DRN-4973052

The complaint

Mr R has complained, with the help of a professional representative, about a transfer of his Phoenix Life Limited (Phoenix Life) personal pensions to a small self-administered scheme (SSAS) in November and December 2014, respectively. Mr R's SSAS was subsequently used to invest in an overseas property redevelopment company – Dolphin Trust – and an overseas holiday resort – Azbuk Resort (Unity Bay.) The investments now appear to have little or no value. Mr R says he has lost out financially as a result.

Mr R says Phoenix Life 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 R says he wouldn't have transferred, and therefore wouldn't have put his pension savings at risk, if Phoenix Life had acted as it should have done.

What happened

In April 2014, Mr R says he was cold called by a business which said it advised on pensions. Mr R provided them with an authority to obtain details about his pension from Phoenix Life

On 8 May 2014, a business called Lucesco Ltd – presumably, the business who called Mr R – wrote to Phoenix Life enclosing Mr R's letter of authority and it requested information on his pension and discharge forms to allow a transfer. Phoenix Life sent Lucesco the requested information on 24 May 2014. Lucesco was not authorised to give financial advice.

Mr R says a pension review was then carried out over the phone. He says everything was carried out over the phone – there was no face-to-face meeting. Mr R, who was 55 at the time, says that they strongly recommended he transfer his Phoenix Life pension and invest in the overseas investments I referred to above. He says he had no experience of investments and trusted the information he was given. He says he was promised returns of 10% a year over five years. He says the investments sounded like a realistic opportunity to achieve a significant increase on his pension savings providing for his future retirement.

On 13 October 2014, a company was incorporated with Mr R as director. I'll refer to this company as B Limited. And on 14 October 2014, Mr R signed documents to open a SSAS with B as its sponsoring employer. A company called Rowanmoor Group PLC was the SSAS administrator and Rowanmoor Trustees Limited its independent trustee. The SSAS documents also recorded the investments to be made, which I have already referred to.

On 19 November 2014, Phoenix Life received an electronic request via the Origo system to transfer the benefits of both Mr R's pension policies. Due to the passage of time, I don't have a copy of the details contained within this electronic request. But on 21 November 2014, Phoenix Life says it processed the request. On 21 November 2014, just over £20,600 was received into the SSAS followed by just over £51,200 on 17 December 2014. And in early January 2015, the intended investments were made.

From account statements provided, it appears that Mr R received some investment returns into his SSAS. But I'm aware that Dolphin Trust went into administration and is no longer trading. Similarly, Mr R says the holiday resort investment has failed and has no value.

On 6 October 2020, Mr R complained to Phoenix Life. Briefly, he said it ought to have spotted, and told him about, a number of warning signs in relation to the transfer. These included but were not limited to: the involvement of unregulated businesses, Mr R having been cold called, the part of Rowanmoor acting as administrator of the SSAS not being authorised by the FCA, no involvement from a regulated adviser, the intended investment being unregulated and of high risk, and the SSAS being newly registered with no genuine employment link to the sponsoring employer. Mr R said if Phoenix Life had properly informed him of these warning signs, he wouldn't have transferred.

Phoenix Life didn't uphold the complaint. In summary it said Rowanmoor is a well-known company that would have gone through various checks with Origo to enable it to register with them. It said if a transfer request is made via Origo it is up to the receiving scheme to go through the risks and implications of transferring the policy with the consumer.

Dissatisfied with its response, Mr R referred his complaint to us. Our Investigator was unable to resolve the dispute informally, so the matter was passed to me to decide.

I issued my provisional decision of August 2024 in which I said I intended to uphold Mr R's complaint. I said this was because I wasn't satisfied Phoenix Life had carried out sufficient due diligence in connection with Mr R's transfer request. I said I considered there were warning signs that something might be a miss with the transfer, which it should've shared with Mr R. Had it done so, I said I thought it could've prevented his losses. So, in the circumstances I said it was fair and reasonable for Phoenix Life to compensate Mr R for those losses.

Both Mr R and Phoenix Life said they had nothing further to add.

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.

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 Life 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 R'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.

<u>The Scorpion guidance</u>

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 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.

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 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. In deciding how to apply the guidance, they needed to consider the guidance as a whole, including the various warning signs to which it drew attention, the case studies that highlighted different types of scam, and the checklist and various suggested actions ceding schemes might take. 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:

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 R says he agreed to a review of his pension following a cold call. He says the call was from a business that said it advised on pensions. He says all of the contact with this business was by phone.

