DRN-5135747

The complaint

Mr F has complained, through his representative, that The Prudential Assurance Company Limited (Prudential) undertook insufficient due diligence when transferring his personal pension to a Qualifying Recognised Overseas Pension Scheme (QROPS) in July 2016.

Mr F’s QROPS - the Bourse Retirement Scheme-was based in Malta. Funds were subsequently used to invest into overseas property with The Resort Group (TRG) as well as a TRG bond and a couple of other investment funds. A small remainder was invested in cash. Mr F says at least some of his pension provisions are illiquid and he has lost out financially.

What happened

On 22 February 2016, Prudential received a request for information about Mr F’s pension from an unregulated company called First Review Pension Services (FRPS). A letter of authority from Mr F was provided at the same time. Prudential provided this information to FRPS on 1 March 2016.

On 2 March 2016 they sent a separate letter directly to Mr F which included the overseas transfer forms. The letter referred to several enclosures, one of them labelled PENL46201 which this service knows referred to the TPR Scorpion inserts. This would have been the version of March 2015.

Documents show that Mr F was also in contact with Felicitas Management Investment Services (Felicitas) who were an advisory group based and regulated in Cyprus. At the relevant time they also appeared on the FCA register as being authorised in the UK with passporting rights. A fact find was completed and signed by Mr F. Felicitas also sent Mr F a report which set out information about the QROPS and the intended investments. It said the contents of the report were restricted to appropriateness and that if Mr F required financial planning advice he should consult an independent financial adviser. It set out the benefits and advantages of a QROPS. They provided the relevant application forms for the Bourse Retirement Scheme which also showed that Felicitas would be the investment advisers. Mr F signed the necessary documents including a client agreement.

Prudential subsequently received a transfer request from the QROPS in April 2016 which included a number of documents including their HMRC registration and QROPS recognition letter.

Prudential asked the QROPS in early June whether they allowed payments of pension benefits before the age of 55 which they confirmed was not the case. And the transfer completed in July 2016.

Mr F complained in 2019 to Prudential that they didn’t do enough due diligence on his transfer. If they had warned him about certain risks, he would not have transferred his pension and suffered financial losses. Prudential rejected his complaint and so it was referred to this service.

One of our investigators considered the complaint should not be upheld. An ombudsman at this service issued a provisional decision where they essentially agreed with this outcome but for slightly different reasons. Due to operational reasons, the ombudsman was not able to issue a final decision, so the complaint was passed to me for a decision.

I issued a provisional decision not upholding Mr F's complaint. I also shared with Mr F's representatives a copy of a letter addressed to Mr F on 2 March 2016 by Prudential which Prudential had found when reviewing their files and which they only recently provided.

My provisional findings

In my provisional findings I said:

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 Prudential 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 how personal pension providers deal with 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.

In February 2013, The Pensions Regulator (TPR) issued its Scorpion guidance to help tackle the increasing problem of pension liberation, the process by which unauthorised payments are made from a pension (such as accessing a pension below minimum retirement age). In brief, the guidance provided a due diligence framework for ceding schemes dealing with pension transfer requests and some consumer-facing warning materials designed to allow members decide for themselves the risks they were running when considering a transfer.

The FSA's endorsement of the Scorpion guidance was relatively informal. The content of the Scorpion guidance was essentially informational and advisory in nature. Deviating from it doesn't therefore mean a firm has necessarily 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 right to transfer.

That said the launch of the Scorpion guidance in 2013 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 schemes 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.

There were further updates to the Scorpion guidance in July 2014 and in March 2015 which is relevant for this complaint. This guidance referenced the potential dangers posed by "pension freedoms" (which was about to give people greater flexibility in relation to taking pension benefits) and explained that pension scams were evolving. In particular, it highlighted that single member occupational schemes were being used by scammers. At the same time, a broader piece of guidance was initiated by an industry working group covering both TPR and FCA regulated firms: the Pension Scams Industry Group (PSIG) Code of Good Practice. The intention of the PSIG Code was to help firms achieve the aims of the Scorpion campaign in a streamlined way which balanced the need to process transfers promptly with the need to identify those customers at material risk of scams.

<u>The March 2015 Scorpion guidance</u>

When the Scorpion guidance was launched in 2013, it included two standard documents that scheme administrators could use to warn their members about some of the potential dangers of transferring: a short "insert", intended to be sent to members when requesting a transfer, and a longer booklet intended to be used for members looking for more information on the subject.

