

## The complaint

Mr H has complained about a transfer of his personal pensions with Sun Life Assurance Company of Canada (UK) Limited (Sun Life) to a small self-administered scheme (SSAS) in December 2014. Mr H's SSAS was subsequently used to invest in The Resort Group plc (TRG) and Dolphin Capital loan notes. The investments stopped providing returns several years ago and now appear to have little value.

Mr H says Sun Life failed in its responsibilities when dealing with the transfer request. He says it should've 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 H says he wouldn't have transferred, and therefore wouldn't have put his pension savings at risk, if Sun Life had acted as it should have done.

## What happened

I issued a provisional decision on 2 August 2024. I set out what had happened, my provisional findings and why I was upholding the complaint. I went on to deal with fair compensation. I've repeated what I said here:

*'Mr H had four personal pension policies with Sun Life. Mr H says he was cold called and offered a pension review.'*

*Sun Life received a request for full plan information from First Review Pension Services Limited (FRPS) and a letter of authority (LOA) signed by Mr H in September 2014. I don't think we've seen what Sun Life received. But we've seen copies of letters and LOAs sent by FRPS in other cases at around the same time and which also mention another business – Moneywise Financial Advisers (Moneywise). FRPS wasn't a regulated firm but Moneywise was – it was regulated by the Financial Conduct Authority (FCA) from 30 August 2012 until 6 October 2017. On the information requests we've seen, Moneywise's FCA registration number was given.*

*The information requested included transfer values and details of the benefits provided, including any that were guaranteed – so the sort of information that would normally be requested by a financial adviser in recommending a pension transfer. Discharge forms were also requested. Sun Life sent a transfer pack to FRPS on 4 September 2014.*

*In September 2014 a limited company was incorporated with Mr H as the sole director. I'll refer to this company as H Limited.*

*On 15 October 2014 Bespoke Pension Services (BPS) wrote to Sun Life requesting a transfer of Mr H's four pension policies to a named SSAS. The enclosures to the letter included:*

- *HMRC's registration letter for the SSAS showing it had been registered on 9 October 2014.*

- A copy of the July 2014 booklet produced by The Pensions Advisory Service (TPAS) warning about the risks of pension liberation and scams and known as the Scorpion booklet (and which I've mentioned further below). The first page was signed by Mr H on 9 October 2014 below a printed statement which read, 'I can confirm I have read this document. I am not party to any such pensions liberation activity in anyway whatsoever.'
- A letter signed by Mr H dated 9 October 2014 (to which I've referred further below).
- Confirmation that Mr H was employed by H Limited – an agreement dated 26 September 2014 showing he'd been appointed as the managing director of H Limited, the sponsoring employer of the SSAS.
- A copy of BPS's 'Policy on Pension Liberation' which, amongst other things, detailed that it administered around 700 SSASs and its staff had extensive industry experience.
- The SSAS trust deed and rules dated 8 October 2014, which had been drafted by a large London law firm.
- A letter from that firm confirming they'd drafted the trust deed and rules which conformed to the Finance Act 2004 as a registered pension scheme and hadn't been drafted in a way which knowingly allowed the scheme to be operated other than as a registered pension scheme.

The letter from Mr H dated 9 October 2014 included the following:

*'The purpose of this letter is to provide you with additional confirmation of the basis upon which I have made this request and to seek to provide a record of the fact that I am aware of the issues relating to pensions liberation. Indeed I have carefully considered my decision to request a transfer to the scheme and have not made it lightly.*

*I confirm that the scheme is a registered pension for HMRC purposes [reference number given] and that the trust deed and rules governing it only allow standard benefit options such as annuities and drawdown in accordance with the applicable legal requirements.*

*From guidance and information I have received in connection with this decision I appreciate that there has recently been a significant rise in cases of 'pensions liberation' fraud. As a result there is increased concern and scrutiny around transfer requests being made, to ensure members fully understand the implications of making a transfer.*

*I therefore wish to confirm that the transfer request is being made in order that I can take advantage of investment opportunities available under the scheme, none of which are in any way connected with pension liberation. I have received detailed information about the Scheme, how it operates, who administers it and the risks associated with making a transfer out of my existing pension arrangement.*

*In making this transfer I am not seeking to access my pension benefits before age 55 and I am aware of the potentially significant tax liabilities that would arise were I to attempt to do so. Indeed the trust deed and rules of the Scheme do not permit benefits to be taken prior to age 55, except in circumstances of ill health which meet HMRC requirements. I also confirm that I have not been offered any cash or other incentive by any person as part of my decision to transfer my pension to the Scheme.'*

BPS's letter also included transfer forms and bank details for the transfer payment. BPS

*confirmed they were a co signatory to the account and the trustees were unable to move any funds without BPS's authority which protected the fund against any risk of pension liberation.*

*On 21 October 2014 Sun Life wrote to BPS and to Mr H with details of its outstanding requirements. In particular Sun Life needed Mr H to complete the section on the transfer application form which referred to guaranteed annuity rates (GARs) and which attached to two of the plans.*

*On 27 October 2014 BPS telephoned Sun Life to chase up the transfer. Sun Life referred to the letter sent to Mr H on 21 October 2014, a copy of which BPS requested and which Sun Life sent.*

*On 19 November 2014 Sun Life received the signed form back with the relevant section completed.*

*On 21 November 2014 Sun Life sent a high risk declaration to Mr H for completion and return. BPS called on 24 November 2014 and Sun Life said they'd written direct to Mr H on 21 November 2014.*

