DRN-5101306

The complaint

Mr H has complained about a transfer of his Phoenix Life Limited personal pension to a small self-administered scheme (SSAS[1]) in February 2014. Mr H's SSAS was subsequently used to invest in storage pods. The investment now appears to be illiquid and has little resale value. Mr H says he's lost out financially as a result.

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

What happened

On 16 October 2013, Mr H signed a letter of authority (LOA) allowing a firm I'll call M to obtain details, and transfer documents, in relation to his pension. At that time firm M was authorised by the Financial Conduct Authority (FCA). The letter said that Mr H was also authorising firm M to release his pension information to two other firms one of which was called Stevenson Pride. Stevenson Pride was not FCA authorised.

On 22 October 2013, firm M sent the LOA to Phoenix Life together with an information request and transfer forms. Phoenix Life sent firm M the requested information on 31 October 2013. It sent similar information, including a quote for the value of Mr H's pension, directly to him together with guidance about the transfer process.

Mr H says his interest in the transfer followed an unsolicited approach from Stevenson Pride. He told us its agent told him that by investing with it he could expect returns around 70% higher than leaving his pension with Phoenix Life.

On 6 December 2013, a company was incorporated with Mr H as director. I'll refer to this company as T. T used the services of a firm which acts as a professional company secretary for many other limited companies. Company T was registered at the same address as the professional secretary company which was some distance from where Mr H lived.

A week later, on 13 December 2013 Mr H signed documents to open a SSAS with Rowanmoor Group PLC (Rowanmoor) as provider and Rowanmoor Trustees Limited were shown as the payee to receive the funds. T was recorded as the SSAS' principal employer. The application included Mr H's signed authority to allow Rowanmoor to gather information

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[1] A SSAS is a type of occupational pension in which the members are also trustees and therefore take responsibility for operating the scheme. It's an arrangement typically intended to meet the needs of people who run their own companies. SSASs are not regulated by the financial services regulator, the Financial Conduct Authority (FCA). They can hold a wider range of investments and assets than many personal pensions. As an occupational pension, a SSAS must be sponsored by an employer company. Usually (and logically) that would be a company employing the scheme members or providing them with an income, although this wasn't a requirement.

about his pension from Phoenix Life. Mr H said on the SSAS application form that he was planning on investing in overseas property developments.

On 22 January 2014 Rowanmoor wrote to Phoenix Life enclosing Mr H's authority to release information to it. Rowanmoor asked Phoenix Life to complete its form to allow a pension transfer. On 29 January 2014 Phoenix Life sent Mr H a transfer quote and similar information to that it had sent to him on 31 October 2013. On 3 February 2014 Phoenix Life sent another transfer quote to Mr H.

Rowanmoor sent the required form to transfer Mr H's pension to Phoenix Life on 14 February 2014. It also sent a request for the same information it had asked for on 22 January 2014. Phoenix Life provided that information on 25 February 2014. Three days later, on 28 February 2014 Phoenix Life sent Rowanmoor a cheque for the full value of Mr H's pension of £47,437. He was 49 years old at the time. Phoenix Life also wrote to Mr H the same day to confirm it had completed the transfer.

In March 2014 Mr H completed a Rowanmoor form setting out his intention to invest £39,750 of the SSAS funds with Store First. Store First offered storage units for sale. Investors like Mr H would buy the units then lease them back to Store First who would let them to customers. Solicitors acting for Mr H in the matter wrote to Rowanmoor on 24 April 2014 to confirm the completion of Mr H's purchase of storage units.

The Store First investment did initially provide returns. But those, generally, reduced and were lower than Mr H would have expected. Concern over Store First and its associated companies resulted in the relevant Secretary of State petitioning the court to have the companies wound up. I understand the companies were the subject of a winding up order in April 2019. The Official Receiver was appointed as liquidator and its assets were sold to a company called Store First Freeholds Limited. As I understand it, the storage units continue to be rented to customers and the units provide returns when rented. However, I understand that there is little or no market for the onward sale of the units and as such the investments are entirely illiquid.

