DRN-5013006

The complaint

Mrs F has complained about the transfer of the personal pension policies she held with Scottish Widows Limited ("SWL") to a small self-administered scheme ("SSAS"), in 2014.

Mrs F's SSAS was subsequently used to invest in The Resort Group ("TRG") an overseas commercial property scheme that has since run into trouble. Mrs F says she has lost out financially as a result.

Mrs F says that SWL failed in its responsibilities when dealing with the transfer request. She says that it should have done more to warn her of the potential dangers of transferring away from her personal pension and into a SSAS, and that it should have undertaken greater due diligence on the transfer, in line with the guidance she says was required of transferring schemes at the time. Mrs F says she wouldn't have transferred, and therefore wouldn't have put her pension savings at risk, if SWL had acted as it should have done.

I should also explain that some other parts of Mrs F's original pension savings as of 2014 were held by her on different pension platforms other than SWL. I'm aware she has complained in respect of these pension policies too. However, in this particular decision I'm only addressing the part of her complaint which relates to SWL. I have, though, looked carefully into the other complaint to understand whether the issues within that case affect my findings in any material ways. I'm satisfied they don't, and so I'm able to issue a decision in this case having considered all the evidence we have.

What happened

Mrs F had two personal pension policies with SWL. One was with SWL itself and had a transfer value of around £8,300. The other policy had been taken out with a legacy company – Clerical Medical - which had since been taken over by SWL; the value of this was around £4,091. To be clear, SWL is responsible for answering the complaint in relation to both policies here.

In November 2014, Mrs F asked what is now SWL to transfer these policies to a newly established SSAS. At the time, she was 45 and employed in the construction sector. Mrs F says she wasn't an experienced investor or knowledgeable around the issue of pensions.

It seems that on or around 13 August 2014, Mrs F signed a letter of authority allowing a firm called Moneywise Financial Advisers Limited ("Moneywise") to obtain details in relation to her SWL pension policies. It does look like she signed a second letter of authority a few weeks later, effectively asking SWL for the same information in relation to her two pension policies. But I've assumed this second request was likely made because of either not noticing there had since been a reply from SWL in the interim, and / or that her letters of authority were ultimately asking for information about multiple pension funds from different pension platforms.

However, I can see that on 27 August 2014 SWL sent details of her pension policies to Moneywise. It seems a second response was sent on 11 September 2014, probably due to the 'double request' I've mentioned above. No further relevant documentation I've seen refers to Moneywise and Mrs F says she has no recollection of ever speaking or dealing with anyone from Moneywise after the initial introduction.

Mrs F says that after the introduction from Moneywise, she met with a representative of First Review Pension Services ("FRPS") and they advised Mrs F that she should consolidate all her pension policies, open a SSAS and invest with TRG. Mrs F says she was attracted by the investment proposals put to her by FRPS, as she was told this was an opportunity to earn much better returns than she was receiving with her existing SWL pensions.

On 7 October 2014, a company was incorporated with Mrs F as the sole director. I won't mention the name of the company but it was a combination of some of Mrs F's personal details with the word "Limited" at the end.

FRPS then obtained Mrs F's authority to submit a SSAS application on her behalf with Rowanmoor Group Plc ("Rowanmoor"); she signed the relevant consent form allowing for this on 20 October 2014. A SSAS is a type of occupational pension, in which the members are also trustees and therefore take responsibility for operating the scheme. As an occupational pension, a SSAS must be sponsored by an employer company. Normally (and logically) that would be a company employing the scheme members or providing them with an income, although this wasn't a requirement. The SSAS's assets must be held and invested by a trustee for the benefit of its members.

Mrs F applied to open a SSAS on the same day (20 October). She was the sole trustee and member. The sponsoring company for the SSAS didn't employ her or provide her any income. It was a dormant company and as I've said, incorporated only a few weeks before. It was registered at Mrs F's home address and she was its sole director and shareholder. It never traded - the company seems to have existed only to allow the SSAS to be opened.

On 13 November 2014, a company called Strategic Alternatives Limited ("SAL") sent Mrs F, in her position as the sole trustee of the SSAS, a letter providing advice on the TRG investment. Mrs F signed the letter in acknowledgement. The advice provided by SAL related specifically to the appropriateness of investments for the SSAS. And this advice was not personal advice to Mrs F, rather it was being provided to the trustee of the SSAS and explicitly in line with Section 36 of the Pensions Act 1995. I explain more about this later.