*On 8 December 2014 Sun Life received BPS's letter dated 4 December 2014, enclosing the high risk declaration signed by Mr H on 24 November 2014. It said he was aware that his investment in overseas property development was unlikely to be covered by UK financial services compensation schemes and that any insurance covering broker default only covers the fund if the investment brokers collapse and is unlikely to cover his pension fund if the investment itself loses money.*

*Sun Life referred the transfer to its technical department on 9 December 2014 to advise if the transfer could be processed. The response was that transfers to SSASs with BPS had previously been agreed subject to the high risk declaration which Sun Life had.*

*On 10 December 2014 Sun Life sent a letter to Mr H about the two plans that had GARs and seeking confirmation that he was happy to proceed, knowing the GARs would be lost. Mr H called Sun Life on 11 December 2014 to confirm he was happy for the transfers to go ahead even though the GARs would be lost.*

*Sun Life paid a total transfer value of £62,899.10 to BPS on 16 December 2014. Mr H later invested £40,174.33 in TRG and £18,000 in Dolphin Capital loan notes. The balance of the amount transferred was held in cash.*

*In June 2020, via his representative, Mr H complained to Sun Life. Briefly his argument is that Sun Life ought to have been aware of the cross government initiative to prevent pension scams and which had been widely published in the financial services industry from February 2013 onwards. In dealing with Mr H's pension transfer, Sun Life fell short of the guidance. Sun Life ought to have spotted, and told Mr H 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; BPS, the SSAS administrator, was relatively newly incorporated and not authorised by the FCA; the catalyst for the transfer was an unsolicited call; Mr H had been promised very high returns; the proposed investment was in unregulated, high risk and non diversified assets; and Mr H hadn't received FCA regulated advice about the transfer.*

*Sun Life didn't uphold the complaint. Sun Life said FRPS were part of Moneywise who were FCA authorised. Sun Life had a Transfer Scheme Reference Check in place that they referred to every time they received a transfer request. The check contained details of all the valid pension schemes in place at the time. Here the SSAS had been set up solely for the*

transfer, as is the case with most schemes of that type. As it wasn't recorded on their transfer scheme reference check Sun Life carried out further investigation, including reviewing the information provided by BPS. They checked the letter from HMRC and that the scheme had been registered on 9 October 2014 and that H Limited was registered on Companies House. Mr H was a trustee of the scheme and there was a document showing he was employed by the company. BPS had provided a copy of the Scorpion booklet (signed by Mr H) and a letter from him confirming his understanding of pension liberation. So he understood and accepted the risks involved with his pension transfer.

Sun Life also said they'd received many requests to transfer to schemes set up with BPS and which followed a similar pattern – the name of the SASS being made up of part of the consumer's address and their year of birth. Sun Life's compliance and financial crime departments had reviewed most of these transfers. In this case, where confirmation of the date that the SSAS had been registered was within days of the transfer request, there'd have been little point in checking with HMRC as there'd have been no reason or time for the SSAS to have been deregistered. Eventually, although Sun Life had misgivings about the BPS's business model, Sun Life had to concede the transfers met the necessary requirements and that the consumer had a right to transfer – an approach which Sun Life said was to some extent justified by the court's decision in the case of *Hughes v The Royal London Mutual Insurance Society Ltd* [2016] EWHC 319 (Ch).

Mr H's investment in TRG – a fractional share of a hotel room in a resort in Cape Verde – stopped providing returns several years ago and now appears to have little value. It is illiquid and there's no market for the investment. I understand that the Dolphin Capital investment (a German based property development company) has failed. Preliminary bankruptcy proceedings were commenced in Germany in 2020 and investors are very unlikely to get any of their money back.

Our investigator was unable to resolve the dispute informally so the matter was passed to me to decide.

### **What I've provisionally 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 FCA. Prior to that they were regulated by the FCA's predecessor, the Financial Services Authority (FSA). As such Sun 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 formal 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 H's transfer request was received and some months before the transfer was actually made). 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 SIPP 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 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.*

#### *What did personal pension providers need to do?*

*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 scams, 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. 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.*

*The circumstances surrounding the transfer – what does the evidence suggest happened?*

*Mr H's representative has said that at the time of the transfer Mr H was self employed and earning about £40,000 pa. He had some savings but no investments and no investment or pensions experience. His attitude to risk was low at most. He was cold called by FRPS and offered a free pension review to which he agreed and he signed forms authorising FRPS to obtain information about his four pension policies with Sun Life.*

*Mr H met with someone from FRPS or BPS once at his home. Neither was FCA authorised or regulated, the significance of which Mr H didn't understand. He was told his Sun Life pensions weren't performing well and he could achieve better returns by transferring them to a new scheme and investing in TRG. Mr H was told it was a five year investment plan which would generate a return of £20,000 in that time and it was guaranteed that he wasn't at risk of sustaining any losses. No risk assessment was undertaken by the adviser.*

*Mr H was persuaded by what he'd been told by the reviewer who he believed was acting in his best interest and, feeling somewhat obliged to accept the advice he'd been given, he agreed to go ahead with the transfer. He signed and returned documentation given to him by FRPS or BPS who set up a SSAS expressly for the transfer and liaised with Sun Life to facilitate the transfer.*

