DRN-5037533

The complaint

Mr W has complained, through his representative, that Phoenix Life Limited ('Phoenix') undertook insufficient due diligence when transferring his personal pension to a Qualifying Recognised Overseas Pension Scheme ('QROPS') in November 2014.

Mr W's QROPS - the Harbour Retirement Scheme ('Harbour') -was based in Malta. Funds from his Phoenix pension as well as monies from a pension Mr W held with another personal pension provider were subsequently used to invest into loan notes on property in Germany through Dolphin Capital. The investment was recorded as having no value in 2020.

What happened

Mr W says he filled in a form on a plane and subsequently was contacted by a firm called Portia Financial Limited ('Portia') who said they could help him invest any pensions he held. They introduced him to Servatus Ltd ('Servatus') who Mr W says advised him on his transfer to the Harbour QROPS and into Dolphin Capital. Mr W says he was told he could improve his investment returns and could expect yearly returns of around £2,000 per year.

Portia was an unregulated firm. Servatus was regulated by the Central Bank of Ireland. At the relevant time they also appeared on the FCA register as being authorised in the UK with passporting rights.

Phoenix received Mr W's letter of authority for a firm called Global Partners Limited in May 2014. Phoenix sent Global Partners a transfer pack. Mr W can't recall dealing with this firm.

In June 2014 Phoenix received a letter of authority for Harbour. On 12 July 2014, Phoenix sent the required transfer forms and pension information to Harbour.

In October 2014, Harbour returned all necessary forms and the transfer completed in November 2014. Subsequently the investment into Dolphin Capital was made in January 2015.

Mr W complained to Phoenix in 2022 that they should have done further due diligence and warned him about the transfer. Phoenix rejected the complaint. It said it had done due diligence on Harbour and the scheme was registered with HMRC as a QROPS. And it had received all the relevant forms signed by Mr W. They had no concerns about the scheme.

Mr W referred his complaint to this service. One of our investigators rejected the complaint. He thought Phoenix should have sent Mr W a Scorpion leaflet which warned about pension scams and they ought to have done more in terms of due diligence. However, further enquiries would have shown that Mr W was being advised by Servatus, an EEA regulated firm with UK passporting rights which would have given them enough comfort that the scam risk was minimal. So no further warnings needed to be given. The investigator thought that even if Phoenix had acted as they should have done, the transfer still likely would have gone ahead.

Mr W's representatives disagreed that Phoenix could take comfort from Servatus's involvement. They say foreign advice would have been unusual and should have been seen as another red flag. Mr W also wouldn't have the same regulatory protections as from a UK adviser. Phoenix should have informed Mr W about all of this.

They also disagreed that Mr W would have proceeded with a transfer if Phoenix had asked more questions and sent him the Scorpion leaflet.

As the complaint couldn't be resolved, it was referred to me for an ombudsman decision.

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.

<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 Phoenix was subject to the FSA/FCA Handbook, and under that to the Principles for Businesses (PRIN) and to the Conduct of Business Sourcebook (COBS). There have never been any specific FSA/FCA rules governing pension transfer requests, but the following have particular relevance here:

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

The Pensions Schemes Act 1993 gives a member of a personal pension scheme the right to transfer the cash equivalent value of their accrued benefits to another personal or occupational pension scheme if certain conditions are satisfied (and they may also have a right to transfer under the terms of the contract). This right came to be exploited, with people encouraged to transfer to fraudulent schemes in the expectation of receiving payments from their pension that they weren't entitled to – for instance, because they were below minimum retirement age. At various points, regulators issued bulletins warning of the dangers of taking such action. But it was only from 14 February 2013 that transferring schemes had guidance to follow that was aimed at tackling pension liberation – the "Scorpion" guidance.

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

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

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

<u>The Scorpion guidance</u>

The materials in the Scorpion campaign comprised:

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

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

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

TPR issued the guidance under the powers at s.12 of the Pension Act 2004. Thus, for the bodies regulated by TPR, the status of the guidance was that it provided them with information, education and/or assistance, as opposed to creating any new binding rule or legal duty. Correspondingly, the communications about the launch of the guidance were predominantly expressed in terms that made its non-obligatory status clear. So, the tenor of the guidance is essentially a set of prompts and suggestions, not requirements.

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

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

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

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

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

For the reasons given above, I don't think personal pension providers necessarily had to follow all aspects of the Scorpion guidance in every transfer request. However, I do think they should have paid heed to the information it contained. In deciding how to apply the guidance, they needed to consider the guidance as a whole, including the various warning signs to which it drew attention, the case studies that highlighted different types of scam, and the checklist and various suggested actions ceding schemes might take. And where the recommendations in the guidance applied, absent a good reason to the contrary, it would normally have been reasonable, and in my view good industry practice, for pension providers at least to follow the substance of those recommendations:

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

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

3. I also think it would be fair and reasonable for personal pension providers – operating with the regulator's Principles and COBS 2.1.1R in mind – to ensure the warnings contained in the Scorpion insert were provided in some form to a member before a transfer even if the transfer process *didn't* involve the sending of transfer packs.

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

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

What did Phoenix do and was it enough?

The Scorpion insert:

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

Phoenix says the Scorpion insert would have manually been added to transfer packs at the time which is why it wasn't referred to in the transfer pack letter. Based on the evidence I've seen there isn't enough evidence in my view that the insert was included when Phoenix sent out Mr W's transfer packs. However, even if they were, they would have been sent to Global Partners Limited and then to Harbour. The leaflets were meant to reach customers directly and I'm not persuaded that such inserts- if they were included- would have been passed on to Mr W. So for the purpose of this decision I'm assuming he didn't receive the Scorpion leaflet.

