DRN-5116948

The complaint

Mr D has complained about a transfer of his SLOC CA Limited trading as Sun Life Financial of Canada (SLOC) personal pension to a Qualifying Recognised Overseas Pension Scheme (QROPS) in Gibraltar in September 2014. Mr D's QROPS was intended to be used to invest these funds in the Trafalgar Multi Asset Fund – a Cayman islands based investment fund. But the investment didn't take place and the funds remained held in cash. Mr D says he has lost out financially as a result.

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

What happened

In January 2014, Mr D says he received a cold call offering him the opportunity to get advice on pension issues. Mr D says this business was called Portia Financial[1]. He says he was then referred to Global Partners Limited[2] (GPL) who, upon Mr D's authority, requested details and transfer documents in relation to his pension from SLOC.

SLOC provided GPL with the requested information on 7 February 2014.

Mr D says he then met with GPL who advised him to transfer his pension to the QROPS and invest in the Trafalgar Multi-asset Fund managed by a firm called Victory Asset Management. Mr D says he was told it would perform better than his existing pension.

Mr D subsequently applied to start a London & Colonial EU QROPS.

The QROPS application documents also recorded that it was to be used to invest via the Investors Europe platform and that Mr D's financial adviser was GPL. However, SLOC wouldn't have seen those documents at the time.

On 2 May 2014, SLOC received an initial request from London & Colonial to transfer Mr D's pension. But further information was required. It wasn't until 11 September 2014, that London & Colonial provided all of the required paperwork. In the intervening period, London & Colonial requested a transfer pack and SLOC also provided Mr D with one too.

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[1] There is no exact match on the FCA register for Portia Financial. It appears therefore this was not an FCA authorised firm.

[2] Global Partners Limited (GPL) – GPL was a financial adviser regulated in a European Economic Area (EEA) member state. The firm became Tourbillon Limited after June 2014 who were again an EEA regulated financial adviser and entered on the Financial Conduct Authority (FCA) register as having passporting rights to provide services within the UK.

Included in the transfer papers submitted in September 2014 were Mr D's discharge forms and HMRC form APSS263.

Mr D's pension was transferred on 15 September 2014. His transfer value was just under £15,500. He was 59 years old at the time of the transfer. Mr D took a tax-free cash lump sum and while the proceeds were intended to be invested as recommended, for some reason they weren't and remained held in cash.

Mr D also held two personal pensions with another provider at the time, which were both transferred to the QROPS shortly before this one – an amount of just over £16,800. This amount was then invested in the Trafalgar Multi Asset Fund. The transfers from both providers were a result of the same advice Mr D received. Mr D has also made a complaint about this transfer, which I am considering separately.

For the sake of clarity, The Trafalgar Multi Asset Fund entered liquidation in early 2017. Also the Serious Fraud Office (SFO) has an ongoing investigation into suspected fraud.

In October 2022, Mr D complained to SLOC. Briefly, his argument is that SLOC 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 transfer was to an overseas scheme, the catalyst for the transfer was an unsolicited call and he had been advised by an unregulated business.

SLOC didn't uphold the complaint. It said it checked the QROPS was registered with HMRC and it was deemed all ok to proceed with the transfer.

Mr D then referred his complaint to us. Our investigator was unable to resolve the dispute informally, so the matter was passed to me to decide.

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 taken into account relevant law and regulations, regulatory rules, guidance and standards, codes of practice, and (where appropriate) what I consider to have been good industry practice at the relevant time. Where the evidence is incomplete or inconclusive I've reached my decision based on the balance of probabilities – in other words, on what I think is more likely than not to have happened, given the available evidence and wider circumstances.

Mr D's representative has raised a number of points in response to the investigator's assessment that the complaint should not be upheld. Where I deem it necessary to do so, I will specifically refer to and address those points below. But I won't address each and every point raised – instead I'll focus on what I believe are the key issues at the heart of this complaint.

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

Personal pension providers are regulated by FCA. Prior to that they were regulated by the FCA's predecessor, the Financial Services Authority (FSA). As such SLOC 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.

An overseas pension scheme is defined in HMRC regulations as being one which is subject to specified regulatory and taxation restrictions in the country of establishment. To become a QROPS it must also be:

- Recognised, meaning in short that it meets specified tests applied by HMRC, including on minimum retirement age and the application of tax relief.
- Qualifying, meaning it must notify HMRC that it is a recognised overseas pension scheme; provide appropriate evidence of this; undertake to adhere to HMRC's requirements; and not be otherwise excluded by HMRC from being a QROPS.

Overseas schemes that have notified HMRC that they qualify to be a QROPS are included in a published list on HMRC's website.

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, which is either registered with HMRC for tax purposes or is a QROPS. And indeed 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.