*Our investigator also spoke to Mr H about what had happened and put a number of questions to him. Mr H said it had been quite a long time ago and he couldn't recall all the details. He confirmed he was self employed at the time of the transfer. He didn't have any debt problems and he hadn't previously tried to transfer his pensions. He wasn't entirely sure who'd contacted him. But someone had come to his house and talked about investments which sounded better than Sun Life's and that was why he'd gone ahead. He thought someone had got in contact with him, rather than him trying to find someone and that he'd probably received a phone call from BPS. He didn't specifically recall any other firm's involvement but he wasn't sure.*

*He said the person who'd visited him talked about a five year investment scheme with good returns. But the German property group had later gone bankrupt. He couldn't recall if anyone*

*he'd dealt with had said they were regulated or endorsed by the government. But he wouldn't have done anything that he'd understood would've been a risk – for example, he didn't have stocks and shares. He understood it was guaranteed that he wasn't at risk of suffering any losses. He said he hadn't felt rushed or under pressure. The meeting lasted a couple of hours with the reviewer going through options and saying how good the new arrangement was. Mr H wasn't told he could get an upfront cash amount, nor was he offered any incentives or told he'd be able to gain access his pension before he reached age 55 (he was 51 at the time). He didn't have any doubts about transferring at the time, otherwise he wouldn't have gone ahead as he wouldn't have risked losing hard earned money.*

*He couldn't recall if the reviewer had mentioned pension scams or liberation or said that Sun Life might try to warn him about that sort of thing. He didn't remember what he'd received from Sun Life, aside from a letter confirming the transfers had been made. He said Sun Life had been wanting him to contribute more to his pension which he couldn't afford and so the new arrangement looked a better option. He didn't recall being shown the Scorpion leaflet or signing it but he accepted that, if we'd seen a signed copy, he had done. He said he'd signed a large number of documents had that been presented to him.*

*Mr H is now unable to recall all the details and, in particular, exactly who did what. I think that's understandable, given the time that's elapsed – getting on for ten years now. In broad terms, I accept what Mr H says happened – that he was cold called, information was then obtained about his Sun Life policies and was then discussed with Mr H at his home. The upshot of that meeting was that Mr H agreed to set up a new pension arrangement – a SSAS – into which his existing policies (two of which had GARs) would be transferred so that he could then invest in TRG and Dolphin Capital.*

*I think it was likely to have been FRPS who initially contacted Mr H. I say that because it was FRPS who initially wrote to Sun Life in September 2014 with a LOA and requesting information about Mr H's pension policies. That would fit with FRPS having called Mr H and offered him a free pension review which he accepted. To review Mr H's existing pension provision FRPS would, in theory at least, need details of the policies he had. I say in theory because I don't see any real review was undertaken – I think the purpose of obtaining information about Mr H's existing policies was to see how much he had available to invest.*

*From what we've seen in other cases, I think the request may also have mentioned Moneywise who, unlike FRPS, was a FCA authorised firm and whose registration number may have been quoted. I think Sun Life's understanding was that FRPS were part of Moneywise and that FRPS collated information for Moneywise. So the inference would be that FRPS was part of and working with Moneywise, in some kind of data collection role, and that any advice would be given by Moneywise, who was authorised by the FCA to give advice on personal pensions. I know that sometimes unregulated firms may mention a regulated firm to add legitimacy. If information was sent to Moneywise and it hadn't requested it (or authorised FRPS to ask for it), it might be expected that Moneywise would contact Sun Life and query why the information had been sent. There's no evidence Moneywise did that.*

*But I don't think the absence of such evidence is enough to say Moneywise must've been involved. And, although as I've noted, Mr H's recollections aren't complete, he hasn't mentioned Moneywise or suggested he had any dealings with that firm. Aside from the assumption that Moneywise was mentioned by FRPS at the outset on the information request, there's nothing to indicate Moneywise was involved. That would be consistent with other cases I've seen where Moneywise was included in the LOA but whose participation ended at that point. Based on what I've seen, I think that's what has happened here.*

*But I think Mr H must've been advised by someone. He's said, and I accept, that he wasn't an experienced investor. He had some savings but he's said that he steered away from*

stocks and shares because he thought they were too risky. I haven't seen anything to suggest he had any real knowledge about pensions. His four existing pension plans were invested in what I'd term mainstream funds.

However he was self employed and he did at the time have his own limited company, presumably through which he worked. So he did have some experience of that, although not in the context of setting up a limited company to facilitate a SSAS as a pension vehicle. The limited company set up as the sponsoring employer for the SSAS with Mr H as the sole director and shareholder was dormant. It has never traded and seems to have existed just so that the SSAS could be set up. I can't see that Mr H would've known that sort of pension arrangement – which is complex and somewhat unusual – existed, unless someone had told him about it. And I'm not sure why, if Mr H wanted to set up a SSAS, his existing limited company wouldn't have been used (although I note that company was wound up in late 2014). Nor can I see that Mr H would've come up with, on his own and without input from anyone else, the idea of investing in overseas property funds.

I think he'd only have been prepared to transfer to a SSAS if he'd been told he'd be better off as a result – essentially he was advised to transfer out of his existing pension policies so that he could invest, via a SSAS, in TRG and Dolphin Capital, which investments would perform better than his existing pensions. That would mean there'd be no need for him to increase his pension contributions which, as he's explained, he didn't feel he could really afford to do. I know he's said he didn't want to take any risk (and the investments in TRG and Dolphin Capital turned out to be high risk) but he's said he was assured he wouldn't suffer any loss as a result of investing in those investments. I think Mr H would've been advised by whoever visited him at home and spent a couple of hours going through his options with him.