Phoenix sent out the transfer packs to Global Partners and Harbour in May and mid July 2014 respectively. This was before the leaflet was updated on 24 July 2024, so the relevant version of the Scorpion insert Mr W should have received would have been the version issued in February 2013.

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. Phoenix satisfied themselves the QROPS was properly registered with HMRC, however I don't think this was enough.

The 2014 Scorpion Action pack listed overseas investments as a possible warning sign of a scam. Given Mr W was transferring his pension overseas I think it would have been fair and reasonable – and good practice – for Phoenix to have looked into the proposed transfer and the most reasonable way of going about that would have been to turn to the check list in the action pack to structure its due diligence into the transfer.

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

1. The nature/status of the receiving scheme

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

2. Description/promotion of the scheme

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

3. The scheme member

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

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

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

<u>What would Phoenix reasonably have discovered?</u>

From a few simple questions directed to Mr W, Phoenix would have likely found out that he had been initially contacted by Portia and that he had been advised by Servatus.

I also think it’s likely Phoenix would have learned from Mr W that he was transferring for better investment returns, that he hadn’t been offered to access his pension early or had been offered any cash incentives.

The Scorpion checklist recommends that, in order to establish whether a member has been advised by a non-regulated adviser, the transferring scheme should consult the FCA’s online register of authorised firms. Phoenix should have taken that step, which is not difficult. Had it done so it would have discovered that Servatus appeared on the FCA register as a firm that was passported from Ireland to the United Kingdom. This means that for UK purposes throughout the period of this transfer Servatus was an authorised person under s.31(1)(b) of the Financial Services and Markets Act (FSMA) 2000 and Schedule 3 to that Act.

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

A ceding pension scheme is not expected to act as a general pension adviser to a member who tells it they want to leave their scheme. The Scorpion guidance is aimed at spotting and averting potential pension transfer scams against the member, rather than delivering general advice about the merits of different regulatory systems or high-risk investments. So, for it to be reasonable to expect a ceding scheme to have concerns and raise these with its member, there must, viewed overall, appear to be a real risk their member is falling victim to a scam. For Mr W’s transfer, viewed overall in that way and if Phoenix had taken the steps it should, I don’t consider that would have been the case.

Mr W’s representatives say Phoenix should have warned Mr W he wouldn’t have the same regulatory protections than from a UK adviser. It is correct that Servatus didn’t have a branch in the UK and so Mr W wouldn’t have had any recourse via UK’s complaints and investor protection institutions, like the Financial Ombudsman Service or the FSCS, as opposed to their Irish equivalents. The Republic of Ireland also has a complaints system, financial services and pensions ombudsman and a statutory investor compensation scheme, which EU countries are required to have under the EU's Investor Compensation Directive.

Servatus was passported from Ireland to the UK and so for the period of this transfer Servatus was an authorised person under FSMA 2000. The right to passport financial services from one EU country to another is a feature of the EU's internal market, which applied to the UK at the time. The right was underpinned by the introduction of EU wide standards of investor protection and harmonised conduct of business rules. So, the UK's regulatory system permitted EU passported firms, if duly registered with the FCA on its public register, to operate here as authorised persons under the FSMA 2000, and I think that, in the present case, that could have provided sufficient comfort for Phoenix's purposes.

As a firm that was regulated (albeit by a home-state regulator in another EU jurisdiction) the regulatory protections included the fact that Servatus would have been held to a high standard, mandated throughout the EU, by its own regulator. And as an authorised firm, Servatus would have had to follow the applicable European regulatory standards and conduct its practice in accordance with those standards. Its operations would have been under some oversight by its regulator to ensure it was acting in the best interest of its client. It therefore would have had to meet certain required standards in all of its dealings and be subject to regulation and to investor recourse under the Irish system. So, in my view, Phoenix could have been reassured that Servatus was regulated to EU standards that were accepted for the purpose of authorisation under United Kingdom law.

Overall, I don't think if Phoenix had made further enquiries that this would have resulted in warnings to Mr W that he was at risk of a scam.

<u>Would further enquiries from Phoenix and sending Mr W the Scorpion insert to him directly have changed his mind about the transfer?</u>

As noted earlier in this decision, I think Mr W should have received the Scorpion leaflet in the version of 2013 which at the time focussed on pension liberation scams which offered early access to a pension before the age of 55 and upfront cash incentives. It warned of potential tax consequences. None of this applied to Mr W, so I don't think these warnings would have been concerning to him.

Even if Phoenix had subsequently sent him the updated leaflet (which I don't think they had to do), this warned about the same issues as the previous leaflet. The only additional warning was about being offered a pension review or being lured into "one off" investment opportunities which arguably Mr W might have recognised as something similar to what had happened to him. The leaflet referred to further information available through TPR's website or by calling TPAS or Action Fraud. However, TPR's website at the time still focused heavily on early access pension liberation and the main recommendation was to seek regulated advice which is what Mr W had received. Mr W said the adviser and investment appeared legitimate and he had no concerns. So overall, just like Phoenix, I think Mr W would have been assured that he was dealing with a regulated adviser and wasn't being scammed.

In summary I don't think Phoenix did enough here. However, if they had done everything they should have, on balance I still think Mr W would have transferred his pension and so he would be in the same position he is in now. So I don't think Phoenix has caused the investment losses he has suffered.

My final decision

I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 21 January 2025.

Nina Walter
Ombudsman