Mr C would have paid attention to that additional information that Phoenix should have provided him. It should not have been the same as the information in the letter Phoenix sent because it would have been based on a reasoned assessment of the warning signs. It would have been significantly more impactive than the information that he received and I think he would have acted on that and would have avoided making the transfer and the loss that he subsequently suffered. So I think it's fair and reasonable that Phoenix should compensate him for his loss.

Did Mr C's negligence contribute to his loss?

I set out why I considered this point in my provisional decision. I still think it's valid for me to do so. Mr C was written to by Phoenix on 21 October 2014 who explained that they would not correspond directly with Capital Facts who had requested information. Mr C had signed a letter of authority for this company. I said in my provisional decision that I considered the context of this letter to be pointed towards data protection issues. Which I still think was the case. But I also pointed out that the letter told Mr C, "*CAPITAL FACTS is not a regulated or otherwise legally authorised entity. In this case, the company does not appear on the Financial Services Register"*. And it is this part of the warning that I consider should have been impactive. It should have been a cause for some concern, and put Mr C on guard about Capital Facts – and any other unregulated business. And it pointed Mr C to the Financial Services Register so he could check for himself the status of any party he was dealing with – the results of which would have caused Mr C further alarm.

I recognise that the message of the letter was blunted somewhat by the reference to data protection (important though that is). So I'm inclined to believe Mr C didn't think the letter pointed to wider concerns and didn't give it his full attention as a result. And it is for this reason I'm not rejecting Mr C's complaint in full. Nevertheless, Mr C should have given it his full attention given it was short, easy to understand and didn't come out of the blue – it was in response to a request he was aware of. It also pointed to some concerns Phoenix had about a business he was dealing with. In that light, I consider Mr C was negligent in not giving the letter his full attention. If he had done so, I'm satisfied he would have had enough information to have prompted him to reconsider pursuing a transfer – especially in conjunction with the Scorpion insert which was sent shortly after and I will refer to next.

This letter was also followed on 24 October 2014 by the transfer pack which included the Scorpion insert. I acknowledge Mr C's point that he probably didn't look at the Scorpion insert because it was described as warning of the dangers of early pension release. But it was also described in the letter as the "*Pension liberation fraud leaflet".* Referring, as it did, to a warning of a type of fraud and following only days after a letter warning about the unregulated nature of the firm he'd given authorisation to. I think that a reasonable person would have read it. It was just two sides of A4 paper with only the second page giving bullet pointed information. I don't agree that it was reasonable for Mr C to ignore it, assuming that is what he did, although I appreciate his difficulty in recalling. I'm therefore persuaded that ignoring the inclusion of a leaflet based on the description in the cover letter wasn't

reasonable and was negligent in these circumstances. As is reading it and failing to act on the information it contained in these circumstances.

As I pointed out in my provisional decision, the Scorpion insert listed four tricks that scammers may use. And I think that two of these – being approached out of the blue and being offered a free 'pension review' or 'one-off' investment opportunities – should have struck Mr C as specifically relevant to his circumstances. These warnings, plus the information that Capital Facts was not regulated and that Phoenix considered that important enough not to share pension information with them was all information that I think a reasonable person would act upon. And I say that based on the fact that the Scorpion insert provided clear signposting to actions that a person, acting reasonably, would follow. Such as contacting the Pensions Advisory Service or Action Fraud on the numbers provided. Or following the link to a website for more information. The letter sent by Phoenix also pointed Mr C to the Financial Services Register.

To summarise I think that Mr C was also at fault because he didn't act on the information he was given. I don't think it was reasonable to have disregarded it without looking at it because the covering letter didn't allude to all of the things it warned of. I think that the information Mr C was given provided warning signs that he ought to have known related to his circumstances if he'd read it, which I think a person acting reasonably would have. And because I think that the same information signposted exactly where to go to find more information I think a person acting reasonably would also have done that. I think that failure to act in this way had a causal link on the loss Mr C suffered for similar reasons to Phoenix's failure to act. I think that contact with The Pension Advisory Service or Action Fraud would similarly have drawn Mr C's attention to the risk of his transfer and he would have acted to cancel it.

Other argument

Mr C's CMC has asked me to consider two other decisions that our service has issued. I am aware of those cases and the circumstances of both differ to this case in a number of respects that I will not set out here. I will explain that our service considers each complaint on its own merits. The reasons for reaching the decision that I have on this case relates to the facts that I have determined and set out in this decision.

Summary

For the reasons I've given my final decision is that I uphold Mr C's complaint, but that it's fair and reasonable to attribute some responsibility for the loss Mr C has suffered due to his own failure to act on information he received. Phoenix should have done more during the process of the transfer to guard against the risk of a scam. But Mr C also had a responsibility to act reasonably to avoid coming to harm. If either Phoenix or Mr C had done what they should have, Mr C's losses would have been avoided.