The March 2015 Scorpion guidance asked schemes to ensure they provided their members with "regular, clear" information on how to spot a scam. It recommended giving members that information in annual pension statements and whenever they requested a transfer pack. It said to include the pensions scam "leaflet" in member communications. In the absence of more explicit direction, I take the view that the member-facing Scorpion warning materials were to be used in much the same way as previously, which is for the shorter insert (which had been refreshed in March 2015) to be sent when someone requested a transfer and the longer version (which had also been refreshed) made available when members sought further information on the subject.

When a transfer request was made, transferring schemes were also asked to use a three-part checklist to find out more about a receiving scheme and why their member was looking to transfer.

<u>The PSIG Code of Good Practice</u>

The PSIG Code was voluntary. But, in its own words, it set a standard for dealing with transfer requests from UK registered pension schemes. It was "welcomed" by the FCA and the Association of British Insurers (amongst others). And several FCA regulated pension providers were part of the PSIG and co-authored the Code. So much of the observations I've made about the status of the Scorpion guidance would, by extension, apply to the PSIG Code. In other words, personal pension providers didn't necessarily have to follow it in its entirety in every transfer request and failure to do so wouldn't necessarily be a breach of the regulator's Principles or COBS. Nevertheless, the Code sets an additional benchmark of good industry practice in addition to the Scorpion guidance.

In brief, the PSIG Code asked schemes to send the Scorpion "materials" in transfer packs and statements, and make them available on websites where applicable. The PSIG Code goes on to say those materials should be sent to scheme members directly, rather than just to their advisers. Like the Scorpion guidance, the PSIG Code also outlined a due diligence process for ceding schemes to follow.

In order to act in the consumer's best interest and to play an active part in trying to protect customers from scams, I think it's fair and reasonable to expect ceding schemes to have paid due regard to both the Scorpion guidance and the PSIG Code when processing transfer requests.

Where one differed from the other, they needed to consider carefully how to assess a transfer request taking into account the interests of the transferring member. Typically, I'd consider the Code to have been a reasonable starting point for most ceding schemes because it provided more detailed guidance on how to go about further due diligence.

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

Mr F says he was cold called by FRPS and offered a pension review. He says he was told he could achieve better returns than in his Prudential pension. He was visited by an adviser and four different investments were recommended. He didn't know what exactly the investments were but understood his funds would be invested overseas. He says he was told that his pension which was worth around £46,000 could be worth around £103,000 when he retired. Mr F says he was excited by the level of higher returns that were promised. He says no risks were explained.

<u>What did Prudential 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. Based on the evidence I have seen I'm satisfied Prudential sent the Scorpion insert (version of March 2015) directly to Mr F in March 2016.

Due diligence:

As explained above, I consider the PSIG Code to have been a reasonable starting point for most ceding schemes. I've therefore looked at Mr F's transfer in that light. But I don't think it would make a difference to the outcome of the complaint if I had considered Prudential's actions using the 2015 Scorpion guidance as a benchmark instead.

Prudential considered information that was provided by the QROPS and asked it if they allowed benefits access before age 55. Overall, based on the information they had at the time I think they could be reasonably reassured that the QROPS itself was a legitimate scheme and the scheme still exists today. However, that in itself I don't think was enough.

Following PSIG guidance I think Prudential should have asked Mr F further questions about his transfer. Especially as they already knew he was transferring overseas and the request for pension information had been made by an unregulated party. Both were warnings signs that shouldn't have been ignored and were mentioned in the guidance.

I won't repeat the list of questions which are suggested in PSIG in full. However two of them would have been answered "yes":

• Did receiving scheme/adviser or sales agents/representatives for the receiving scheme make the first contact (e.g. a cold call)?

• Have you been informed of an overseas investment opportunity?

Under the Code, further investigation should follow a "yes" to any question. The nature of that investigation depends on the type of scheme being transferred to. The QROPS section of the Code (Section 6.4.4) has the following statement:

"The key items to consider are the rationale for moving funds offshore, and the likelihood that the receiving scheme is a bona fide pension scheme, as if HMRC determine retrospectively that it is not, there may be a scheme sanction charge liability regardless of whether the receiving scheme was included on the list or not."

In order to address those two items – the rationale for moving funds offshore and the legitimacy of the QROPS – the Code suggests a series of example questions to help scheme administrators assess the potential risk facing a transferring member.

Not every question would need to be addressed under the Code. Indeed, the Code makes the point that it is for scheme administrators to choose the most relevant questions to ask (including asking questions not on the list if appropriate). But the Code makes the point that a transferring scheme would typically need to conduct investigations into a "wide range" of issues to establish whether a scam was a realistic threat.

Prudential didn't ask Mr F any further questions about the transfer at all, so I don't think they did enough in this respect.

