DRN-5120886

Financial Ombudsman Service

The complaint

Mr P has complained about a transfer of his Phoenix Life Limited (Phoenix) personal pension to a small self-administered scheme (SSAS) in June 2014. Mr P's SSAS was subsequently used to invest in loan notes with Dolphin Capital and High Street Boutique, and overseas property via The Resort Group. The investments now appear to have little value. Mr P says he has lost out financially as a result.

Mr P says Phoenix 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 P says he wouldn't have transferred, and therefore wouldn't have put his pension savings at risk, if Phoenix had acted as it should have done.

What happened

Mr P says his interest in this transfer followed an unsolicited approach from the High Street Group Contact Centre. He says he was attracted by the prospect of the expectation of improved investment performance being offered – between 10% and 15%.

In April 2014, a company was incorporated with Mr P as director. I'll refer to this company as Firm A. On 23 April 2014, Mr P signed documents to open a SSAS with Rowanmoor Group. Firm A was recorded as the SSAS's principal employer. The SSAS documents also recorded that the SSAS was to be used to invest approximately: £100,000 in Dolphin Capital; £23,500 in High Street Boutique; £23,500 in The Resort Group.

On 10 June 2014 Phoenix received a transfer request from Rowanmoor Group via the Origo Options platform.

Mr P's pension was transferred on 18 June 2014. His transfer value was around £18,500. He was 53 years old at the time of the transfer.

Mr P also had two other pensions with different providers that he was recommended to transfer to the Firm A SSAS as part of the same process. On 17 June 2014 around £111,000 was transferred to the SSAS from Clerical Medical and on 26 June 2014 around £24,500 was transferred by Aviva. Those transfers are the subject of separate complaints that I am also considering, and information provided at the time from all ceding schemes has been considered in this case.

The transferred pension funds were invested in the following way:

- £23,500 in a loan note with High Street Commercial Finance Limited.
- £100,000 in a Dolphin Capital GmbH loan note.
- £22,125 in The Resort Group – fractional ownership of hotel room in Cape Verde.

In May 2020, Mr P complained to Phoenix via a claims management company (CMC). Briefly, his argument is that Phoenix 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 didn't uphold the complaint. It said it had a letter of authority from Mr P on 16 January 2014 from a financial adviser. And considered that Rowanmoor Group was a well-known company that would have gone through various checks in order to be registered with the Origo platform. It considered that it was the receiving scheme that had the obligation to go through risks and implications with its customer.

Our investigator was unable to resolve the dispute informally, so the matter was passed to me to decide. I issued a provisional decision to explain why I thought Mr P's complaint should be upheld.

In my provisional decision I said

"*<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 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 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 statutory 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. *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 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 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.*

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>

The evidence in this case indicates that Mr P appears to have been in contact with a number of different firms in the run up to this transfer request. The evidence provided by Phoenix in this case is limited, although in its final response to the complaint it said it had received a letter of authority for a firm it referred to as 'Waterhead Financial'. It has not provided any corroboration and this is not a name that features in any of the evidence that I have seen.

The evidence from Mr P's other transfers however give a more detailed picture. Clerical Medical, for example, have a record of Watermead Financial Ltd being the servicing adviser *on its pension from 2009. And it received a signed letter of authority in March 2013 from The Pension Review Centre followed by a requested transfer in June 2013 to an occupational pension scheme. This transfer was cancelled by Mr P in June 2013. He explains that he was contacted again by another firm with what appeared to be a better recommendation.*

In November 2013 Clerical Medical have evidenced that it was contacted by Claritas Group with a letter of authority to receive transfer information. Then, in January 2014, it received a letter of authority from a regulated firm – The Pension Review Centre – followed by another from a different regulated financial advice firm – Alexander House Financial Services Ltd – in February 2014. And Phoenix have explained that it received similar letters of authority from The Pension Review Centre and Alexander House Financial Services Ltd at the same times.

So I think that Mr P was approached by a number of different firms, who were regulated to provide advice on pension transfers. Based on the evidence across all transfers as a whole, I think that the firm that Phoenix referred to receiving a letter of authority from was also Watermead Financial Ltd. And this firm was regulated. I've also considered the fact that requesting pension information isn't a regulated activity and doesn't necessarily mean that firm will go on to provide financial advice. Indeed, it was unlikely that all of the firms that seemed to be involved were all providing such advice. Or, more specifically, responsible for the ultimate recommendation that led Mr P to eventually transfer to the Firm A SSAS.