On 21 November 2014, SWL received a transfer request for Mrs F's SWL policy for £8,300 via the Origo Options transfer service. There's no dispute that the other £4,091 policy (SWL - Clerical Medical) was transferred at the same time, but it's unclear if the Origo system was used for this second transfer as opposed to a traditional 'paper based' method. Origo is an electronic-based system that reduces the need for paper-based correspondence during pension transfers, so it is often used by providers to accelerate the transfer process. The Origo screenshot in relation to Mrs F's transfer recorded the receiving scheme as being a SSAS, the provider of the SSAS as being Rowanmoor Group Plc and various details about Mrs F (such as her date of birth and national insurance number) and the receiving scheme (such as details of the bank account the transfer was to be paid into). The Origo transfer screenshot said the advising firm name was SAL.

I've seen evidence of both the pension policy transfers having been completed. The SSAS's bank statements show the two transfer values of the pension policies were all received by 5 December 2014. The combined transfer value of £12,392.19 was used to invest (with her other pensions) in a hotel resort under construction in Cape Verde, offered by TRG. The TRG investment was unregulated and high risk. The TRG investment has proven to be illiquid and incapable of sale on the open market.

In March 2020, Mrs F complained to SWL. Briefly, her argument is that SWL ought to have spotted, and told her 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; Mrs F was an inexperienced investor and was advised to invest in overseas property developments which she had little understanding of and were inappropriate for her attitude to risk; and, the catalyst for the transfer was an unsolicited call and the involvement of unregulated businesses.

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

Mrs F wasn't satisfied with this, so the complaint was referred to the Financial Ombudsman Service. One of our investigators looked into it and said they didn't think we should uphold the complaint, but Mrs F still disagreed. As the dispute couldn't be resolved informally the matter was passed to me to make a decision.

I then made a provisional decision (PD) about the complaint. Here, I explained in full my intention to uphold Mrs F's complaint. However, I gave the parties a chance to reflect on the issues and submit any points of new information or evidence they wanted me to consider. Mrs F agreed with the outcome I set out in my PD, which was to uphold her complaint. However, SWL didn't agree I should uphold the complaint and it sent in a detailed response which I've taken time to consider.

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 read with great care everything that's been said by both parties. I've considered in detail the responses to my PD.

My final decision is that I am upholding Mrs F's complaint. I'll explain why below.

<u>The relevant rules and guidance</u>

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 SWL 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 Mrs F'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 a similar vein, in August 2014, the FCA was already voicing 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 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 they could become aware of the scam risks they were facing.

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

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. 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 and Mrs F's recollections

The available documentation relating to the transfer sheds some light on which firms were involved and what role they played:

- Moneywise. This firm is now dissolved. At the time it was authorised by the FCA to provide regulated financial advice about pensions although Mrs F says it did *not* advise her; she says its involvement here was limited firstly to that of an introductory cold call. Mrs F then signed a letter of authority giving Moneywise permission to obtain information about her two SWL pension policies.

- FRPS. Mrs F says that it was FRPS which provided the advice to transfer away from SWL, open a SSAS and invest in TRG. This firm is also now dissolved. It was not authorised to provide regulated financial advice. However, we've seen a number of very similar cases to this one and I've seen persuasive evidence of Moneywise and FRPS working together with clients who ultimately invested with TRG. Mrs F says she had meetings which were only with FRPS. These took place after the introductory call and a letter she'd been sent asking her to authorise (a letter of authority) Moneywise to obtain her pension holding(s) information from SWL.

- Lifestyle Connections Limited ("Lifestyle Connections"). This company was never mentioned by Mrs F, but I note its name appears on a "pension summary" sheet for all of her plans within the file Mrs F's representative sent, as compiled from its information requests. The document cites Lifestyle Connections as the *"LOA* [letter of authority] *Generator"*. We know that in 2016, BBC Panorama carried out an investigation into pension scamming, related to overseas investments offered by TRG. There's persuasive evidence, including undercover video footage, of Lifestyle Connections generating leads for its sister company FRPS to unlawfully advise clients to transfer their personal pensions to these types of high- risk investments. In support of this, Lifestyle Connections and FRPS shared an identical company address and a common company director. Lifestyle Connections is now dissolved and was not authorised at the time to provide regulated financial advice.

- Strategic Alternatives Limited ("SAL"): This company was appointed to provide Mrs F with advice under section 36 of the Pensions Act 1995, a provision which requires a SSAS trustee to take and consider appropriate advice on whether a proposed investment is satisfactory for the aims of the scheme. SAL provided this advice to Mrs F in a letter dated 13 November 2014. The letter explained that the scope of its advice was limited to this and that it *hadn't* advised her on the establishment of her SSAS. It said the nature of the advice it did provide *wasn't* regulated under FSMA. I've noted Mrs F's SSAS statement does show that in 2015 a fee of £100 was paid to SAL which supports that it was involved in some capacity. But as I say, in any event, SAL wasn't authorised to provide regulated financial advice. I explain a little more about SAL's involvement further down.