Phoenix Life received a request to release information about Mr R's pension and provide a transfer pack, on his authority, from a company called Lucesco Ltd – an unregulated firm. Mr R says that it was a representative from the same business who recommended he transfer his pension and make the investments via a SSAS I referred to above. I can see the SSAS application records Lucesco Ltd as the trustee member adviser. So, taking all of this into account, and in the absence of any evidence to suggest that another business was involved here, on balance I think it was Lucesco Ltd which carried out the cold call and the subsequent 'pension review' meeting in which Mr R was advised to transfer his pension.

Mr R says he was strongly advised to transfer his pension to a SSAS and invest with the promise that he would make significantly better returns that with Phoenix Life – 10% a year over a five-year period. He says the risks weren't discussed and the representative didn't make it clear they weren't regulated. He says he proceeded as recommended because it sounded like a realistic opportunity to increase his savings and provide for his future retirement. He says he doesn't recall receiving any contact or correspondence from Phoenix Life.

I've seen nothing to indicate that Mr R was offered a cash or other incentive to transfer or that he was planning or did receive funds from the pension. I also can't see any evidence of Phoenix Life contacting him during the transfer process. So, I think the reason Mr R went ahead appears to have been the prospect of the higher investment returns he was told he would receive by transferring.

What did Phoenix Life 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.

In this case, while Phoenix Life ultimately received the transfer request via Origo – the electronic transfer system – it received a transfer pack request in writing and provided details of Mr R's pension to Lucesco Ltd. So, Phoenix Life had an opportunity to give Mr R a warning. The evidence would appear to suggest that it included the Scorpion insert in the transfer pack it sent to Lucesco. But it does not appear to have sent it to Mr R direct or otherwise brought the warning the insert gave to his attention. Instead it went ahead with the transfer seemingly relying on Lucesco passing the insert on to Mr R. But given it was an unregulated business that stood to gain from the transfer, I don't think it should have generally relied on passing this information on to Mr R. So, I don't think Phoenix Life did enough here.

Due diligence:

In light of the Scorpion guidance, I think firms 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. But Phoenix Life didn't undertake any further due diligence.

In my view, a potential warning sign of a scam was present in this case because a feature of Mr R's transfer was that his SSAS was recently registered. I accept that the date might not have been clear from the Origo request. But Phoenix Life should have reasonably checked the SSAS was correctly registered. And in doing so it would've identified the registration date as being very recent. So, I think Phoenix Life should 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 Life 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.

I can see that Phoenix Life argues that because of Rowanmoor's involvement as a well-known company and the various checks Origo would have carried out to allow it to register with them, this somehow absolved it of any responsibility to carry out further due diligence. But as I will explain in more detail below, I disagree. I don't think either of these things reasonably meant Phoenix Life could ignore or dismiss what in my view was a clear warning sign.

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 R's transfer request, and the relatively limited information it had about the transfer, I think in this case Phoenix Life should have addressed all three parts of the check list and contacted Mr R as part of its due diligence.

<u>What should Phoenix Life have found out?</u>

If Phoenix Life had followed the questions in part 1 above, it should have established that the SSAS was not only recently established but also connected to a company, which was geographically distant from Mr R, he was the sole director, it wasn't trading and Mr R wasn't actually employed by it in a meaningful way.

Investigations into part 2 would at that time have, most likely, identified that Mr R was neither offered any form of cash incentive to transfer nor told he could access his pension funds early. But he was being advised to invest in a holiday resort abroad and an overseas property redevelopment company. In my view, both investments include some features that might be implicated in a pension scam (overseas, unregulated and/or unusual or creative techniques.)

If Phoenix Life had asked questions in part 3, it would likely have learned that Mr R was both cold called and appeared to be taking advice from Lucesco Ltd. And that firm was unregulated.

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 Life should have taken that step, which is not difficult, and it would quickly have discovered that Mr R's adviser was indeed unauthorised.

Being a*dvised* 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 – indeed, the Scorpion guidance itself makes this point.