Phoenix were the professional party here, operating a regulated pensions business in which dealing with members' transfer requests was an inherent feature; so my decision is that it should have been more familiar with the risks than Mr C. In accordance with its duty under the Principles and COBS 2.1.1R, Phoenix should (as I have found above) have given a specific warning about risks inherent in Mr C taking financial advice from a third party that was not regulated to give it. So, I think that Phoenix's failings were worse than those of Mr C. In the circumstances of this complaint my decision is that it's fair and reasonable to reduce Mr C's compensation by 30%. I think this is a fair and reasonable way to account for Mr C's own contribution to the loss he's suffered.

Putting things right

My aim is that Mr C should be put as closely as possible into the position he would probably now be in if Phoenix had treated him fairly, taking into account that Mr C shares responsibility for his loss.

The Firm A SSAS only seems to have been used in order for Mr C to make an investment that I don't think he would have made from the proceeds of this pension transfer but for Phoenix's actions. So I think that Mr C would have remained in his pension plan with Phoenix and wouldn't have transferred to the Firm A SSAS.

To compensate Mr C fairly, Phoenix should subtract the proportion of the actual value of the Firm A SSAS which originates from the transfer of the Phoenix pension, at the date of the further transfer to True Potential SIPP, from the notional value if those funds had remained with Phoenix until the same date. If the notional value is greater than the actual value, there is a loss. Phoenix should then adjust that loss up to the date of my Final Decision as set out below and then pay 70% of that loss.

Actual value

This means the proportion of the Firm A SSAS value originating from Mr C's Phoenix transfer (the **"relevant proportion"**) at the date of the further transfer to True Potential SIPP. Mr C may be asked to give Phoenix his authority to enable it to obtain this information to assist in assessing his loss, in which case I expect him to provide it promptly.

If any illiquid investments in the Firm A SSAS were wound up in order to transfer to True Potential SIPP and close the Firm A SSAS down, it's possible that this has resulted in further stray proceeds of those investments becoming payable after the transfer. To cover this eventuality, Phoenix may ask Mr C to provide an undertaking, to account to it for 70% of the relevant proportion of any net proceeds of the illiquid investments he has received or may receive in future, and which weren't taken into account in the transfer value paid to True Potential SIPP. Phoenix will need to meet any costs in drawing up the undertaking. If Phoenix asks Mr C to provide this undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

Notional value

This is the value of Mr C's funds had he remained invested with Phoenix up to the date of the further transfer to True Potential SIPP.

Phoenix should ensure that the relevant proportion of any pension commencement lump sum or gross income payments Mr C received from the Firm A SSAS are treated as notional withdrawals from Phoenix on the date(s) they were paid, so that they cease to take part in the calculation of notional value from those point(s) onwards.

Payment of compensation

The loss established at the date of the transfer out to True Potential SIPP should be adjusted up to the date of my Final Decision in line with further changes in the notional value of the funds Mr C originally held with Phoenix.

True Potential SIPP is an FCA-regulated pension provider, so Phoenix should pay into True Potential SIPP to increase its value by the amount of 70% of any loss established from the steps above. As the amount Phoenix pays to True Potential SIPP will be treated as a member contribution, its payment may be reduced to allow for any tax relief to which Mr C is

entitled based on his annual allowance and income tax position. However, True Potential SIPP's systems will need to be capable of adding any compensation which doesn't qualify for tax relief to the plan on a gross basis, so that Mr C doesn't incur an annual allowance charge. If True Potential SIPP cannot do this, then Phoenix shouldn't pay compensation to True Potential SIPP.

If Phoenix is unable to pay compensation to True Potential SIPP, it should pay the amount of 70% of any loss direct to Mr C. But if this money had been in a pension, it would have provided a taxable income during retirement. Therefore compensation paid in this way should be notionally reduced to allow for the marginal rate of income tax that would likely have been paid in future when Mr C is retired. (This is an adjustment to ensure that Mr C isn't overcompensated – it's not an actual payment of tax to HMRC.)

To make this reduction, it's reasonable to assume that Mr C is likely to be a basic rate taxpayer in retirement. I base this on my understanding that the transferred pensions in this case represent Mr C's entire retirement provision, other than his state pension, and that these pensions would most likely be used to provide an income in some way over his retirement. So, if the loss represents further 'uncrystallised' funds from which Mr C was yet to take his 25% tax-free cash, then only the remaining 75% portion would be taxed at 20%. This results in an overall reduction of 15%, which should be applied to the compensation amount if it's paid direct to him in cash.

Alternatively, if the loss represents further 'crystallised' funds from which Mr C had already taken his 25% tax-free cash, the full 20% reduction should be applied to the compensation amount if it's paid direct to him in cash.

If payment of compensation is not made within 28 days of Phoenix receiving Mr C's acceptance of my Final Decision, interest should be added to the compensation at the rate of 8% per year simple from the date of my Final Decision to the date of payment.

Income tax may be payable on any interest paid. If Phoenix deducts income tax from the interest, it should tell Mr C how much has been taken off. Phoenix should give Mr C a tax deduction certificate in respect of interest if Mr C asks for one, so he can reclaim the tax on interest from HMRC if appropriate.

Details of the calculation should be provided to Mr C in a clear, simple format.

My final decision

For the above reasons I uphold this complaint and direct Phoenix Life Limited to compensate Mr C as set out under '*putting things right*' above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 9 September 2024.

Gary Lane
Ombudsman