- Rowanmoor Group Plc. This was a relatively widely known provider of SSAS administration services at the time. Mrs F's SSAS was arranged with Rowanmoor, and it was Rowanmoor which wrote to SWL on 21 November to request the release of Mrs F's pension funds into the SSAS.

Mrs F's motives for transferring appear to have been to generate higher returns for her pension rather than to receive unauthorised payments from it as she says she was told the TRG investment could generate "excellent returns". And I think the idea of opening a SSAS and then investing overseas came from external factors as Mrs F herself did not appear to have the knowledge to make these types of investment decisions on her own. I haven't seen anything about her circumstances, or anything from what she has told us, that makes me think it's likely she would have decided, without advice, to embark on such a complicated and esoteric arrangement, which involved transferring out of her existing pension, setting up a new company, opening a SSAS and investing in property overseas.

In effect, Mrs F submits that she received a personal recommendation to transfer her SWL pension into a SSAS from FRPS. Advice of that nature was (and remains) regulated by the Financial Services and Markets Act 2000 (FSMA). Only someone authorised to do so by the Financial Conduct Authority (FCA) is permitted to give regulated financial advice unless they have a specific exemption under FSMA.

After our investigator issued their 'view' Mrs F clarified that the initial introducer in her case was Moneywise, but that it provided no advice. She agrees she was sent a letter of authority to sign, but the subsequent meetings she had were with a representative of First Review Pension Services. It was at this stage that she received advice to transfer and re-invest with TRG through a SSAS, which Mrs F had no previous experience or knowledge of. And she is clear that neither Moneywise nor SAL or Rowanmoor were involved in the advice at this point.

I've considered Mrs F's testimony and that these events took place some years ago. I've also compared her recollections with all the other evidence we have in this case. In my view, there's no indication Mrs F took any action consequent to Moneywise's request, which was only to obtain her pension information. So, she doesn't appear to have relied on any financial advice from Moneywise.

It wasn't until later – and after when she said she met with FRPS - that Mrs F took the first concrete step towards transferring: she established a new limited company solely for the purpose (it would seem) of setting up a SSAS. She also gave FRPS her written authority, on 20 October 2014, to help her set up the SSAS by signing a declaration which said, *"I authorise First Pension Review Services to submit my application form to establish the above SSAS"*. This FRPS authority form was signed on the same day as her SSAS application. In my view, this adds considerable weight to FRPS's involvement in 'advising' Mrs F, as she herself describes, in setting up a new SSAS into which her existing SWL pension savings could be transferred. Her authority was set out on FRPS branded documentation which also provided FRPS's registered address in Derby. I've noted that this FRPS address is very geographically close to that of TRG's registered office, and I've also noted FRPS and TRG have at one point shared a common company director. Further to this, this Service has also seen many examples of FRPS working with consumers specifically to promote the TRG investment and the use of the firm Moneywise, to obtain information about consumers' existing pension arrangements.

Finally, I think it's revealing that mention in the file is made of Lifestyle Connections. Mrs F herself doesn't remember this company but it is mentioned once – on an informal document which summarised all her pension savings. As I've said, Lifestyle Connections and FRPS shared a common address and company director and there's strong evidence of them having linked roles. The mentioning of Lifestyle Connections in the paperwork therefore adds further weight to Mrs F's recollections about being advised by someone from a company she recalls as FRPS.

So, on balance, it's far more likely Moneywise – and its regulatory status - was used merely as a conduit to obtain Mrs F's pension details from SWL. There's simply no evidence that this arrangement extended to Moneywise providing regulated financial advice and / or advising Mrs F to transfer her pension(s) away from her existing SWL platform.

For good order, I've considered the involvement of the other firms I've mentioned above. For example, on or around 13 November 2014, Mrs F received a letter from SAL. However, this was providing her with advice under s36 of the Pensions Act 1995. This letter made it clear that SAL was *not* a regulated financial adviser, and it *wasn't* advising her in her personal capacity, but rather advising her in the role as a SSAS trustee. It went on to say the TRG investment was a legitimate and credible arrangement that didn't facilitate pension liberation and was suitable to be held in a SSAS. But it also warned Mrs F that the investment was risky and suitable only for more adventurous investors, pointing out that if she preferred advice on the suitability of the investment for her personally, she should seek regulated financial advice from an independent financial adviser.