Mr H is unsure if that was FRPS or BPS. I think it's likely to have been FRPS. I note Mr H's signature on the trust deed was witnessed by someone from FRPS. That suggests FRPS's role wasn't limited to just gathering information which was then passed on to another business to take things forward. Instead it seems that FRPS remained involved and was instrumental in the setting up of the SSAS. I think it's likely that it was a representative from FRPS who visited Mr H at his home and who told him about setting up a SSAS to facilitate the investments in TRG and Dolphin Capital, using his existing pension funds. So what was said would've amounted to a personal recommendation, that is advice.

And, even if it wasn't FRPS, it would've been someone from BPS. Neither FRPS nor BPS was authorised or regulated. As the SSAS administrator, BPS didn't need to be regulated or authorised. But advice to transfer out of Mr H's existing pension plans would be regulated advice and as such could only be given by a FCA authorised firm. I think FRPS likely told Mr H that's what he should do and, once Mr H had agreed, FRPS would then have asked BPS to set up a SSAS for Mr H.

In other cases we've seen that another firm was also involved to provide advice under section 36 of the Pensions Act 1995. To explain, that provision imposes a duty on a trustee of a pension scheme (here Mr H) to take and consider appropriate advice as to whether the proposed investments are satisfactory for the scheme's aims. A firm giving such advice doesn't need to be authorised as the nature of the advice isn't regulated under FSMA. Mr H hasn't mentioned the involvement of any other firm and who might've provided the section 36 advice. We haven't made any further enquiries about this aspect of the matter as I'm satisfied I can fairly decide the complaint on the basis of such information as I've seen.

What did Sun 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. TPR had said, as far back as February 2013, that it wanted this to become best practice. Sending the insert to members would've been a simple and inexpensive step for providers to take and one which wouldn't have prevented them from dealing efficiently with transfer requests.*

*Sun Life should've sent the insert direct to Mr H when FRPS got in touch in September 2014 to request details of Mr H's pension policies. I say that the insert should've been sent direct to Mr H as the contents were aimed directly at consumers and, given the warnings given about some intermediaries not acting in the consumer's best interests, it would've defeated the purpose of the insert by sending it to the intermediary in the hope that they'd share it with the consumer. From what I've seen Sun Life didn't send the Scorpion leaflet to Mr H or give him substantially the same information.*

*That said, I don't think anything turns on any failure on Sun Life's part to send the insert to Mr H at the outset. That's because it's clear Mr H saw the longer version – the seven page Scorpion booklet. BPS's letter of 15 October 2014 enclosed a copy of that booklet which Mr H had signed to confirm he'd read it. So I'm satisfied that Mr H was shown the booklet by BPS and he signed it. So, even Sun Life failed to send the insert to Mr H, he did see the longer version. I don't think seeing the insert earlier on would've made any material difference.*

*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.*

*Sun Life did undertake some due diligence. Sun Life refers to its Transfer Scheme Reference Check process in place at the time. But, as Mr H's SSAS had been set up for the sole purpose of the transfer, Sun Life didn't hold any details. So Sun Life checked the letter from HMRC (which showed the SSAS had been registered on 9 October 2014) and that H Limited was registered on Companies House. From the documents BPS had supplied, which included the trust deed, Sun Life could also see that Mr H was a trustee of the scheme and there was also an agreement showing he was employed by H Limited.*

*There's also the letter Mr H signed on 9 October 2014 and which was aimed at reassuring Sun Life that pension liberation wasn't involved – in broad terms the letter confirmed Mr H was aware of the threat posed by pension liberation, that he wasn't doing that and that he wanted to proceed with the transfer. Sun Life might also have placed some reliance on BPS's 'Policy on Pension Liberation' document which accompanied the transfer. It referred to SSASs having been used in recent years for the promotion of non-regulated investments by non-regulated agents and to the steps BPS had taken to guard against that and when the SSAS was to be invested in UCIS (Unregulated Collective Investment Scheme) or close substitutes. I think the document might be viewed as seeking to pre-empt possible concerns on Sun Life's part.*

*Sun Life did check with Mr H that he understood he'd be giving up the GARs associated with two of the plans. But I don't see that was much to do with the possibility that Mr H might have fallen victim to a scam. Rather it was the sort of concern that would routinely be addressed where a policy had a GAR which would be lost on transfer.*

*Sun Life did refer the transfer to its technical department to advise if it could be processed. The response was that transfers to SSASs with BPS had previously been agreed subject to*

*the high risk declaration which Sun Life had asked Mr H to sign and which specifically referred to investments in overseas property developments. It's unclear how Sun Life knew that was what Mr H intended to invest in. Sun Life was aware, from the letter Mr H had signed on 9 October 2014, that the SSAS was being set up in order to take advantage of investment opportunities. But the letter didn't specify the actual intended investments. I'm unsure if there was some later exchange with Mr H or BPS about exactly what Mr H would be investing in. But Sun Life was familiar with transfer requests from BPS – Sun Life had received other requests to transfer to schemes set up with BPS and which followed a similar pattern. It may be that Sun Life just suspected that overseas property developments could be involved.*