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

<u>What should Phoenix Life have told Mr R – and would it have made a difference?</u>

I think if Phoenix Life had done more thorough due diligence, there would have been a number of warnings it could have given to Mr R in relation to a possible scam threat as identified by the action pack. For the avoidance of doubt these are: an unregulated adviser gave Mr R illegal advice; he was intending to invest in the types of schemes often associated with pension scams; and a SSAS, sponsored by an artificial employer was set up for the purposes of making those investments. Phoenix Life should also have been aware of the close parallels between Mr R'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.)

In my view, the gravest oversight was Phoenix Life's failure to uncover the threat posed by a non-regulated adviser. Its failure to do so, and its failure to warn Mr R 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 Life to have informed Mr R that the firm he had been advised by was unregulated and could put his entire pension at risk. Phoenix Life 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 from Mr R's existing pension provider – a firm I think it's reasonable to conclude in the circumstances he would've considered trustworthy – would've carried weight. In my view, they would have set off alarm bells with Mr R – I don't think he would've ignored these warnings.

The messages would have followed conversations with Mr R, 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 Life raising concerns about the risk of losing pension monies as a result of untrustworthy advice. This would have made Mr R 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.

And I've seen no persuasive reason why Mr R would have acted differently to the majority of people in those circumstances. Mr R had received an unsolicited call to discuss his pension – he was not actively looking to transfer his pension or make different investments. He was an inexperienced investor who appears to have been dependant on advice. At the very least, I think he'd have sought further guidance as suggested in the action pack and/or advice from a properly regulated adviser before proceeding. And I think it's more likely than not that, had he done so, this would've led him to fully appreciate the transfer and the investments being contemplated were of extremely high risk, unwise and so conclude they were not in his best interests. I therefore can't see Mr R would more likely than not have still gone ahead with the transfer.

So, I consider that if Phoenix Life had acted as it should, Mr R would not have proceeded with the transfer out of his personal pension or suffered the investment losses that followed. I therefore uphold Mr R's complaint.

Other arguments

Phoenix Life has argued that Origo would already have completed due diligence checks on the receiving scheme's administrators as part of its registration process negating the need for it to do its own due diligence. But Phoenix Life hasn't provided any details on what exactly Origo did in this respect. And I think that points to the problem here, which is that Phoenix Life relied on due diligence conducted by a third party even though it doesn't appear to have really known what that due diligence involved. I've taken into account what the due diligence in question was aimed at preventing – pension scams, the end result of which can often be the loss of entire pension funds – and the clear steps that were expected of ceding schemes to prevent this happening. Also given the duties of personal pension providers under PRIN and COBS 2.1.1R, I don't think Phoenix Life's approach was fair and reasonable here.

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, there's an argument that it could have taken comfort from this. I disagree. 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 Life 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 Rowanmoor's business was regulated by the FCA doesn't change my thinking on this. The key point is that Rowanmoor Group Plc and Rowanmoor Trustees Limited (both of which were involved in the operation of the SSAS) weren't FCA-regulated so I see no reason why they would have operated with FCA regulations and Principles in mind – or why their actions would have come under FCA scrutiny. As such, I'm not persuaded Phoenix Life could, reasonably, have derived sufficient comfort about the Rowanmoor SSAS as a destination for Mr R's transfer.

Summary

Overall, I think Phoenix Life should've fairly and reasonably done more to protect Mr R as its member. It should've undertaken due diligence in connection with the transfer and not simply relied on it already having been carried out by third parties. It should also have not taken comfort from the fact that the receiving scheme was Rowanmoor (who had a vested interest in the transfer proceeding.)

Had Phoenix Life looked into the transfer, it would've seen there was a warning sign which, if it had followed that up, would've revealed other issues – in particular, the involvement of an unregulated adviser. Phoenix Life should've been on notice that something might be a miss here. And if it had shared those concerns with Mr R as to why his pension fund might be at risk, I think that would've made Mr R think again and ultimately decide against proceeding with the transfer and investments. As a result, Mr R wouldn't have suffered the investment losses that followed. I think Phoenix Life could've prevented Mr R's losses, so in the circumstances it's fair and reasonable for it to compensate him for those losses.

Putting things right – fair compensation

My aim is that Mr R should be put as closely as possible into the position he would probably now be in if Phoenix Life had treated him fairly.

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

To compensate Mr R fairly, Phoenix Life should subtract the actual value of the SSAS from the notional value if the funds had remained with Phoenix Life. If the notional value is greater than the actual value, there is a loss.