I have also noted that SWL concedes that on the Origo transfer screenshot, the adviser firm name was SAL. I've therefore considered whether SWL could have taken that into account. But of course, SAL wasn't authorised to provide regulated financial advice either. So, if SWL was relying on the brief Origo entry which may have implied Mrs F had an 'adviser' then it certainly couldn't have been reassured by this. SAL providing personal advice to her to transfer from Scottish Widows would have been unlawful. However, in any event, SWL's final response letter said no check was done at the Origo transfer stage as it didn't form part of SWL's processes.

As for Rowanmoor, all the evidence strongly shows this was the provider and professional trustee of the SSAS. Rowanmoor would have been aware that another firm (SAL) had been engaged to advise on the SSAS's investments, as required by the Pensions Act - and I don't see it as likely that Rowanmoor itself would have got involved in giving Mrs F advice.

To be clear then, my finding is that it's more likely than not that FRPS was the firm which personally met with Mrs F and advised her to transfer her SWL pension policies to a SSAS. Firstly, this corresponds with Mrs F's recollections. But it is also corroborated by other evidence I've seen. I've also seen a number of very similar cases to this and so I'm able to say that my knowledge and experience is that FRPS was indeed regularly involved in providing unregulated advice connected to TRG investments at around this time. And we know of FRPS's involvement in 'assisting' Mrs F to set up her SSAS at the end of October 2014: her authority for FRPS to act for her in setting up the SSAS was given on the same day she signed relevant SSAS application forms. All these things support Mrs F's recollections. FRPS was *not* authorised to give investment advice and I think basic enquiries would have uncovered its involvement, together with other very significant signs of a scam, which SWL should have spotted when applying reasonable due diligence.

<u>What did SWL do and was it enough?</u>

The Scorpion insert:

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. There is no evidence that a Scorpion leaflet or insert was sent to Mrs F by SWL.

Having said that, I mentioned earlier that Mrs F had made a complaint to another company about some pensions she held on a different platform. And the evidence in that case is that a Scorpion leaflet or insert *was* sent which seems to be the Scorpion leaflet from February 2013, focussing mainly on liberation activities – which I don't think would have been a concern for her. She was still only 45 years of age and her intention was not to access her pension at that stage, but to transfer to a SSAS and to take advantage of the "excellent growth" she had been promised. So whilst Mrs F was given some information by another company relating to the Scorpion campaign, this most likely didn't include the important regulator's update of 24 July 2014 which widened the concerns to broader pension scamming activities, rather than only liberation.

I think SWL was at fault for not sending Mrs F any of the Scorpion information. But even the other pension provider told her at the end of August 2014, *"most pension transfers are problem-free. However, there are a number of companies who are seeking to persuade pension holders to access their pension funds early – also known as 'pension liberation'. We enclose a leaflet produced by The Pensions Regulator designed to give you some important information about the potential risks to your pension fund from pension liberation".* And so, this means I don't think the warning from the other pension firm would have resonated with her. In arriving at this view, I've considered what she was actually sent by the other provider, that she was not an experienced investor and her motivation seemed to be drawn towards improving her pension's performance. She had no intentions of liberating her pension early so I don't think she'd have thought this warning was related to her situation. I also can't see any evidence that Mrs F was contacted directly in any other way by SWL throughout this process.

Of course, even if it *had* sent the Scorpion insert, SWL's responsibilities didn't end there. In light of the Scorpion guidance, I think firms ought also to have been on the look-out for the tell-tale signs of pension liberation and indeed the other activities mentioned in the later update. Firms like SWL needed to undertake further due diligence and take appropriate action if it was apparent their customer might be at risk.

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. SWL didn't undertake any further due diligence.

I accept it might not have been clear from the Origo request when the SSAS was registered. But in checking her Scheme was correctly registered – which SWL would have needed to do – it would have become apparent when it was registered. And in my view, given the information SWL should have had at the time, Mrs F's transfer would have contained potential warning signs of scam activity as identified by the Scorpion action pack: Mrs F's

SSAS was recently registered. SWL should therefore have followed up on this 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 SWL to look into the proposed transfer and the most reasonable way of going about that would have been to turn to the check list in the action pack to structure its due diligence into the transfer.

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

1. The nature/status of the receiving scheme

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

2. Description/promotion of the scheme

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

3. The scheme member

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

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

I don't think it would always have been necessary to follow the check list in its entirety. And I don't think an answer to any one single question on the check list would usually be conclusive in itself. A transferring scheme would therefore typically need to conduct investigations across several parts of the check list to establish whether liberation was a realistic threat.

The letter of authority coming from Moneywise wasn't enough to give SWL comfort not to go through the checklist. Some time had passed since Mrs F had signed the letter of authority and the actual transfer request hadn't come from Moneywise. So, given the warning sign that should have been apparent when dealing with Mrs F's transfer request, and the relatively limited information it had about the transfer, I think in this case SWL should have addressed all three parts of the check list and contacted Mrs F as part of its due diligence.