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

Prudential did establish the legitimacy of the QROPS. But that was the extent of its due diligence. It didn't enquire about Mr F's rationale for transferring or who advised him. If it had asked him about this – which it reasonably should have done, using the framework outlined above – it would have found out he was transferring his pension following an unsolicited approach and that he was transferring to a type of arrangement more commonly used by people living overseas even though he wasn't intending to do that. Prudential would also have found out that the reason for transferring overseas was to invest, in part, in TRG– an overseas property scheme of the type that was highlighted as an area of concern in the PSIG Code.

However, I think Mr F would have likely also mentioned the involvement of Felicitas and the advice he received from them about the QROPS and the investments within it. And that he wanted higher investment returns.

Enquiries into Felicitas would have shown that they were passported from Cyprus to the UK and so during the period of this transfer they were an authorised person under FSMA 2000. The right to passport financial services from one EU country to another is a feature of the EU's internal market, which applied to the UK at the time. The right was underpinned by the introduction of EU-wide standards of investor protection and harmonised conduct of business rules.

The UK's regulatory system permitted EU passported firms, if duly registered with the FCA on its public register, to operate here as authorised persons under the FMSA 2000, and I think that, in the present case, that could have provided sufficient comfort for Prudential's purposes that despite the presence of some warning signs (cold call, overseas investment, moving to a QROPS without moving abroad) the scam risk here was minimal as a regulated adviser had been involved in advising on the transfer and providing Mr F with information about it.

So overall, I don't think if Prudential had made further enquiries that this would have resulted in warnings to Mr F that he was at risk of a scam. And this was essentially the purpose of the PSIG and Scorpion guidance; for ceding schemes to take additional steps if they thought a customer was likely being scammed. They weren't expected to provide general advice to the customer about the transfer, the investment risks of certain investments or the possible differences in regulatory protections when using an EEA regulated firm with service passporting rights into the UK.

<u>What would have happened if Prudential had asked further questions about his transfer?</u>

Mr F received the Scorpion insert which warned against cold calls and overseas transfer of funds. This in itself didn't seem to worry him even though he had been cold called and knew he was investing overseas. I don't think that Prudential asking further questions about who advised him and why he wanted to move to a QROPS would have concerned him. I think he would have taken some comfort from the fact Felicitas was involved and were a regulated party. They had informed him that whilst it wasn't common in the UK to have a QROPS, there were certain advantages and benefits having a QROPS including various tax benefits. So I don't think Mr F would have had reason to have concerns about that. And as I said above I don't think it would have been unreasonable for Prudential not to provide further risk warnings once they learned a regulated adviser was involved. So I think Mr F would have proceeded with his transfer.

I understand that Mr F is in a difficult position and it seems that at least some part of his pension has no market value and that he is worried about his pension. I have great sympathy for him and his situation and I understand that my decision will be very disappointing. However, I need to consider that even if Prudential had done further due diligence, I think the transfer would have happened anyway. So they haven't caused Mr F's losses and it wouldn't be fair or reasonable to hold them responsible for this.

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.

Prudential had nothing further to add after my provisional decision. Mr F's representatives disagreed with some of my findings. I summarise their key arguments as follows:

- It's not fair or reasonable to accept the letter recently provided by Prudential as evidence that Mr F received the Scorpion insert.

- If Prudential had asked Mr F who was advising him he likely would have mentioned FRPS as that was the only firm Mr F had met. Felicitas' client agreement said it offered three options for service and for Mr F this was "receipt and transmission only". So Felicitas did not consider themselves to be providing investment advice to Mr F.

- During their due diligence investigations, Prudential would have been confronted with a situation where Mr F was not intending to move abroad but was nonetheless transferring his pension to a Maltese QROPS and investing in property investments in Cape Verde. He was being advised by an unregulated party (FRPS) and a firm in Cyprus (although as above Felicitas's terms say they weren't providing advice.) These circumstances were highly suspicious involving multiple jurisdictions and Mr F was obtaining no regulatory protections. Any shortcomings by Felicitas would have had to be dealt with under the Cypriot licensing system and subject to Cypriot law and Felicitas didn't even accept they were providing advice. It's not accepted that Felicitas' involvement here could have provided sufficient comfort that the scam risk was minimal.

- The involvement of FRPS in itself ought to have been a warning sign. FRPS had been involved in many transfers in the years leading up to 2015. They had links to TRG and since around 2012 had been involved in transfers to SIPPs. When this process was clamped down, they altered their business model to direct transfers into single members SSAS and the model later changed again to transfers to QROPS. The ultimate intention has always been to invest all or a substantial part of the funds into TRG. With this background Prudential should have treated the involvement of an unregulated party as a very important scam warning sign that couldn't be neutralised by the involvement of a Cypriot advisory firm carrying EEA passporting rights.