As I've said above, the Scorpion campaign was launched in February 2013 and the guidance was updated regularly over the next few years. Both the guidance published in 2013 and the 24 July 2014 update are relevant in this case – from start to finish the transfer process encompassed both sets of the guidance. Briefly – the 2014 update widened the focus from pension liberation specifically, to pension scams, which it said were on the increase. Transfers of money or investments overseas, were also highlighted as something to watch out for and it explained this was because the money would be harder to recover.

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 booklet 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 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 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 legal 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 those 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. 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 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.

2. 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.

3. The Scorpion guidance asked firms to look out for the tell-tale signs of pension liberation scams and undertake further due diligence and take 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.

4. These were additional requirements over and above what a ceding scheme would always have needed to when processing a QROPS transfer. Those requirements included checking whether the QROPS was on HMRC's published list, and ensuring the necessary HMRC forms were completed.

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 D says that, following an unsolicited call from a business called Portia Financial with an offer to provide advice on his pension, he was referred to and then met with a representative from GPL. Mr D says GPL then recommended he transfer his pension to a QROPS and invest his pension benefits in the Trafalgar Multi Asset fund. He says he was told about excellent returns and that investing this way would be much better than his existing pension arrangement.

The wider documentary evidence from the time (this includes the evidence from Mr D's other linked complaint) supports that it was GPL Mr D met with. I can see GPL completed a Client Confidential Financial Review Questionnaire or fact-find document in March 2014, which recorded Mr D's circumstances and objectives. This type of document is typically used to help an adviser provide advice. And this is exactly what it said the purpose of the document was at the top of the fact-find. I can also see that the QROPS application Mr D signed recorded GPL as his professional adviser.

From what I understand of Mr D's circumstances, he doesn't appear to have had the requisite skill or knowledge to carry out a pension transfer of this nature without advice. And being told that a transfer would generate better investment returns than leaving things where they are, is in my view the type of language consistent with being advised.

So, I think Mr D's recollections about the discussion he had with GPL are plausible. And I think it was these discussions, and the prospect of the higher investment returns he was told he would receive, that prompted him to transfer. I also think the evidence shows that GPL advised Mr D to transfer. And that's what's key here for the reasons I will come on to below.

<u>What did SLOC 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.

SLOC has said that it did not provide a Scorpion leaflet to Mr D. Its reason for not doing so is because it (erroneously) believed the transfer request had come from a FCA authorised firm. But it should've sent Mr D the insert regardless, or substantially the same information in another format. So, SLOC didn't do what it ought to have done here.

I think the most appropriate opportunity to send Mr D the leaflet was when it sent him a letter enclosing the transfer forms for him to complete. Mr D's representative has referred to SLOC's letter of May 2014 in which it sent him these. I've not seen a copy of this letter, but like the investigator, I've seen a letter dated 11 June 2014 from SLOC referring to the same forms. Whether it was May or June 2014, the Scorpion insert that was in use at the time was the version published in February 2013. And this was focused on accessing pension benefits before the age of 55 – pension liberation. But Mr D wasn't planning to do this – he was transferring for different reasons. So, I don't think the information contained here would've had much impact on Mr D on its own in any event – the things referred to here wouldn't have resonated with him.

So, even though SLOC should have sent the Scorpion insert to Mr D, I don't think it would have made any difference to what he went on to do.

I can see the investigator said that SLOC had several opportunities to send Mr D the Scorpion leaflet including upon receipt of the transfer request. If SLOC had sent the leaflet when it contacted him in June 2014 (in my view the most appropriate opportunity to do so) then despite the guidance being updated in July 2014, I don't think SLOC needed to send Mr D the leaflet again as a matter of course upon receipt of the complete transfer request in September 2014. While SLOC should have taken the updated 2014 guidance into account when processing the transfer request, there was no need for a provider to send the updated Scorpion insert if the ongoing transfer process straddled the period the insert was updated.

But even if SLOC had gone further and sent Mr D the 2014 insert later in the process (which for the avoidance of doubt I don't think it reasonably needed to do) I don't think this would have changed his mind about proceeding with the transfer. The insert warned again about cold calls and offers of a pension review to lure customers into one-off investment opportunities, which Mr D might have recognised as warning signs in his transfer. The insert referred to more information being available about pension scams on TPR's website. But the information on the website at that time relevant for customers still warned of accessing pension benefits early or being promised more tax-free cash – neither of which applied to Mr D. And the recommendation was to seek advice from a regulated adviser. So, if Mr D had checked GPL's regulatory status, I think just like SLOC (as I will go on to discuss below) he would have taken comfort from the fact that a regulated adviser had advised him.

Due diligence:

Mr D's completed transfer request paperwork was received in September 2014, after the update to the Scorpion guidance in July 2014. And so, at that time I think firms, like SLOC, 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. At the same time though its approach had to be proportionate and it needed to balance any caution and due diligence with the fact that consumers were entitled to request a transfer.