What should SWL have found out?

SWL knew, or certainly should have known, firstly of the threat posed by the newly incorporated company and SSAS. It would have learned from contacting Mrs F that there was no genuine employment link to the sponsoring employer. So, investigations under part 1 of the check list would have revealed the SSAS's sponsoring employer was recently incorporated and set up to facilitate the creation of the SSAS rather than as an entity in its own right.

Investigations under part 2 of the check list would have revealed that Mrs F was attracted to the investment opportunities pitched to her, including overseas investments which were potential sources of concern under the action pack (and an overseas property development, which was what Mrs F was investing in, was one of the examples given in the action pack's case studies).

I think investigations would have then revealed the existence of a 'cold' call to start this process off; again this was another risk area listed in part 3. I think these warning signals should have then caused investigations into the issue of unregulated advice. For this, I'm satisfied Mrs F would have told SWL that she was being 'advised' to transfer by FRPS - my previous findings in the "circumstances surrounding the transfer" section support this. Had SWL asked her about this – as it should have done under part 3 of the check list, it would have revealed signs of a scam.

The check list recommends that in order to establish whether its member has been advised by a non-regulated adviser, the ceding scheme should "*check whether advisers are registered with the FSA at www.fsa.gov.uk/fsaregister*". In other words, they should consult the FSA's online register of authorised firms. SWL should have taken that step, which is not difficult, and it would quickly have discovered that there were reasons to be suspicious, or at least, that further enquiries were appropriate.

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

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 insert itself makes this point. And my findings are that FRPS gave advice to Mrs F when unauthorised to do so.

What should SWL have told Mrs F – and would it have made a difference?

Had it done more thorough due diligence, there would have been a number of warnings SWL could have given to Mrs F in relation to a possible scam threat as identified by the action pack. SWL should also have been aware of the close parallels between Mrs F's transfer and the warnings the FCA was giving to consumers by August 2014 about transferring to SSASs (which was brought to the attention of pension providers the following month). But the most egregious oversight was SWL's failure to uncover the threat posed by a non-regulated adviser. Its failure to do so, and failure to warn Mrs F 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 SWL to have informed Mrs F that the firm she had been advised by was unregulated and could put her pension at risk. SWL should have said only authorised financial advisers are allowed to give advice on personal pension transfers, so she risked falling victim to illegal activity and losing regulatory protections.

I'm satisfied any messages along these lines would have changed Mrs F's mind about the transfer. The messages would have followed conversations with Mrs F so would have seemed to her (and indeed would have been) specific to her individual circumstances and would have been given in the context of SWL raising concerns about the risk of losing pension monies as a result of untrustworthy advice. This would have made Mrs F aware that there were serious risks in using an unregulated adviser. I think the gravity of any messages along these lines would prompt most reasonable people to rethink their actions. I've seen no persuasive reason why Mrs F would have been any different. So, I consider that if SWL had acted as it should, Mrs F wouldn't have proceeded with the transfer out of her personal pension or suffered the investment losses that followed.

<u>Other arguments</u>

I note that at the time of the transfer Rowanmoor was an established SSAS provider. Rowanmoor Trustees Limited also had legal and fiduciary duties as a professional trustee. There's an argument, therefore, that SWL could have taken comfort from this. However, I don't think that argument holds weight.

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, SWL was assuming, in effect, that Rowanmoor would want to maintain its standing in the industry and the trustee subsidiary would comply with its legal and fiduciary duties. In the context of guarding against pension scams – and an environment where providers and trustees clearly didn't always act as they should have done – I don't consider this to have been a prudent assumption.

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

It was on the basis of what I've comprehensively explained above that my PD said I was minded to uphold Mrs F's complaint.

<u>Response to the provisional decision (PD)</u>

SWL responded to my PD in considerable detail. The high-level summary of SWL's PD response is that it denies it acted unfairly or unreasonably in Mrs F's case. It cites the areas of *relevant rules and guidance; conduct; causation and putting things right* as being the main aspects of its defence of its actions in the transfer.

I've looked carefully at everything it said and reconsidered each point.

For the purposes of addressing SWL's disagreement with my PD, I've concentrated on the main issues which I think could affect the outcome of this complaint.