- Prudential should have sent out the short and long version of the Scorpion warnings and communicate with Mr F in a bespoke manner to tell him they had identified a number of warning signs including initial cold calling, overseas investment which was high risk and unregulated, no rationale for transferring overseas and concerns about FRPS being involved. They accept Prudential didn't need to give a detailed explanation about the differing regulatory structure between directly authorised FCA firms and passporting firms. However, Prudential knowledge of those differences justified a communication to Mr F making him aware of the scam warnings present in his transfer.

- If Prudential had given such warnings, Mr F would have stopped the transfer. They referred to submissions made by Mr F on the issue of causation in earlier correspondence which hadn't been addressed.

I carefully considered the submissions made, however, I remain satisfied that the outcome I reached in my provisional decision is fair and reasonable in the circumstances. I'll explain why.

The legitimacy of the letter addressed to Mr F on 2 March 2016 has been called into question. Mr F's representatives say this letter wasn't included in a subject access request in 2019 and Prudential wasn't able to point to a specific letter showing the Scorpion insert had been sent when they responded to the complaint in 2019. What had been included were letters dated 1 and 2 March to Mr F which didn't show the Scorpion insert as an enclosure. They also point out that the letter says Prudential is responding to an email received on 22 February 2016 which was an email sent by FRPS and not Mr F. Wording in the letter also suggest it was sent to FRPS rather than Mr F. It says *"Please ensure that these forms are* *completed and signed by the policy holder"* and one of the enclosures is listed as *"policyholder's letter".* The letter didn't need to be phrased this way if it was being sent to Mr F. Given these doubts about the legitimacy of the letter, an argument is made that it's not reasonable to rely on this as evidence the Scorpion leaflet was provided to Mr F.

It's unfortunate that the letter was provided so late in the process given the many opportunities Prudential had to provide it. However, I have no reason to think this isn't a genuine letter or that this has been fabricated last minute by Prudential, a regulated firm, particularly in a complaint that has not been upheld at any stage whilst it's been with the ombudsman service.

All the letters sent to Mr F and FRPS on 1 and 2 March seem to have been sent in response to FRPS's email of 22 February. Whilst I appreciate that the wording of the newly provided letter reads as if it is intended for a representative, it's addressed to Mr F and so on balance I think this is where it was likely sent. I've seen other letters where similar information was sent to Mr F and FRPS in separate letters. This shows that Prudential wasn't just sending information to FRPS, but was sending the same information and forms to Mr F directly. So overall, I remain satisfied that Mr F would have been sent the Scorpion insert.

I remain of the view that if Prudential had asked Mr F who was advising him that he would have likely mentioned Felicitas's and FRPS's involvement. I already acknowledged that Felicitas said their report was limited to appropriateness. However, Felicitas completed a fact find with Mr F and they were listed on the QROPS paperwork as the investment adviser. Mr F's representatives also said in their complaint letter that Felicitas endorsed the transfer to the QROPS and the investments within it. And I agree that this is likely the impression Mr F would have taken from Felicitas' paperwork. So whilst technically Felicitas didn't see themselves as giving advice, they were investment advisers and I think Mr F would have perceived them as giving him advice on the QROPS and TRG.

So I think Mr F likely would have mentioned both FRPS and Felicitas when asked who was involved in the advice. With this information I think Prudential could have reasonably assumed that the advice would have come from only one of the firms and that was most likely Felicitas. FRPS had referred Mr F to Felicitas and it wouldn't seem unusual for an unregulated party to introduce consumers to a regulated party for advice.

I remain of the view that despite there being some warning signs in Mr F's transfer the presence of a regulated advisory firm would have reasonably provided enough comfort that a scam likely wasn't taking place. The fact that a non-UK firm was involved in an overseas transfer wouldn't be unusual and Mr F had been advised about the advantages of transferring into a QROPS. It wasn't for Prudential to question whether this advice was suitable or not. I also don't think as a ceding scheme they needed to find out about details of the connections between FRPS and TRG and that the involvement of a particular firm ought to have been seen as a warning sign which would override anything else.

So I don't think Prudential needed to provide further individual warnings to Mr F about the warning signs they had identified after they had reasonably discounted the likelihood of a scam.

Having considered everything again I think any further contact wouldn't have resulted in additional warnings to Mr F. So I think he would have continued with the transfer.

My final decision

I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 30 December 2024.

Nina Walter
Ombudsman