SLOC's due diligence appears to have been limited to checking with HMRC that the QROPS was registered. This step ensured that the transfer payment qualified as an authorised payment for tax purposes. But SLOC knew that Mr D wanted to transfer his pension into an overseas pension scheme – a QROPS based in Gibraltar – and that this very likely involved overseas investments.

The 2014 Scorpion Action Pack, which is relevant here gave more prominence to overseas investments. And the potential for a QROPS to facilitate investments, which were at risk of a scam in the wider sense (the guidance shifted the focus away from just pension liberation to pension scams more broadly) was greater.

And so, I think it would have been fair and reasonable – and good practice – for SLOC to have followed up on this apparent warning sign and looked into the proposed transfer further. 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 D's transfer request, and the relatively limited information it had about the transfer, I think in this case SLOC should have addressed all three parts of the check list as part of its due diligence.

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

From checking with HMRC, it would've discovered that the QROPS was registered or recognised in November 2012 – so it was not a recently registered scheme, which would've been a warning sign. And from a few simple questions directed to Mr D, SLOC could have learned several facts about the transfer.

I think it's likely SLOC would've learned from Mr D that the prompt for Mr D to transfer his pension to the QROPS was a cold call from an unregulated introducer. I also think he would've said he'd been told he could expect high annual returns from an overseas investment.

In addition to this, I think SLOC would've discovered that Mr D had been advised to transfer his pension. And based on what I set out earlier on, I think Mr D would've named GPL as his adviser (Mr D has said as much and the documentary evidence supports this.)

The Scorpion checklist recommends that, to establish if a member has been advised by a non-regulated adviser, the transferring scheme should consult the FCA's online register. I think SLOC should reasonably have taken that step, which is not difficult. Had it done so, on receiving the application and contacting Mr D for further information, it would have discovered that GPL (it became Tourbillion after June 2014) appeared on the FCA register as an EEA firm that was passported into the UK. This means that for UK purposes GPL was an authorised person under s.31(1)(b) of the Financial Services and Markets Act (FSMA) 2000 and Act.

So, if SLOC had made these inquiries, I think it's reasonable the presence of GPL, as an authorised person advising Mr D, would have suggested that the transfer was unlikely to be a scam. As a regulated firm, in its home country, GPL would have been held to a high standard by its own regulator. And Mr L would enjoy some regulatory protections in the unlikely event the transfer turned out to be a scam – not via the UK's complaints and investor protection institutions, the FOS or the FSCS, but through its own regulator. Under the EU's Investor Compensation Directive, EU countries are required to have certain investor protection institutions/schemes.

So, in light of this, I think it's reasonable that GPL could (and would if it had checked up on GPL's regulatory standing) have been reassured that GPL was regulated to EU standards that were accepted for the purpose of authorisation under UK law.

<u>What should SLOC have done with this information?</u>

SLOC needed to check for the risk of pension liberation and scams in a way that was proportionate to the warning signs. So, while I accept SLOC would likely have (had it conducted thorough due diligence) found there to be some of the pension scam warning signs indicated in the Scorpion Action Pack – e.g. Mr D had been cold called and he was contemplating investing in overseas investments – I think the knowledge Mr D was being advised by a properly authorised adviser in this case reasonably would've given SLOC comfort the transfer was unlikely to be a scam. And that as his regulated adviser, they were likely acting in his best interests and would've made him aware of the relevant risks and issues. It wasn't SLOC's responsibility to scrutinise or interfere with that advice – for example by understanding whether it was appropriate for Mr D to be transferring overseas.

So, even if SLOC had done more thorough due diligence in line with the Scorpion Action Pack as it ought to have done here, the end result of any such due diligence wouldn't have resulted in any warnings being given to Mr D. And I don't think the mere act of contacting him and asking questions about the transfer would have prompted a change of heart. The majority of the responses Mr D would likely have provided would not have given rise to concerns.

As I've said, I think SLOC should have sent Mr D the Scorpion insert, which contained general warnings. But for the reasons I explained, I don't think this would've resonated with him or caused him to question the advice he received. And if Mr D had checked his adviser was regulated as the insert suggested, he'd have found GPL was. So, I think he'd have taken comfort in this, in the same way I think SLOC would have.

So, taking everything into account, even if SLOC had sent Mr D the Scorpion insert when I think it should have and had carried out additional due diligence, I don’t think this would have resulted in Mr D being in a different position – I think he’d have still gone ahead even if things had happened as they should have.

It follows that I don’t require SLOC to do anything here.

My final decision

For the reasons above, I’ve decided to not uphold this complaint, so I make no award in Mr D’s favour.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr D to accept or reject my decision before 20 February 2025.
Paul Featherstone
Ombudsman