<u>Relevant rules and guidance</u>

SWL said *“we think the Ombudsman has put too much weight on the Scorpion guidance requirements at the expense of other important regulatory requirements that were ‘in play’ at the time of Mrs F’s transfer – such as the need to treat customers fairly, including by avoiding delays and barriers to switching…. The Ombudsman has also ‘over-stretched’ the scam guidance onto what was essentially a non-scam situation in Mrs F’s case – namely a poor investment case.”*

SWL said it was notable that the updated Scorpion leaflet came into effect from 24 July 2014 whereas the initial approach and request for transfer information in this case only arose in mid-August (i.e. a particularly short period of time between the introduction of the updated guidance and the request). SWL said, for example, that it required 3 months to adapt to sending out updated Scorpion information to clients, so it couldn’t have sent the updated Scorpion leaflet. I had already explained in my PD that the FCA had also begun circulating concerns about SSAS scams at around the time TPR broadened its campaign – and it informed the industry of this in a regulatory round-up published on its website in September 2014. Given that the transfer wasn’t requested until late November 2014, it remains my view that SWL had plenty of time to get acquainted with these emerging risks that the regulators had identified, particularly as a major player in the pensions landscape. Put another way, the regulatory focus at the time had ‘moved on’ significantly and by the time of this particular transfer, the focus had quite obviously changed to incorporate greater concerns about pension scamming in general, rather than earlier liberation-only concerns.

The dates SWL cares to highlight relate only to the very beginning of these events where Mrs F’s pension information was being sought. But by the time the transfer became a reality SWL should have identified sufficient warning signs about pension scamming which ought to have caused it to be on guard.

I also disagree with SWL that I am over-stretching Mrs F’s scenario because (in its view) it was essentially a non-scam situation and only about poor investment choices. This makes the mistake of not considering the way the transfer, the SSAS creation and the subsequent investment were *promoted* to Mrs F; given the unregulated parties acting unlawfully, it was very similar indeed to a scam. And the Scorpion campaign wasn’t just about what investments were being made – it included how they were being promoted. Again, I make the point that as a major player in the pensions business, SWL should have been up to date with developments in the pension transfer landscape and cognisant of this.

Unreasonable barriers to exit

SWL said other relevant factors and expectations (on it) existed, such as avoiding *“unreasonable barriers to exit”* – one of the FCA’s desired outcomes of Treating Customers Fairly (TCF) (Principle 6). I do understand this point, as here, SWL is effectively saying it was constrained by the expectation that it shouldn’t also be preventing people who wanted to transfer, from doing so. However, the FCA endorsed the Scorpion campaign; and in my view, carrying out these checks (and warning consumers where necessary) were certainly not in conflict with TCF. I do accept SWL had to ensure it removed barriers to switching and Mrs F had a statutory right to transfer. But acting in its client’s best interests wouldn’t amount to SWL placing an unreasonable barrier to exit. And warning her about what she was doing would not amount to regulated advice. The Scorpion guidance was designed to help SWL achieve all these things and in my view was *not* acting against them.

Relying on ”reputable actors and systems”

SWL says it had no visibility of FRPS's involvement. It says it's not fair to cite the period of a few months between Moneywise's letter of authority (LOA) and the transfer request, to suggest that Mrs F may have no longer been using Moneywise as an adviser.

However, Moneywise was the firm that asked for the information (using the LOA) about Mrs F's pension, in August 2014. It wasn't named on the Origo request which was in November, when ordinarily if it was still involved in advising on the transfer one would expect it to be named as the adviser for the transfer; in fact only SAL was. So, there's a very reasonable argument that when giving appropriate scrutiny to the actual transfer system (Origo) in November 2014, SWL ought to have become concerned at the possible involvement of a different (and unregulated) adviser – SAL - and started to ask further questions of Mrs F.

SWL also said in its reply to my PD that I had made *"assumptive findings, based on experience, that FRPS gave the advice and the recollections of the complainant".* I have added some further points in the background above to cover this, such as providing the date and the evidence of FRPS obtaining Mrs F's authority to submit a SSAS application on her behalf on 20 October 2014. This was clearly on FRPS notepaper and this in my view adds reliable weight to Mrs F's recollections.

<u>*Conduct*</u>

SWL said that *"Origo membership was itself subject to a rigorous application process including on member firms' regulated status and credit worthiness, with fellow Origo members encouraged to raise any concerns regarding applicants. And so membership was not automatically granted but subject to certain verification criteria."*

Here therefore, SWL is making the assertion that Origo had a robust application process for members and that membership would not be automatically granted. It says Origo required members - which would have included Rowanmoor - to commit to the memorandum of understanding (MOU) to prevent any use that was fraudulent or otherwise unlawful or contrary to TPR guidance.