In September 2020 Mr H complained to Phoenix Life. Briefly, his argument is that it ought to have spotted, and told him about, a number of warning signs in relation to the transfer, including (but not limited to) the following:

- the SSAS was newly registered;
- there wasn't a genuine employment link to the sponsoring employer;
- the catalyst for the transfer was an unsolicited call; and
- he had been advised by an unregulated business.

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

Mr H brought his complaint to the Financial Ombudsman Service. One of our Investigators looked into it. While he didn't think Phoenix Life had done everything it should have done, he didn't recommend the complaint be upheld. That was because he thought that Mr H would have gone ahead with the transfer anyway.

Mr H didn't agree with our Investigator's complaint assessment. As the matter was not resolved informally, it was passed to me to decide.

Provisional decision

On 18 September 2024 I issued a provisional decision setting out why I intended to uphold the complaint and invited the parties' comments on that. For ease of reference I've reproduced the relevant extracts below.

'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.

When doing so I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

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

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

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

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

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

- *An insert to be included in transfer packs (the 'Scorpion insert'). The insert warns readers about the dangers of agreeing to cash in a pension early and identifies a number of warning signs to look out for.*
- *A longer leaflet issued by TPAS which gives more information, including example scenarios, about pension liberation. Guidance provided by TPR on its website at the time said this longer leaflet was intended to be sent to members who had queries about pension liberation fraud.*
- *An 'action pack' for scheme administrators that highlighted the warning signs present in a number of transfer examples. It suggested transferring schemes should "look out for" various warning signs of liberation. If any of the warning signs applied, the action pack provided a checklist that schemes could use to help find out more about the receiving scheme and how the member came to make the transfer request. Where transferring schemes still had concerns, they were encouraged to write to members to warn them of the potential tax consequences of their actions; to consider delaying the transfer; to seek legal advice; and to direct the member to TPAS, TPR or Action Fraud.*

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 statutory rights.

That said, the launch of the Scorpion guidance was an important moment in so far as it provided, for the first time, guidance for personal pension providers dealing with transfer requests – guidance that prompted providers to take a more active role in assessing those requests. It was launched in response to widespread abuses that were causing pension scheme members to suffer significant losses. And its specific purpose was to inform and help ceding firms, like Phoenix Life, 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 a turning 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. But, I do think they should have paid heed to the information it contained. And where the recommendations in the guidance applied, without 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. *When TPR launched the Scorpion guidance in February 2013, its press release said the Scorpion insert should be provided in the information sent to members requesting a transfer. It said on its website that it wanted the inclusion of the Scorpion insert in transfer packs to "become best practice". The Scorpion insert provided an important safeguard for transferring members, allowing them to consider for themselves the liberation 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 transferring schemes should have sent the Scorpion insert as a matter of good industry practice with transfer packs and direct to the transferring member when the request for the 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 pension liberation scams and undertake further due diligence and other appropriate action where it was apparent their client might be at risk. The action pack points to the warning signs transferring schemes should have been looking out for and provides a framework for any due diligence and follow-up actions. Therefore, whilst using the action pack wasn't an inflexible requirement, it did represent a reasonable benchmark for the level of care expected of transferring schemes and identified specific steps that would be appropriate for them to take, if the circumstances demanded.*

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

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

Mr H told us that Stevenson Pride cold called him. Prior to that he hadn't been considering a pension transfer. He said he had no investment experience. He said Stevenson Pride's agent, who Mr H could name, then visited him on a number of occasions. The agent told him to expect returns around 70% higher than he would receive from Phoenix Life. The agent didn't offer him any cash up front or incentive to transfer. But the agent told him that after six years, when Mr H was 55 years old, there was a "get out" provision and he could walk away from the investments and be 70% better off. Mr H said that the agent was very convincing.

On balance I accept Mr H's evidence that it was Stevenson Pride who gave him advice to make the storage pod investments. I've noted that Mr H signed firm M's LOA to gather information about his pension. But that LOA allowed firm M to share that information with Stevenson Pride. And there's no evidence of any further involvement from firm M. So it appears that firm M's only involvement was in requesting information and then passing it on to Stevenson Pride.

Also Mr H hasn't made any reference to firm M at any point when bringing his complaint – although he clearly signed its LOA. But he's been consistent that Stevenson Pride's agent visited him at home and gave him the advice to invest in storage pods. And Mr H's told us that he still has the agent's business card. So on balance I'm persuaded that Stevenson Pride's agent took Mr H through the required steps to make the storage pod investments.