Mr P explains that he was cold called by High Street Group. I have asked for information about when this occurred but Mr P cannot be specific. Although he says that this transfer to the Firm A SSAS, and the investments that followed, came about based on the advice of High Street Group. I have seen no evidence that High Street Group made any contact with Phoenix or any other of the ceding schemes prior to the transfer. But I have seen corroborative evidence that named High Street Group Contact Centre as the adviser on the Origo request which Clerical Medical received. And the High Street Group Contact Centre was named on the SSAS application form as the trustee adviser. Further to this there is evidence of the High Street Group Contact Centre emailing Rowanmoor to establish the progress of the Aviva transfer and when payments can be expected to High Street Boutique and to TRG. And there is further evidence of Rowanmoor contacting The High Street Group Contact Centre directly regarding Mr P's transfer.

I acknowledge that the exact circumstances are not absolutely clear. But I must decide what more likely than not happened on a balance of probability. And, given the testimony that Mr P has provided and the corroborating evidence that I've referred to, I think that Mr P was, more likely than not, acting on a recommendation from the High Street Group Contact Centre Limited, who was not regulated by the FCA.

There is no evidence to indicate that there was any type of incentive for Mr P to transfer his pension to the Firm A SSAS or that he otherwise accessed his pension before the age of 55. So I am satisfied that there was no pension liberation. I think that the motivation for this transfer was simply the attraction of improved investment performance. Mr P has said he'd been told he could achieve returns between 10% and 15%.

The Dolphin Capital loan note failed to pay the indicated returns. Dolphin Capital later became the German Property Group. The planned property developments that the loan notes were funding did not materialise and the German Property Group entered bankruptcy proceedings meaning investors are unable to get their initial investments back. These investments have, or are likely to have nil value. The Resort Group was similarly a high risk investment in fractional ownership of hotel rooms. Rental income failed to be paid due to various factors and there is no secondary market for the investments meaning customers have been unable to get their initial investments back. This is similarly illiquid and likely to have nil value.

The High Street Boutique investment repaid approximately £38,000 to the SSAS in August 2019. That figure has remained uninvested in the SSAS deposit account.

<u>What did Phoenix 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.

I've seen no correspondence that Phoenix sent directly to Mr P regarding his pension transfer. So the evidence clearly points to a finding that Phoenix did not send Mr P a copy of the Scorpion insert either at the point that the transfer request was made, or at the earlier point when it said that it provided transfer information to a third party that had been authorised by Mr P. In this regard Phoenix failed to provide Mr P with the scam warnings that were advocated by TPR at that time.

Having said this, I explained that Mr P had two other pension transfer requests that were made. And in one of those I have seen that Aviva wrote directly to Mr P on 20 February 2014 warning of the risk of pension liberation and including the Scorpion insert with that correspondence. So I'm satisfied that, in spite of Phoenix's failing, Mr P had received the relevant insert.

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 take appropriate action if it was apparent their customer might be at risk. Phoenix have provided no evidence that it undertook any further due diligence.

Phoenix has argued that Origo would already have completed due diligence checks on the receiving scheme's administrators negating the need for it to do its own due diligence. However, Phoenix hasn't provided any details on what exactly Origo did in this respect. And I think that points to the problem here, which is that Phoenix relied on due diligence conducted by a third party even though it doesn't appear to have really known what that due diligence involved. Given the importance of what the due diligence in question was aimed at preventing – pension liberation, the end result of which can often be the loss of entire pension funds – and the clear steps that were expected of ceding schemes to prevent this happening, not to mention the duties of ceding schemes under PRIN and COBS 2.1.1R, I don't think Phoenix's approach was good enough here.

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

The fact that a different part of 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 could, reasonably, have derived sufficient comfort about the Rowanmoor SSAS as a destination for Mr P's transfer.

Moving on to what Phoenix should have done, as I explained earlier, Phoenix should have checked that the Firm A SSAS was a validly registered pension scheme before allowing the transfer. Therefore, the information Phoenix ought to have had before transferring would have made it apparent that Mr P's SSAS was recently registered. This was a feature of Mr P's transfer that should have been seen as a potential warning sign of liberation activity as identified by the Scorpion action pack.