This is all very well. However, I don't think that generic assurances to a third party within an MOU, or initial checks when agreeing membership, were something SWL could reasonably rely exclusively on when weighing up potential scam risks for its customers in a particular transfer. In arriving at my PD, I took note, and placed weight on, the importance of what the Scorpion campaign due diligence in question was aimed at preventing – namely pension liberation and scams, the end result of which can often be the loss of entire pension funds. Clear steps were expected of ceding schemes like SWL to prevent this happening, not to mention the duties of all ceding schemes under the wider PRIN and COBS 2.1.1R responsibilities. I don't think SWL's general arm's length reliance on other parties' checks and processes - and essentially delegating its own responsibilities - was good enough here.

As it happens, I do think this point can also be fundamentally discredited in this particular case. I say this because the Origo printout said SAL was advising on a transfer; and advice to leave SWL would need to be regulated. And as SAL was itself *unregulated*, then that couldn't have reassured SWL. It did in fact suggest that transfers were being put through the Origo platform where unregulated advisers were acting in potential breach of the law. Rowanmoor's processes - or Origo's scrutiny – couldn't simply be blindly relied upon as being sufficient, without doing further due diligence.

Also, just because the SSAS provider – Rowanmoor – had a known and established presence in this sector, it didn't necessarily follow that it could be universally trusted. I explained this area in my PD and how such a laissez-faire approach would be flawed. The fact that one part of the Rowanmoor Group was regulated by the FCA doesn't change what needed to be checked by SWL during this transfer process by way of due diligence. The key point here is that Rowanmoor Trustees Limited wasn't FCA-regulated so there is no reason why it would have operated with FCA regulations and Principles in mind – or why its actions would have come under FCA scrutiny. As such, I remain unpersuaded that SWL could, reasonably, have derived sufficient comfort about the Rowanmoor SSAS as a destination for Mrs F's transfer.

Recent registration is implicit in all SSAS transfers

SWL quotes a Pensions Ombudsman's Decision as saying [for an October 2014 transfer] *"the Scheme was only established as a SSAS for the sole purpose of a transfer and* [a certain consumer] *was the only member. The date that the Scheme was registered with HMRC was unlikely to be a cause for concern given the nature of the transfer and receiving scheme".* However, I am not bound by the decisions of TPO nor do I think a decision made in different circumstances necessarily applies to Mrs F's situation. The nature of scams was constantly evolving, as can be seen in the FCA campaign circulated to businesses like SWL. So, to rule out any newly established SSAS being at risk of a scam would be in contradiction of the FCA warning and it calls into question whether it would be a proper interpretation of TPR guidance at the time of this transfer request.

Causation

In replying to my PD about this issue, SWL said any intervention it might have made at the time of the transfer, would have most likely been perceived by Mrs F simply as self-interest on SWL's part (i.e. keeping her pension invested with it) and therefore less trustworthy than any adviser she had been dealing with. SWL also said it was disproportionate for it to conduct a *"protracted enquiry"* into whether FRPS had breached FSMA, even if it had known FRPS was involved. SWL implied that Mrs F went ahead with transferring in the face of *"numerous"* other risk warnings - this refers I think to the pre-2014 Scorpion insert sent to her by another ceding scheme. Overall, SWL said its experience was that pension scheme members (in general) were typically insistent on transferring, even in the face of warnings.

However, I've since brought SWL up to speed on the wider evidence we have of FRPS commonly being involved in these types of pension transfers (both on this file and generally – a example was also sent of the BBC Panorama article showing FRPS was involved in unlawfully advising people). I do understand the point about Mrs F not necessarily being caught up in the language of liberation or scams, and potentially even ignoring these terms or the clear thrust of the Scorpion insert she received, because this was all about early access to cash. That might have meant she missed the references to, for instance, pushy salesmen in the early Scorpion leaflet she got.

However, I don't think Mrs F's reaction to receiving a leaflet which wasn't directed at the type of potential scam she faced, is the right test here. It remains my judgement that without the specific features contained in the later Scorpion leaflet (referring more widely to scams), combined with an explanation from SWL of what it had found of concern in her particular transfer request, what Mrs F was *actually* given wouldn't have carried enough weight. I've reached my decision on the balance of probabilities. It remains my view that a well explained warning about being illegally advised, in circumstances very similar to those warned about by both TPR and FCA, would have caused a reasonable person – and Mrs F – to have acted quite differently.

Fair compensation

Mrs F was given advice to transfer her SWL pension by FRPS, in breach of FSMA, in order to invest in TRG. So, in my view it came within SWL's duty of care to identify this and warn Mrs F accordingly. The losses flow from that. I'm satisfied there is sufficient connection between the harm Mrs F wants to be compensated for now, and the risk that SWL had a duty to guard against. I also remain satisfied that Mrs F's position as a lay trustee was being taken advantage of by unregulated parties, so that means she didn't negligently contribute to her losses.