Further, in order to achieve that Mr H needed to set up his own company and establish a SSAS. Doing that, i.e. setting up his own limited company, establishing a SSAS, transferring his existing pension and investing in storage pod companies – were complex and unusual arrangements for someone such as Mr H. He wasn't a sophisticated investor. I can't see he'd have done all that, or even known that sort of arrangement was available to him, unless he'd been told it would be a good idea and he'd end up better off. So I'm satisfied that action was recommended to him.

Advice to transfer out of his personal pension with Phoenix Life would be regulated advice which should only have been given by an FCA authorised adviser. But I'm satisfied that, on balance, it was Stevenson Pride's agent who was not regulated, who gave that advice.

Our Investigator asked Mr H what he would have done if Phoenix Life had sent him the Scorpion insert. Mr H said he "didn't really know" and that he might have spoken with Stevenson pride in the first instance.

Mr H said that some time after he made the investments he contacted Stevenson Pride's agent as he'd been expecting a review of his situation. The agent told him he no longer worked for Stevenson pride and couldn't help Mr H.

Mr H told us he has tried to access his funds which are invested in the storage pods but has been unable to do so.

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

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.

When it responded to our request for information Phoenix Life initially told us that it included the Scorpion insert with transfer packs. But I don't find that comment convincing. While

Phoenix Life did write to Mr H directly after it received requests for transfer quotes or packs, there's nothing in that correspondence which indicates that the Scorpion insert has been included. Further, Mr H doesn't recall seeing it. So, on balance, I'm satisfied that Phoenix Life didn't ever send the Scorpion insert to Mr H. I think that was an oversight.

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 pension liberation and needed to undertake further due diligence and other appropriate action if it was apparent their customer might be at risk. In this case there's no evidence of Phoenix Life undertaking any further due diligence whatsoever.

Given the information Phoenix Life had at the time, one feature of Mr H's transfer should have been a potential warning sign of liberation activity as identified by the Scorpion action pack in that Mr H's SSAS was recently registered. It's not obvious, from the information I've seen, that Phoenix Life actually checked that the SSAS was correctly registered. But that was something it was required to do. And if it had done so it would have become apparent that the SSAS was recently registered. So, Phoenix Life should have followed up on this to find out if other signs of liberation were present.

Given this warning sign, I think it would have been fair and reasonable – and good practice – for Phoenix Life to look into the proposed transfer and the most reasonable way of going about that would have been to turn to the checklist in the action pack to structure its due diligence into the transfer.

The checklist 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 checklist could have been addressed by checking online resources such as Companies House and HMRC. Others would have required contacting the consumer. The checklist is divided into three parts (which I've numbered for ease of reading and not because I think it 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 checklist identified actions that should help the transferring scheme establish the facts.

I don't think it would always have been necessary to follow the checklist in its entirety. And I don't think an answer to any one single question on the checklist would usually be conclusive in itself. A transferring scheme would therefore typically need to conduct investigations across several parts of the checklist to establish whether liberation 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 Phoenix Life should have addressed all three parts of the checklist and contacted Mr H as part of its due diligence.

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

With a few simple enquiries Phoenix Life should have discovered that the SSAS was not only recently established but also connected to a company which was recently registered. It wasn't trading; Mr H wasn't actually employed by it in a meaningful sense and it was geographically distant from where he lived. All of these were given as warning signs in the Scorpion action pack.

Also Phoenix Life would likely have learned that the advice to transfer had come following a cold call and then a visit from an agent of Stevenson Pride who recommended investing in storage pods. And while Stevenson Pride wasn't offering cash or another incentive, it was giving Mr H pensions advice.

The checklist recommends that in order to establish whether its member has been advised by a non-regulated adviser, the ceding firm, in this case Phoenix Life, should "check whether advisers are registered". In other words, they should consult the regulator's online register of authorised firms. Phoenix Life should have taken that step, which is not difficult, and it would quickly have discovered that Mr 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 insert itself makes this point.