*So it seems there was a pattern of transfer requests from BPS, including Mr H's, which seemingly did cause Sun Life concerns. Sun Life had recognised that the transfers were to SSASs with employers which appeared only to have been established to enable the schemes to operate. This should have alerted Sun Life to the risk that there was taking place some type of campaign to extract people's pension savings from conventional schemes and move them into less regulated SSASs and was potentially an indicator of the promotion by unregulated firms of unregulated investments and perhaps too the risk unregulated advice had been given. But, instead of conducting further due diligence, Sun Life allowed the transfers to proceed, subject to the high risk declaration being signed.*

*Of further concern is Sun Life's understanding that FRPS were part of Moneywise and which, as I've explained above, wasn't the case and so there was no involvement on the part of a regulated firm.*

*In the main, Sun Life relied on the information it had been given, rather than making its own enquiries. For example, Sun Life took the view that, because the SSAS had only been recently registered with HMRC, there was no point asking HMRC if it had deregistered the scheme as there was unlikely to have been any change in HMRC's view as to whether the scheme was operating legitimately. I don't think that was a reasonable position to take. Even if checking with HMRC would've proved futile, that didn't mean Sun Life should've accepted the transfer request without further enquiry. HMRC said, on its website at the time, that checking if a scheme had been deregistered wasn't a substitute for ceding schemes carrying out their own due diligence. I think there was also a danger for Sun Life in relying on information which been supplied by a party (BPS) who had a vested interest in the transfers going ahead.*

*Given the information Sun Life had at the time, at least one feature of Mr H's transfer would've been a potential warning sign of a scam: his SSAS was recently registered. And, as I've indicated above, I think there would've been other concerns too, in particular arising from what Sun Life had seen more generally and which it seems Sun Life had noted and was concerned about. Rather than simply taking the view that it couldn't do other than accede to Mr H's transfer request, I think Sun Life should've followed up on it to find out if other signs of a scam were present.*

#### *What should Sun Life have done?*

*In the circumstances I think Sun Life needed to look into the proposed transfer and what lay behind Mr H's request. And the most reasonable way of going about that would've been to turn to the check list from the 2014 action pack to structure its due diligence into Mr H's 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 H's transfer request, and the relatively limited information it had about the transfer, I think in this case Sun Life should've addressed all three parts of the check list and contacted Mr H as part of its due diligence. Sun Life clearly had concerns about the transfer anyway and so it would've made sense to use the checklist to try to get to the bottom of things and address those concerns. I note that Mr H contacted Sun Life by telephone on 16 September 2014 and which could've been an opportunity for Sun Life to discuss things further with him.*

*What would Sun Life reasonably have found out?*

*Under part 1 of the checklist, by referring to Companies House, and as I think Sun Life did, Sun Life would've quickly established that the sponsoring employer – H Limited – had been incorporated very recently – in September 2014 – and which was only weeks before BPS's transfer request was made (on 15 October 2014). As I've noted, Mr H was self employed at the time. And he already had his own company, through which he was presumably working. But he was setting up another limited company and a contract of employment was provided. But, notwithstanding, I think Sun Life should've asked Mr H about why he'd set up H Limited and why he'd entered into an employment contract. I don't think there was any real employment link between Mr H and H Limited. If he'd have been asked I can't see he'd have said anything other than he'd been told the new company was required for the new pension arrangement and through which the new investments would be made.*

*Enquiries under Part 2 of the checklist would have revealed that, although Mr H hadn't been offered loans or other cash incentives for making the investment, the proposed investments*

were both overseas. I think, had Sun Life made enquiries of Mr H, he'd have told Sun Life that part of his pension fund was to be invested in the TRG, a resort development in Cape Verde. And the other investment, Dolphin Capital, was also an overseas property investment. I also note that fractional hotel ownership was a relatively new investment innovation and fitted the FCA's 'Protect your pension pot' warning about unusual investments including overseas property.

And, under Part 3 of the checklist, Mr H would've said he'd been cold called – which was highlighted as another reason to be wary – and advised to transfer his existing pension to the SSAS so that he could invest in TRG and Dolphin Capital. Mr H (and contrary to what his representative said on his behalf) doesn't recall being rushed or the adviser being pushy. But I don't doubt that the adviser would've been persuasive. And I think Mr H would've told Sun Life that he'd been told the new SSAS would deliver better returns than his existing pensions, and that was why he wanted to transfer – he'd been told he'd be better off in retirement as a result.

Given what I've found likely had happened at the meeting at Mr H's home, I think Mr H would've told Sun Life that he'd been advised to transfer to a SSAS so he could invest in TRG and Dolphin Capital by FRPS (or possibly BPS). Enquiries made at the time by Sun Life would've been when what had happened was fresh in Mr H's mind and I think he'd have recalled who'd been in contact with him and what they'd said and which amounted to advice or a personal recommendation from FRPS.

The checklist recommends that, in order to establish whether a 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](http://www.fca.gov.uk/register)". In other words, they should consult the FCA's online register of authorised firms. Sun Life should've taken that step, which is not difficult, and it would quickly have discovered that Mr H's adviser was indeed unauthorised.

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 – indeed, the Scorpion guidance itself makes this point. My view is that Sun Life should have been concerned by the involvement of an unregulated adviser because it pointed to a criminal breach of FSMA. On the balance of probabilities, I'm satisfied such a breach occurred here.

#### What should Sun Life have told Mr H – and would it have made a difference?

I think, had Sun Life gathered further information from Mr H, it would've reinforced Sun Life's existing concerns about BPS's business model as well as raising concerns specifically about Mr H's transfer.