In upholding the complaint, the issue is that Mrs F's pensions ought *not* to have been transferred at all. If SWL hadn't failed in the areas I have pointed out above, then the future investments in the unregulated and risky assets would never have taken place. This is because Mrs F's attention would have been drawn to illegal activity by FRPS for example, and the associated risks of a pension scam.

I also have satisfactory evidence that the income from the TRG investment stopped and there has never been a realistic prospect for Mrs F to have extricated herself from that investment. So, I am directing that it is fair and reasonable for SWL to compensate her for the losses in the way I set out in the PD.

For all these reasons, I'm now upholding Mrs F's complaint.

Putting things right

Fair compensation

My aim is that Mrs F should be put as closely as possible into the position she would probably now be in if SWL had treated her fairly.

The SSAS only seems to have been used in order for Mrs F to make an investment that I don't think she would have made from the proceeds of this pension transfer, but for SWL's actions. So I think that Mrs F would have remained in her pension plan with SWL and wouldn't have transferred to the SSAS.

To compensate Mrs F fairly, SWL should subtract the proportion of the actual value of the SSAS which originates from the transfer of the SWL pension(s), from the notional value if the funds had remained with SWL. If the notional value is greater than the actual value, there is a loss.

Actual value

This means the proportion of the SSAS value originating from Mrs F's SWL transfer (the **"relevant proportion"**) 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. Mrs F may be asked to give SWL her authority to enable it to obtain this information to assist in assessing her loss.

My aim is to return Mrs F to the position she would have been in but for the actions of SWL. 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 investment(s) in The Resort Group. And I don't think it's realistically possible for SWL to only acquire a part of the investment from the SSAS as I'm only holding it responsible for the loss originating from a transfer in of the SWL funds. Therefore as part of calculating compensation:

- SWL should give the illiquid investment(s) a nil value as part of determining the actual value. In return SWL may ask Mrs F to provide an undertaking, to account to it for the relevant proportion of the net proceeds she may receive from those investments in future on withdrawing them from the SSAS. SWL will need to meet any costs in drawing up the undertaking. If SWL asks Mrs F to provide this undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

- It's also fair that Mrs F should not be disadvantaged while she 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 SWL should pay an upfront sum to Mrs F equivalent to the relevant proportion 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 Mrs F's funds had she remained invested with SWL up to the date of my Final Decision.

SWL should ensure that the relevant proportion of any pension commencement lump sum or gross income payments Mrs F received from the SSAS are treated as notional withdrawals from SWL 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

There doesn't appear to be any reason why Mrs F needed a pension arrangement that wasn't privately held, administered by an established provider and under FCA regulation. So I don't think it's appropriate for further compensation to be paid into the SSAS.

SWL should reinstate Mrs F'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 Mrs F was invested in).

SWL shouldn't reinstate Mrs F'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 SWL to determine whether this is possible.

If SWL is unable to reinstate Mrs F'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 Mrs F's original pension.

If SWL 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 Mrs F is entitled based on her annual allowance and income tax position. However, SWL'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 Mrs F doesn't incur an annual allowance charge. If SWL cannot do this, then it shouldn't set up a new plan for Mrs F.

If it's not possible to set up a new pension plan, SWL should pay the amount of any loss direct to Mrs F. But if this money had been in a pension, it would have provided a taxable income. Therefore compensation paid in this way should be notionally reduced to allow for any income tax that would otherwise have been paid. (This is an adjustment to ensure that

Mrs F isn’t overcompensated – it’s not an actual payment of tax to HMRC.)

To make this reduction, it’s reasonable to assume that Mrs F is likely to be a basic rate taxpayer in retirement. So, if Mrs F has yet to take her 25% tax-free cash from the SSAS, 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 her in cash.

Alternatively, if Mrs F has already taken her 25% tax-free cash from the SSAS, the full 20% reduction should be applied to the compensation amount if it’s paid direct to her in cash.

If payment of compensation is not made within 28 days of SWL receiving Mrs F’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 SWL deducts income tax from the interest, it should tell Mrs F how much has been taken off. SWL should give Mrs F a tax deduction certificate in respect of interest if Mrs F asks for one, so she can reclaim the tax on interest from HMRC if appropriate.

This interest is not required if SWL is reinstating Mrs F’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 Mrs F was invested.

In my view, there is nothing credible to dispute any of the following:

- the assumption that Mrs F will be a basic rate taxpayer in retirement
- the assumption of nil value for The Resort Group at the date of my Final Decision

Details of the calculation should be provided to Mrs F in a clear, simple format.

My final decision

My final decision is that I am upholding this complaint.

I now direct Scottish Widows Limited to take the steps outlined above to put things right for Mrs F.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mrs F to accept or reject my decision before 8 October 2024.

Michael Campbell
Ombudsman