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

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

Had it done more thorough due diligence, there would have been a number of warnings Phoenix Life could have given to Mr H in relation to a possible scam threat as identified by the action pack. Those included:

- *The SSAS was newly registered with HMRC as was its sponsoring employer.*
- *The employer was a dormant company that did not employ Mr H in any meaningful sense and was geographically distant from where he lived.*
- *The intended investments were in an unregulated company (Store First) involving a 'creative' investment technique.*
- *Mr H had been advised following a cold call.*
- *The adviser was not regulated.*

In particular I think Phoenix Life's failure to uncover this risk of illegal advice and then warn Mr H about it meant it didn't meet its obligations under Principles 2, 6 and 7 and COBS 2.1.1R. With those obligations in mind, it would have been appropriate for Phoenix Life to have informed Mr H that the firm which had advised him, Stevenson Pride, was unregulated and could put his pension at risk. Phoenix Life should have said only authorised financial advisers are allowed to give advice on personal pension transfers, so he risked falling victim to illegal activity and losing regulatory protections by following its advice.

I note Mr H had previously told our Investigator that if he'd seen the Scorpion leaflet, while not sure exactly what he would have done, his first thought was that he might have asked Stevenson Pride about it. And our Investigator said that, in those circumstances, it's likely Stevenson Pride would have found a plausible argument to defend its unregulated status. But, as I've said above, Phoenix Life didn't send the leaflet. And, even if it had, I don't think that would have gone far enough. Given that there were warning signs I think it should have ran through the checklist and had a conversation or corresponded with Mr H. That interaction would have alerted him to the fact he was dealing with a firm which, as professional and legitimate as its agent might seem, was almost certainly engaging in criminal activity in the very act of advising him.

The messages would have followed conversations or correspondence with Mr H so would have seemed to him (and indeed would have been) specific to his individual circumstances. That interaction would have been given in the context of Phoenix Life raising concerns about the risk of losing pension monies as a result of untrustworthy advice. This would have made Mr H aware that there were serious risks in using an unregulated adviser even if he was not liberating his pension.

I think the gravity of any messages along these lines would prompt most reasonable people to either change their mind or, at the very least, to seek further guidance from TPAS (as suggested in the action pack) or advice from a properly regulated adviser before proceeding. And I think it's more likely than not that this guidance or advice would have made Mr H acutely aware that the investments he was considering were extremely high risk, unwise and likely outside of his attitude to risk.

I'm aware that our Investigator believed, given the plausibility of Stevenson Pride's agent, that Mr H may have simply gone ahead with the transfer anyway even if Phoenix Life had given him the appropriate warnings. But Mr H's account is that he had no other investment experience. He also had no other pension provision. So, he would be relying on his Phoenix Life pension as his only other source of income in retirement outside of his state pension. He had no other investments which would give him the capacity for loss that he would be willing to risk losing his only personal pension source if he'd understood the risks he was taking. And in those circumstances, I consider that if Phoenix Life had acted as it should, Mr H wouldn't have proceeded with the transfer out of his personal pension or suffered the investment losses that followed.

<u>The cause of Mr H's loss</u>

I bear in mind that this complaint is similar to the type of claim that in legal proceedings would be treated as a claim for damages for negligent failure to give someone the information or advice to which they were entitled. In that kind of case, the court asks itself whether there is a sufficient connection between the harm for which the claimant seeks damages as compensation and the subject matter of the defendant's duty of care. The court looks to see what risk the defendant's duty was supposed to guard against and whether the claimant's loss represents that particular risk coming to fruition.

So, it's important I bear in mind that the Scorpion guidance was directed towards protecting people from the risk of pension liberation, and that doesn't appear to have happened here. The loss was suffered because Mr H accepted unsuitable advice from an agent who wasn't authorised to act as a financial adviser at all, and it wasn't (as far as I can establish taking into account what Mr H has said) a case of seeking to cash in a pension in an unauthorised way.

Nonetheless, the circumstances that gave rise to this complaint were very similar to those of a pension liberation scam: the transfer followed unsolicited contact from an unauthorised firm and involved the setting up of a new SSAS to house an investment and the involvement of a recently established employer.