With its obligations under the regulator's Principles and COBS 2.1.1R in mind, it would've been appropriate for Sun Life to have informed Mr H that the firm he'd been speaking to was unregulated and could put his pension at risk. Sun Life should've also explained to Mr H that being cold-called and getting unregulated advice to make an overseas property investment were the same potential signs of a scam that TPR was highlighting in its Scorpion guidance. It should've also said that only authorised financial advisers were allowed to give advice on personal pension transfers, so he risked falling victim to illegal activity. As I've noted, Sun Life did have the chance to discuss the transfers with Mr H when he called in response to Sun Life's request for him to confirm he wanted to transfer even though he'd lose the GARs on two of the policies.

*But instead Sun Life made the transfer, seemingly resigned to the fact that it wasn't in a position to prevent transfers to BPS, despite its concerns about the business model. The point here isn't that Sun Life should have prevented the transfer. The point is that it should've given Mr H's transfer request due consideration and told him of the risks it would've identified as a result. I think Sun Life's conduct in failing to take the steps I've described fell significantly short of what the FCA's regulations under COBS and PRIN required. I think Sun Life should've provided more specific information about the risks of the transfer to Mr H, along the lines I've set out above.*

*I've therefore gone on to consider whether Sun Life's failings caused Mr H harm or loss. Essentially what I need to decide here is whether, if Sun Life had alerted Mr H to the risk of a scam and as I consider Sun Life should've done, if that would've made any difference to what Mr H did.*

*I note first that he signed the letter dated 9 October 2014. I accept that the letter had been prepared for him but it wasn't long and I think Mr H ought to have read the letter before signing it. But whether or not he did, the focus of the letter was pension liberation which Mr H wasn't doing. So I don't think the letter adds anything.*

*There's also the high risk declaration which Mr H signed on 24 November 2014 and which alerted him to the fact that his investment in overseas property development was unlikely to be covered by UK financial services compensation schemes if it failed. So Mr H would've known that his pension fund wouldn't be fully protected and which, arguably at least, ought to have made him think about if that sort of investment was appropriate. But, against that, he's said he was given to understand there was no risk he wouldn't get his money back. So there'd be no need for him to have to seek compensation.*

*I think the Scorpion booklet is of more significance. Although Sun Life didn't send the Scorpion insert to Mr H, a copy of the July 2014 version of the longer Scorpion booklet and signed by Mr H on the front page has been produced. When we asked him about the booklet, he didn't remember it but he accepted that, if we'd seen a signed copy, then he did see and sign it.*

*It listed the warning signs of a scam. From what Mr H has said, the investments weren't presented as one off opportunities and it doesn't appear he was rushed or pressurised into agreeing to transfer, nor were investment returns presented as guaranteed. But some of the things which were highlighted as indicative of a scam had happened to Mr H – he'd been cold called, offered a free pension review and both of the proposed investments were overseas. And the clear message given was to check that any adviser was authorised by the FCA before going ahead. The website address for the FCA register was given as well as the phone number for TPAS helpline. If Mr H had searched the FCA's register for FRPS – which would've been relatively easy and quick to do – he wouldn't have found them so he'd have known that FRPS wasn't authorised and regulated by the FCA.*

*On the one hand, if he signed to say he'd read and understood it, I think he ought to have read the booklet. And if he'd read it he should've realised there were parallels with what had happened to him and some of the warning signs given in the booklet as being indicative of a scam.*

*But, against that, I accept he'd have been given multiple documents to sign in connection with the transfer, setting up the SSAS and making the investments. So it's possible he just signed the documents, including the Scorpion booklet, without reading them. Or, at best, he only gave the booklet a fairly cursory glance. Mr H has said that, when someone came to his house with documents for him to sign, they made an effort to make conversation and put him at ease. I think he'd have been made to feel fairly confident that everything was above*

board, although in reality he was being lulled into a false sense of security. I also note that he signed the Scorpion booklet on the same day (9 October 2014) as he signed the letter saying he wasn't liberating. If liberation, which Mr H wasn't doing, was presented as the main threat, then he may have thought the Scorpion booklet was more about that and so any warnings the booklet contained wouldn't really apply to him, hence he just signed it without reading it.

In my view, it isn't the case that Mr H read the Scorpion booklet and concluded that he wasn't at risk of a scam. Rather he didn't read the booklet at all. That wasn't because he was determined to go ahead anyway. Rather it's that, given his confidence in those he was dealing with, he didn't really think he needed to pay close attention to the booklet. I'm not considering here whether it's reasonable that Mr H didn't read the booklet, just whether there's a plausible explanation why he didn't. I've considered below how Mr H's failure (which might be described as negligence on his part) affects things in terms of the losses he's sustained.

Because Mr H didn't read the Scorpion booklet he didn't see the warnings it contained. And he didn't do what the booklet suggested – check out that those he was dealing with were FCA authorised. But that was something which I've said, if Sun Life had made further enquiries of Mr H, would've come to light.

And, in my view, if Sun Life had engaged directly with Mr H, it would've made a difference. I think he'd have listened to Sun Life and taken seriously any warnings that Sun Life gave. Any warnings given to Mr H by Sun Life would've seemed to him (and indeed would've been) specific to his individual circumstances. Any reservations expressed by Sun Life would've been in the context of Sun Life raising concerns about the risk of Mr H losing his pension monies as a result of untrustworthy advice. That would've made him aware that there were serious risks in using an unregulated adviser and doing so could expose his pension savings to substantial risk of loss.