Phoenix should therefore 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 to look into the proposed transfer and the most reasonable way of going about that would have been to turn to the check list in the action pack to structure its due diligence into the transfer.

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

1. *The nature/status of the receiving scheme*

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

2. *Description/promotion of the scheme*

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

3. *The scheme member*

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

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

I don't think it would always have been necessary to follow the check list in its entirety. And I don't think an answer to any one single question on the check list would usually be conclusive in itself. A transferring scheme would therefore typically need to conduct investigations across several parts of the check list to establish whether liberation was a realistic threat. Given the warning sign that should have been apparent when dealing with Mr P'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 P as part of its due diligence.

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

Phoenix ought already to have established that the Firm A SSAS was newly established as I've already pointed out. And enquiries under part 1 of the check list would also have revealed that the sponsoring employer was dormant and not employing Mr P.

Under part 2 of the check list Phoenix would also have been alerted to the unusual and creative nature of the intended investments.

Enquiries made of Mr P under part 3 of the check list would, more likely than not, have revealed that he was cold called by and acting on a recommendation from The High Street Group Contact Centre.

The check list recommends that in order to establish whether its member has been advised by a non-regulated adviser, the ceding firm should "check whether advisers are registered with the FSA at www.fsa.gov.uk/fsaregister". In other words, they should consult the FSA's online register of authorised firms. Phoenix should have taken that step, which is not difficult, and it would quickly have discovered that Mr P'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 should have been concerned by High Street Group Contact Centre'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 have told Mr P – and would it have made a difference?</u>

I think Phoenix's failure to uncover this risk of illegal advice and then warn Mr P 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 to have informed Mr P that the firm he had been advised by was unregulated and could put his pension at risk. Phoenix 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.

I'm satisfied any messages along these lines would have changed Mr P's mind about the transfer. The messages would have followed direct contact with Mr P so would have seemed to him (and indeed would have been) specific to his individual circumstances and would have been given in the context of Phoenix raising concerns about the risk of losing pension monies as a result of untrustworthy advice. This would have made Mr P 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 change their mind. I've seen no persuasive reason why Mr P would have been any different. So, I consider that if Phoenix had acted as it should, Mr P wouldn't have proceeded with the transfer out of his personal pension or suffered the investment losses that followed.*

<u>The cause of Mr P'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 P accepted unsuitable advice from an introducer who wasn't authorised to act as a financial adviser at all, and it wasn't (as far as can be established taking into account what Mr P 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 business and involved the setting up of a new pension scheme to house an investment and the involvement of recently established businesses. The Scorpion action pack and insert both recommend checking that financial advice comes only from an authorised person by checking the FSA/FCA register. And Phoenix'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 P wants to be compensated for and the risk that Phoenix had a duty to guard against. So I do consider it fair and reasonable for Phoenix to compensate Mr P for his losses.

I have also considered that I've decided Mr P received the Scorpion insert from another ceding scheme in February 2014. I've considered the content of the Scorpion insert of that period and don't think that it would, by itself, have alerted Mr P to the dangers of the transfer he was making. That document was targeted at preventing consumers from transferring and making unauthorised payments. Which wasn't a feature of Mr P's transfer. Nothing in that Scorpion insert warned of the kind of harm that Mr P went on to experience from his transfer. So I don't think that Mr P's receiving it mitigates Phoenix's failure to identify and warn Mr P of the risks in this case."

Responses to my provisional decision

Mr P accepted my provisional finding and offered no further comments or evidence.

Phoenix responded to explain that it disagreed with my provisional finding. In summary, it argued the following:

- The Scorpion guidance at the time was focussed on pension liberation so any warnings were only relevant to that.

- It provided evidence of the involvement of a number of regulated advisers making contact on Mr P's behalf prior to the transfer request, and had no evidence of contact from the High Street Group.

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.

Having considered all the evidence in this case a final time, including the additional information and arguments that Phoenix has provided, I am upholding Mr P's complaint for the same reasons that I gave in my provisional decision, and elaborate on below.

I agree with Phoenix's argument that the Scorpion guidance in place for this transfer was focussed on preventing pension liberation. And I made exactly that point in my provisional decision. My point then, and now, is that the Scorpion action pack set out the measures that Phoenix should do in order to determine whether pension liberation was about to happen. It simply couldn't tell from the transfer request whether or not that risk was present.