Actual value

This means the SSAS value at the date of my Final Decision. To arrive at this value, any amount in the SSAS bank account is to be included, but any overdue administration charges yet to be applied to the SSAS should be deducted. Mr R may be asked to give Phoenix Life 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.

My aim is to return Mr R to the position he would have been in but for the actions of Phoenix Life. This is complicated where an investment is illiquid (meaning it cannot be readily sold on the open market), as its value can't be determined. On the basis of the evidence I have, that is likely to be the case with the following investments: Dolphin Capital and Azbuk Resort (Unity Bay.) This is because I understand the investments have failed.

Therefore as part of calculating compensation:

- Phoenix Life should seek to agree an amount with the SSAS as a commercial value for the illiquid investment(s) above, then pay the sum agreed to the SSAS plus any costs, and take ownership of those investment(s). The actual value used in the calculations should include anything Phoenix Life has paid to the SSAS for illiquid investment(s).

- Alternatively, if it is unable to buy them from the SSAS, Phoenix Life should give the illiquid investment(s) a nil value as part of determining the actual value.
  In return Phoenix Life may ask Mr R to provide an undertaking, to account to it for the net proceeds he may receive from those investments in future on withdrawing them from the SSAS. Phoenix Life will need to meet any costs in drawing up the undertaking. If Phoenix Life asks Mr R to provide this undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

- It’s also fair that Mr R should not be disadvantaged while he is unable to close down the SSAS. So to provide certainty to all parties, if these illiquid investment(s) remain in the scheme, I think it’s fair that Phoenix Life should pay an upfront sum to Mr R equivalent to five years’ worth of future administration fees at the current tariff for the SSAS, to allow a reasonable period of time for the SSAS to be closed.

Notional value

This is the value of Mr R’s funds had he remained invested with Phoenix Life up to the date of my Final Decision.

Phoenix Life should ensure that any pension commencement lump sum or gross income payments Mr R received from the SSAS are treated as notional withdrawals from Phoenix Life 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

I don’t think it’s appropriate for further compensation to be paid into the SSAS given Mr R’s dissatisfaction with the outcome of the investment it facilitated.

Phoenix Life should reinstate Mr R’s original pension plan as if its value on the date of my Final Decision was equal to the amount of any loss established from the steps above (and it performs thereafter in line with the funds Mr R was invested in).

Phoenix Life shouldn’t reinstate Mr R’s original plan if it would cause a breach of any HMRC pension protections or allowances – but my understanding is that it might be possible for it to reinstate a pension it formerly administered in order to rectify an administrative error that led to the transfer taking place. It is for Phoenix Life to determine whether this is possible.

If Phoenix Life is unable to reinstate Mr R’s pension and it is open to new business, it should set up a **new** pension plan with a value equal to the amount of any loss on the date of my Final Decision. The new plan should have features, costs and investment choices that are as close as possible to Mr R’s original pension.

If Phoenix Life considers that the amount it pays into a **new** plan is treated as a member contribution, its payment may be reduced to allow for any tax relief to which Mr R is entitled based on his annual allowance and income tax position. However, Phoenix Life’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 R doesn’t incur an annual allowance charge. If Phoenix Life cannot do this, then it shouldn’t set up a new plan for Mr R.

If it’s not possible to set up a new pension plan, Phoenix Life should pay the amount of any loss direct to Mr R. 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 R is retired. (This is an adjustment to ensure that Mr R isn’t overcompensated – it’s not an actual payment of tax to HMRC.)

To make this reduction, it’s reasonable to assume that Mr R is likely to be a basic rate taxpayer in retirement. So, if the loss represents further ‘uncrystallised’ funds from which Mr R 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 R 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 Life receiving Mr R'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 Life deducts income tax from the interest, it should tell Mr R how much has been taken off. Phoenix Life should give Mr R a tax deduction certificate in respect of interest if Mr R asks for one, so he can reclaim the tax on interest from HMRC if appropriate.

This interest is not required if Phoenix Life is reinstating Mr R's plan for the amount of the loss – as the reinstated sum should, by definition, mirror the performance after the date of my Final Decision of the funds in which Mr R was invested.

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

My final decision

For the reasons above, I uphold this complaint and instruct Phoenix Life Limited to put things right in line with the approach set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 16 September 2024.
Paul Featherstone
Ombudsman