I think that sort of direct and personal warning, coming from his existing pension provider, would've carried weight with Mr H. And made him think about if what he'd been told to do, by someone who shouldn't have been giving that sort of advice anyway, was really likely to be in his best interests. I think Mr H would've realised that his confidence in those he'd been dealing with was misplaced and he'd have thought again. He'd already taken various steps to establish the SSAS (which involved setting up a limited company) to facilitate the TRG and Dolphin Capital investments. But I don't think he was so committed that he wouldn't have decided not to go ahead with the transfers. His motivation came from unsolicited and unlawful advice. I think he'd have reconsidered and decided against proceeding if he'd understood the advice he'd been given was likely to be untrustworthy.

I'm persuaded Mr H wouldn't have transferred his pensions or suffered the losses he did but for Sun Life's failings. I've gone on to consider what's fair and reasonable compensation in the circumstances here.

### **Fair compensation**

The Law Reform (Contributory Negligence) Act 1945 is relevant for me to take into account in this complaint. It allows for the apportionment of liability in the case of contributory negligence. It says that where any person suffers damage as the result partly of his own fault and partly of the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage. I've taken this into consideration when looking at the actions taken by Mr H. I do so, not because the Act

*directly applies to complaints to our service (it applies only to legal claims based on the breach of a tortious or contractual duty of care), but because I consider this complaint raises similar issues to a legal claim in negligence.*

*There are three questions I need to think about here. First, if Mr H had acted as a reasonable person should've done, by reading what he should've read and looking after his own interests in a reasonable way, would this have prevented the transfers from going ahead? Secondly, in the event that there were errors by both Mr H and Sun Life that led to the transfers going ahead, can it be said that one party's fault was a more potent cause than the other's? And thirdly, what was the relative degree of fault, if any failure by Mr H to take the steps he should've reasonably taken is compared with Sun Life's failure to take the steps it should've taken?*

*On the first question, Mr H was contacted out of the blue to discuss his pension, offered a free review, following which overseas investments were recommended. There were warnings about those issues (identified as 'hallmarks' of a scam) in the Scorpion booklet which Mr H had signed to say he'd read and understood. The message given was that any advisers should be authorised by the FCA and details of how to check that were given. As I've said, Mr H could've easily checked out FRPS's regulatory status. I accept that, had he done, he might've challenged FRPS about it. In which case FRPS would've likely tried to downplay any risks and reassure Mr H that transferring was the right thing for him to do and possibly played on his lack of investment knowledge and experience in an attempt to convince him to go ahead. But I think the damage by then would've been done and Mr H would've lost faith in what FRPS was telling him to do.*

*In so far as Sun Life was to blame, although Sun Life clearly had reservations about the transfers, Sun Life failed to engage with Mr H and share its concerns and warn him, based on what Sun Life should've found out, that there was a significant risk he was being drawn into the type of scam the Scorpion guidance was warning about and that his pension savings were at risk. Coming from the provider with which he had an established relationship, this warning would undoubtedly in my view have had more significance for him and resonated with him, for the same reasons I've argued previously.*

*All in all, I think both Mr H and Sun Life should've done more to guard against the risk of a scam and that if either of them had done as they reasonably should've done, Mr H's losses would've been avoided. But Sun Life was the professional party, operating a regulated pensions business in which dealing with members' transfer requests was an inherent feature, so it should've been more familiar with the risks than Mr H. In accordance with its duty under PRIN 6 and COBS 2.1.1R, Sun Life should (as I've found above) given a specific warning to Mr H about the likelihood he'd been drawn into a scam. So I think Sun Life was more to blame than Mr H and so it's appropriate to attribute greater relative responsibility to Sun Life than Mr H for the losses he's suffered.*

*While this isn't an exact science, in the circumstances of this complaint, I propose to reduce Mr H's compensation by 30%. I think this is a fair way to account for Mr H's own contribution to the loss he's suffered.'*

I went on to set out how Sun Life should put things right for Mr H.

Sun Life accepted my provisional decision and didn't offer any further comments. Mr H did comment. He agreed with my central findings (about the Scorpion warning, due diligence, communications (or the lack thereof) from Sun Life and causation) but he said it wasn't fair or reasonable to reduce his compensation by 30% on the basis there'd been contributory negligence on his part. I've summarised the points made about that.

- Many complaints with similar facts had been upheld in full, with no deduction for contributory negligence. There were no features in Mr H's case which were different or unusual to justify a finding of contributory negligence.
- I'd made a number of comments as to what Mr H might've done differently. Including that he might've checked out FRPS's regulatory status and challenged FRPS about it and which might've resulted in him losing faith in FRPS. It wasn't fair or reasonable to categorise Mr H's failure to check out FRPS's regulatory status as negligent in the context of there being no specific warnings from Sun Life, Mr H not having any prior investment or pensions knowledge, FRPS having presented themselves as knowledgeable, persuasive and professional and given the extensive documentation Mr H was asked to sign as part of the transfer process.
- If I maintained there had been contributory negligence, a deduction of only 10% should apply.

### **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've considered very carefully the comments made on behalf of Mr H in response to my provisional decision. In relation to his comments about consistency, each case is decided on its own individual facts and merits and on the basis of what's fair and reasonable in the circumstances of that particular case. Sometimes complaints which may appear very similar aren't identical and may be decided or redressed differently. With that in mind, my conclusions are the same as they were in my provisional decision.