I explained that the very fact that the SSAS was recently registered was a trigger, highlighted by the Scorpion action pack, which meant that further investigation was required. Phoenix didn't identify this or do that additional due diligence. So my decision needs to consider what it would have found out if it had.

To summarise what I explained in my provisional decision, enquiries along the lines of those recommended in the action pack would have led Phoenix to identify the following additional risk factors:

- The sponsoring employer of the SSAS was dormant and Mr P was not meaningfully employed by it.

- Phoenix would have been alerted to the unusual and creative nature of the intended investments.

- Enquiries made of Mr P under part 3 of the check list would, for the reasons I gave in my provisional decision, more likely than not have revealed that he was cold called by and acting on a recommendation from The High Street Group Contact Centre.

I understand that, on this last point, Phoenix has said that it had previously had no contact from High Street Group. And I accept that was the case. And it has now provided the letters of authority that it received from:

- Pension Review Centre in March 2013 (FCA authorised appointed representative);
- Greenchurch Capital in June 2013 (not FCA authorised);
- Claritas Group in December 2013 (not FCA authorised);
- Watermead in January 2014 (FCA authorised appointed representative);
- Alexander House in February 2014 (FCA authorised appointed representative).

Whilst this is new information it reinforces the overall picture of what I know happened in Mr P's other transfers. Some of these firms were regulated to provide financial advice. But I consider this level of activity in terms of frequency of request should in itself have seemed unusual. Mr P was not likely to have been taking financial advice from all of these firms. I don't think it necessarily provided reassurance that Alexander House, for example, of all these businesses was advising Mr P. Not without corroboration.

Phoenix have not provided the Origo Options request it received, but I have seen the request that Rowanmoor sent to another of Mr P's ceding schemes. All three Origo Options requests were sent by Rowanmoor at the same time from the same SSAS application. I am therefore persuaded that the requests to all businesses would, more likely than not, have provided the same information. The correspondence that Rowanmoor had with High Street Group indicated that it was dealing with that party and I've no reason to suppose it had any awareness of the other firms who had sent letter of authority to Phoenix. Which means that I think that the Origo Options request that Phoenix received, more likely than not, named High Street Group as the financial adviser as it did on the Origo Options request that I have seen. And this should have been of concern to Phoenix.

Even if that was not the case, I still think it would have been reasonable for Phoenix to contact Mr P as part of its due diligence to clarify who his adviser was as I explained in my provisional decision. And, for the reasons I gave in my provisional decision I still think that Mr P would likely have told Phoenix that High Street Group had advised him.

Overall, even though I think Phoenix would have ruled out the risk of pension liberation, I think the very due diligence that it needed to carry out in order to determine that would have led it to uncover the breach of the general prohibition imposed by FSMA. The risk presented by this could not have been ignored by a firm complying with its obligations under Principles 2, 6 and 7 and COBS 2.1.1R**.**

In summary, Phoenix's failure to carry out adequate due diligence to safeguard against the risk highlighted by the Scorpion campaign meant that it failed to identify and warn Mr P of important risks associated with his transfer. Had it done so, I am persuaded (for the reasons set out in my provisional decision) that Mr P would not have transferred and wouldn't have suffered the loss that he did.

Putting things right

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

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

To compensate Mr P fairly, Phoenix should subtract the proportion of the actual value of the Firm A SSAS which originates from the transfer of the Phoenix pension, from the notional value if the funds had remained with Phoenix. If the notional value is greater than the actual value, there is a loss.

This is complicated in this case by the fact that on 23 August 2019 the High Street Commercial Finance Limited investment appears to have been realised and £37,846.99 was paid into the SSAS bank account. I think that it would be reasonable to expect Mr P to have mitigated further loss by investing that sum in an appropriate way. He has explained that he was aware that this sum was returned to his SSAS. And that he wanted to invest it but was told that he couldn't. But he has not provided any further explanation as to the source of this information. I think that, having experienced a loss due to unsuitable investments, and having identified the importance of suitably investing this sum, it's not reasonable not to have done so for five years. This returned liquid cash sum will have suffered five years of investment losses that I don't think its reasonable to hold Phoenix accountable for. I think that it's fair to take into consideration that sum (£37,846.99) could have been invested within a reasonable period of being paid into the SSAS. Which for the purposes of calculation I think would be a month to allow for advice and arrangement of a suitable fund.