The Scorpion action pack and insert both recommend checking that financial advice comes only from an authorised person by looking at the FCA register. And Phoenix Life's obligations under the Principles and COBS were of general application and went well beyond just protecting its customers from pension liberation. In the circumstances, even though this doesn't appear to be a case of pension liberation, I'm satisfied there is sufficient connection between the harm Mr H wants to be compensated for and the risk that Phoenix Life had a duty to guard against. So I do consider it fair and reasonable for Phoenix Life to compensate Mr H for his losses.

<u>The involvement of Rowanmoor.</u>

I note that at the time of the transfer Rowanmoor was a long established SSAS provider and had some repute in the industry. Rowanmoor Trustees Limited also had legal and fiduciary duties as a professional trustee. There's an argument, therefore, that Phoenix Life could have taken comfort from this. I disagree.

The Scorpion guidance gave ceding schemes an important role to play in protecting customers wanting to transfer a pension. It would defeat the purpose of the Scorpion guidance for a ceding scheme to have delegated that role to a different business – especially one that had a vested interest in the transfer proceeding. An important aspect in this is the fact that there is little regulatory oversight of single-member SSASs; they don't have to be registered with TPR. In the absence of that oversight, it wouldn't be reasonable for Phoenix Life to assume 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 would have been a prudent assumption.

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

<u>Summary</u>

For the reasons given above I think Phoenix Life should have taken more robust action when presented with the facts.

Had Phoenix Life reacted appropriately to the warning signs as set out in my findings above, it would have followed the Scorpion guidance and began further enquiries. I think those would have uncovered that Mr H was in danger of putting his pension funds at risk by going ahead with the transfer.

But Phoenix Life didn't begin those investigations, it simply proceeded with the transfer without ever contacting Mr H, beyond sending him transfer information. And, as a result of Phoenix Life's omissions I think that led to the losses Mr H suffered. It follows that I think it's fair and reasonable for Phoenix Life to take the action set out below to put things right.'

Developments

Mr H accepted my provisional decision but Phoenix Life didn't. It said that the best practice at the time of the transfer request was to look out for the signs of pension liberation, that is early or unauthorised access to pension funds rather than scams more generally.

Phoenix Life added that the initial contact came from firm M which – at that time – was FCA regulated. And while the letter of authority said that firm M could disclose Mr H's pension information to two unregulated firms there was no other evidence to suggest those firms were giving Mr H advice. Phoenix Life said it was "*fair to say*" that its understanding was that an authorised firm was advising Mr H to transfer.

Phoenix Life said it wasn't required to give advice. And it took some comfort an authorised firm was advising Mr H.

Phoenix Life added that any warnings given in the Scorpion leaflet were unlikely to have resonated with Mr H as pension liberation "*was not in play*" in Mr H's case.

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'll turn first to the involvement of firm M. Phoenix Life said it could take comfort from the involvement of an FCA authorised business. But I disagree. While Phoenix Life had received an LOA from an FCA business that explicitly said it only authorised firm M to gather evidence; it did not appoint firm M as Mr H's financial advisers.

Further the LOA also said that two other firms, which were not authorised or regulated, were also entitled to the same information as firm M. So, from the limited information available to it Phoenix Life had no persuasive reason to conclude that firm M was giving Mr H advice or indeed had done so. It follows that I don't find that it was reasonable or fair to conclude that an authorised firm hid given Mr H advice. In fact Phoenix Life had no convincing evidence of knowing which firm had given Mr H advice.

I accept that TPR's guidance at the time aimed to help firms identify the warning signs of pension liberation. And its Scorpion action pack gave examples of the sort of things to look out for. And where there were apparent warning signs, the guidance encouraged ceding schemes like Phoenix Life to follow its checklist to find out about the receiving scheme and how the transfer request came about.

As I said in my provisional decision one of those warning signs was the receiving scheme being recently registered with HMRC. That was the case for Mr H's SSAS. So Phoenix Life needed to do further due diligence and the checklist gave guidance on how to establish if any of the other warning signs were in play. But, as far as I can tell it didn't undertake any further due diligence in this regard at all.