In relation to Mr H's contribution to his own losses, he was given multiple documents to sign and, in view of his confidence in those he was dealing with and their professional and relaxed manner, he didn't give the Scorpion booklet the attention it deserved. That's why I'm not rejecting his complaint in full. If he'd absorbed the booklet's contents, it would be difficult to conclude he would've listened to any warnings from Sun Life given the nature of the booklet's warnings, and the sources of further information it provided. Nevertheless, the booklet was short and to the point. It was clearly in relation to something important – pension scams. The imagery used on the front page was, intentionally, striking. The booklet was put under his nose because he was asked to sign to say he had read it. And the overall context was that he was signing documents in relation to a decision he was making on his pensions which were worth, in total, over £60,000 – reason enough, in my view, to give any documents due consideration. In the circumstances, it seems to me that Mr H was negligent in giving the Scorpion booklet scant attention. And I remain satisfied, as I was previously, that the Scorpion booklet would've given Mr H enough information to have prompted him to reconsider pursuing a transfer.

As I recognised in my provisional decision, apportioning fault (and with it if any reduction in compensation is justified) isn't an exact science. But, for the same reasons as I gave in my provisional decision, I still think some responsibility rested with Mr H and that it's fair and reasonable to recognise that by making a deduction of 30% to the compensation to reflect that.

All in all I maintain what I said in my provisional decision. I've repeated what I said there as to what had happened, my provisional findings and my approach to redress, all of which forms part of this decision.

I'm upholding the complaint and awarding redress as set out below (and which follows what I said in my provisional decision).

## **Putting things right**

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

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

To compensate Mr H fairly, Sun Life must subtract the actual value of Mr H's SSAS from the (combined) notional value if the funds had remained with Sun Life. If the notional value is greater than the actual value, there's a loss. Sun Life must then pay 70% of that 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 H may be asked to give Sun 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 H to the position he'd have been in but for the actions of Sun 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: TRG and Dolphin Capital. This is because there's no market for the investments. And I don't think it's realistically possible for Sun Life to only acquire a part of the investment from Mr H's SSAS as I'm only holding it responsible for 70% of the loss. Therefore as part of calculating compensation:

- Sun Life must give the illiquid investment(s) a nil value as part of determining the actual value. In return Sun Life may ask Mr H to provide an undertaking, to account to it for 70% of the net proceeds he may receive from those investments in future on withdrawing them from Mr H's SSAS. Sun Life will need to meet any costs in drawing up the undertaking. If Sun Life asks Mr H to provide this undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.
- It's also fair that Mr H 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 Sun Life must pay an upfront sum to Mr H equivalent to 70% of 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 H's funds had he remained invested with Sun Life up to the date of my Final Decision.

Two of Mr H's plans had Guaranteed Annuity Rates (GARs). I consider that option should be restored as part of redressing this complaint, as Mr H wouldn't have lost the GARs if he hadn't transferred the policies. I'm not aware (Mr H didn't say so in response to my provisional decision) that Mr H has withdrawn any tax-free cash or income that he'd have been entitled to take from the SSAS (subject to it having sufficient funds) from age 55.

## ***Payment of compensation***

I don't think it's appropriate for further compensation to be paid into Mr H's SSAS given his dissatisfaction with the outcome of the investments it facilitated. However, in a case such as this where I've concluded there is contributory negligence, I can't expect Sun Life to reinstate Mr H's policies entirely as if they had never been transferred. Because of the practicalities of restoring Mr H's ability to exercise a GAR, I'm nevertheless giving Sun Life the option of reinstating a proportionate amount of each of Mr H's former pension policies as if their combined value on the date of my Final Decision was equal to the amount of 70% any loss he has suffered (and those policies perform thereafter in line with the funds Mr H was invested in). Sun Life should also include the relevant GAR options as they apply to the reinstated policies.

Sun Life shouldn't reinstate Mr H'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 Sun Life to determine whether this is possible.

If Sun Life is unable to reinstate Mr H's pension and it is open to new business, it should set up a **new** pension plan or plans for a total value of equal to 70% of 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 H's original pension. If the new plan(s) cannot provide GARs on the same basis as Mr H's former policies where relevant, then the value of the relevant plan(s) will have to be artificially adjusted upwards to account for the loss of the GAR. The adjustment is made by multiplying that part of the total loss relating to the loss of the relevant GAR by the ratio of G divided by C, where:

G = the GAR as a percentage applying to Mr H's former policy at age 60; and

C = the best annuity rate available on the open market at age 60 on the date of my Final Decision, for an annuity with the same basis in payment (such as spouse's proportion, escalation and guarantee period) as the GAR on Mr H's former policy.

If Sun 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 H is entitled based on his annual allowance and income tax position. However, Sun 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 H doesn't incur an annual allowance charge. If Sun Life cannot do this, then it shouldn't set up a new plan for Mr H.

If it's not possible to set up a new pension plan, Sun Life must pay the amount of 70% of any loss, with the same upward adjustment for the loss of GARs above, direct to Mr H. But if this money had been in a pension, it would've 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 H is retired. (This is an adjustment to ensure that Mr H isn't overcompensated – it's not an actual payment of tax to HMRC.)

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

This interest is not required if Sun Life is reinstating Mr H'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 H was invested.

Details of the calculation must be provided to Mr H in a clear, simple format.

### **My final decision**

I uphold the complaint. Sun Life Assurance Company of Canada (UK) Limited must redress Mr H as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 24 September 2024.

Lesley Stead  
**Ombudsman**