Actual value

This means the proportion of the Firm A SSAS value originating from Mr P's Phoenix transfer (the **"relevant proportion"**) at the date of my Final Decision. To arrive at this value, any amount in the Firm A SSAS bank account is to be included, but any overdue administration charges yet to be applied to the Firm A SSAS should be deducted.

In addition Phoenix may add the potential investment return Mr P ought reasonably to have received, if suitably invested, on the relevant proportion of £37,846.99 from 23 September 2019 until the date of my final decision. I think it's reasonable to assume that Mr P would only have been willing to take a small amount of risk with this money having already suffered a loss on the remaining fund and being 59, so closer to retirement age. Phoenix should therefore determine the lost investment growth by applying the following benchmark:

> *For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds*

My aim is to return Mr P to the position he would have been in but for the actions of Phoenix. 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 have been the case with the following investments: Dolphin Capital Loan Note and TRG fractional property investment. This is because there is no secondary market for these investments. And I don't think it's realistically possible for Phoenix to only acquire a part of the investment from the Firm A SSAS as I'm only holding it responsible for the loss originating from a transfer in of the Phoenix funds. Therefore as part of calculating compensation:

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

- It's also fair that Mr P should not be disadvantaged while he is unable to close down the Firm A SSAS. So to provide certainty to all parties, if these illiquid investments remain in the scheme, I think it's fair that Phoenix should pay an upfront sum to Mr P equivalent to the relevant proportion of five years' worth of future administration fees at the current tariff for the Firm A SSAS, to allow a reasonable period of time for the Firm A SSAS to be closed.

Notional value

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

Phoenix should ensure that the relevant proportion of any pension commencement lump sum or gross income payments Mr P received from the Firm A SSAS are treated as notional withdrawals from Phoenix 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 Firm A SSAS given Mr P's dissatisfaction with the outcome of the investment it facilitated.

Phoenix should reinstate Mr P'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 P was invested in).

Phoenix shouldn't reinstate Mr P'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 to determine whether this is possible.

If Phoenix is unable to reinstate Mr P'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 P's original pension.

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

If it's not possible to set up a new pension plan, Phoenix should pay the amount of any loss direct to Mr P. But if this money had been in a pension, it would have provided a taxable income during retirement. Therefore compensation paid in this way should be notionally reduced to allow for the marginal rate of income tax that would likely have been paid in future when Mr P is retired. (This is an adjustment to ensure that Mr P isn't overcompensated – it's not an actual payment of tax to HMRC).

To make this reduction, it's reasonable to assume that Mr P is likely to be a basic rate taxpayer in retirement. So, if the loss represents further 'uncrystallised' funds from which Mr P 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 P 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 receiving Mr P's acceptance of my Final Decision, interest should be added to the compensation at the rate of 8% per year simple from the date of my Final Decision to the date of payment.

Income tax may be payable on any interest paid. If Phoenix deducts income tax from the interest, it should tell Mr P how much has been taken off. Phoenix should give Mr P a tax deduction certificate in respect of interest if Mr P asks for one, so he can reclaim the tax on interest from HMRC if appropriate.

This interest is not required if Phoenix is reinstating Mr P'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 P was invested.

Why is the above benchmark suitable?

I have chosen this benchmark because:

- Mr P most likely wanted Capital growth with a small risk to his capital.

- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to his capital.

- The FTSE UK Private Investors Income ***Total Return*** index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is a mix of diversified indices representing different asset classes, mainly UK equities and government bonds. It would be a fair measure for someone who was prepared to take some risk to get a higher return.

- I consider that Mr P's risk profile was in between, in the sense that he was most likely prepared to take a small level of risk to attain his investment objectives. So, the 50/50 combination would reasonably put Mr P into that position. It does not mean that Mr P would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker fund. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mr P could have obtained from investments suited to his objective and risk attitude.

Details of the calculation should be provided to Mr P in a clear, simple format.

My final decision

For the above reasons I uphold Mr P’s complaint and direct Phoenix Life Limited to compensate Mr P as I set out above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr P to accept or reject my decision before 16 December 2024.

Gary Lane
Ombudsman