If Phoenix Life had followed the checklist, as I said in my provisional findings, it would have uncovered that there were a number of warning signs that the Scorpion materials said that ceding schemes should be on the look out for. And the most significant of those was that the recommendation to transfer had come from an unregulated adviser who was most likely acting in breach of FSMA. And Phoenix Life should have been aware of the serious risks for consumers associated with following the recommendation of an unregulated adviser. It follows that, had Phoenix Life done the due diligence it should have done it could have given Mr H the appropriate warnings that could have prevented the losses he later suffered.

I appreciate Phoenix Life would have likely confirmed that Mr H wasn't trying to access his funds early, nor had he been offered an incentive to join the scheme. I also appreciate that its role didn't include giving Mr H advice about whether or not his chosen investments were suitable. However, the recommended investments involved include features that might be implicated in pension liberation type activity. They were high-risk, unregulated and employed unusual or creative techniques. And, if Phoenix Life had done further due diligence it's likely this would have become apparent and it should have given Mr H the appropriate warnings.

I also accept that the Scorpion insert at that time focused on early and unauthorised access to pension funds, which Mr H was not trying to do. But even if I'd been persuaded that Phoenix Life had given Mr H the Scorpion leaflet I wouldn't have concluded that action alone would have gone far enough. As I've already said, given the apparent warning signs, and what Phoenix Life should have uncovered of it had acted on those, I think its intervention could have prevented Mr H from suffering the losses he has. So I remain satisfied that Phoenix Life didn't do what it was obliged to do under the Principal and COBS. In those circumstances it's reasonable that it needs to put things right as set out below.

Putting things right

Fair compensation

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

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

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

Actual value

This means the SSAS value at the date of my Final Decision. To arrive at this value, any amount in the SSAS bank account is to be included, but any overdue administration charges yet to be applied to the SSAS should be deducted. Mr H may be asked to give Phoenix Life his authority to enable it to obtain this information to assist in assessing his loss, in which case I expect him to provide it promptly.

My aim is to return Mr H to the position he would have been in but for the actions of Phoenix Life. This is complicated where an investment is illiquid (meaning it cannot be readily sold on the open market), as its value can't be determined. On the basis of the evidence I have, that is likely to be the case with the Store First investments. This is because as I understand it there is no secondary market for the sale of the storage pods. Therefore as part of calculating compensation:

- Phoenix Life should seek to agree an amount with the SSAS as a commercial value for the illiquid investments above, then pay the sum agreed to the SSAS plus any costs, and take ownership of those investments. The actual value used in the calculations should include anything Phoenix Life has paid to the SSAS for illiquid investments.
- Alternatively, if it is unable to buy them from the SSAS, Phoenix Life must give the illiquid investments a nil value as part of determining the actual value. In return Phoenix Life may ask Mr H to provide an undertaking, to account to it for the net proceeds he may receive from those investments in future on withdrawing them from the SSAS. Phoenix Life will need to meet any costs in drawing up the undertaking. If Phoenix Life asks Mr 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 investments remain in the scheme, I think it's fair that Phoenix Life must pay an upfront sum to Mr H equivalent to five years' worth of future administration fees at the current tariff for the SSAS, to allow a reasonable period of time for the SSAS to be closed.

Notional value

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

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

Payment of compensation

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

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

Phoenix 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 Phoenix Life to determine whether this is possible.

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

If Phoenix Life considers that the amount it pays into a **new** plan is treated as a member contribution, its payment may be reduced to allow for any tax relief to which Mr H is entitled based on his annual allowance and income tax position. However, Phoenix Life's systems will need to be capable of adding any compensation which doesn't qualify for tax relief to the plan on a gross basis, so that Mr H doesn't incur an annual allowance charge. If Phoenix 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, Phoenix Life must pay the amount of any loss direct to Mr H. But if this money had been in a pension, it would have provided a taxable income during retirement. So 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 Phoenix Life receiving Mr H's acceptance of the Final Decision, interest must be added to the compensation at the rate of 8% per year simple from the date of the Final Decision to the date of payment.

Income tax may be payable on any interest paid. If Phoenix Life deducts income tax from the interest, it should tell Mr H how much has been taken off. Phoenix 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 Phoenix 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. However, I expect any such reinstatement to be achieved promptly.

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

My final decision

For the reasons given above I uphold this complaint. I require Phoenix Life Limited to take the steps set out above under 'putting things right'.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 20 November 2024.

Joe Scott
Ombudsman