DRN-5148692

The complaint

Mr B has complained our text about a transfer of his Scottish Widows Limited personal pension to a self-invested personal pension (SIPP) in 2014. Mr B's SIPP was subsequently used to invest in an overseas property development company. The investment now appears to have little value. Mr B says he has lost out financially as a result.

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

What happened

Mr B held two personal pensions: one with Scottish Widows and another with a pension provider I'll refer to as provider R.

In July 2014 Scottish Widows responded to a request from Mr B for a transfer value of his pension held with it. Scottish Widows replied to a similar request from Mr B in September 2014.

On 9 September 2014 Mr B applied to become a member of the Orbis SIPP administered by Guinness Mahon Trust Corporation Limited. Guinness Mahon was fully authorised by the Financial Conduct Authority (FCA) as a provider of SIPPs and other pension services. In his SIPP application Mr B said he wanted to transfer the funds from both his personal pensions into the SIPP.

Mr B says he became interested in transferring his pensions after receiving an unsolicited call from a firm offering a free pension review.

The firm offering the review was called API which I understand is an abbreviation of Alternative Pension Investments. API presented Mr B with some investment options including an investment in Dolphin Capital[1] loan notes. The loan notes were a form of investment in a company which was purported to be developing properties in Germany.

In October 2014 Guinness Mahon sent a request via the Origo system to transfer the funds from Mr B's Scottish Widows pension to the Orbis SIPP. I'll explain that Origo is an electronic platform which allows the transfer of pensions and investments which can make transfers quicker and more efficient. Scottish Widows initially transferred the funds that month but because of an error they were returned. It successfully transferred Mr B's pension funds of £50,278.89 to the SIPP on 26 November 2014. In the meantime provider R had transferred Mr B's pension funds held with it of £26,962.40 into the Orbis SIPP. Mr B was 61 years of age at the time of the transfers.

[1] Dolphin Capital also operated under the name Dolphin Trust. It later changed its name to the German Property group, but for ease I'll only refer to Dolphin in this decision.

Mr B then invested £16,450 in a three-year maturity Dolphin loan note. Soon after he invested a further £40,000 in a five-year maturity Dolphin loan note.

Mr B took the maximum tax free cash lump sum of £19,310.32 from his SIPP in January 2015. He left the balance of funds in the SIPP in cash.

Mr B's three year loan note matured in November 2017. Dolphin paid £23,733 into his SIPP. Mr B then took a further pension withdrawal of £23,060 (gross).

Dolphin later ran into difficulties and became insolvent. As such Mr B is unlikely to receive any significant return from his outstanding five year loan note.

In 2020, following complaints and claims against Guinness Mahon concerning its lack of due diligence in respect of historic high-risk non-standard investments it went into administration. The administrators sold its SIPP business to another provider. The FCA published a notice to Guinness Mahon's customers. It said for those that had complaints about Guinness Mahon, who had received advice from an authorised adviser, the consumer should in the first case complain to the adviser. It said that otherwise, as Guinness Mahon was unable to meet its liabilities arising from complaints, consumers could direct their complaints to the Financial Services Compensations Scheme (FSCS[2]).

I understand Mr B submitted a claim to the FSCS regarding Guinness Mahon's lack of due diligence in connection with his SIPP. The FSCS accepted it and paid Mr B compensation of £23,317.

In March 2021, Mr B complained, via his representatives, to Scottish Widows. Briefly, his argument is that Scottish Widows failed to do sufficient due diligence or to identify and tell him about a number of warning signs in relation to the transfer including (but not limited to) the catalyst for the transfer being an unsolicited call. He also complained that, amongst other things, Scottish Widows had not established:

- what advice Mr B had received;
- whom had provided that advice and if they were regulated;
- Mr B's reasons for transferring and if he was offered incentives to do so;
- The details of the investments offered in the SIPP and if those promised guaranteed rates of return.

Scottish Widows didn't uphold the complaint. It said that Guinness Mahon had been FCA authorised. So Scottish Widows believed it had conducted an appropriate level of due diligence given the requirements of the time. It said that in similar cases it would advise the consumer to submit a claim to the FSCS but Mr B had already done so successfully.

[2] The FSCS helps consumers when a financial business is unable – or is likely to be unable – to pay compensation due from a claim against the business. This usually happens when a business is insolvent or has stopped trading and doesn't have enough assets to pay claims made against it. In either situation, the FSCS can declare a business to be "in default" and so confirm that it will accept complaints about it.

Mr B brought his complaint to the Financial Ombudsman Service. One of our Investigators looked into it. He didn't think Scottish Widows had dealt with Mr B fairly so he recommended upholding the complaint and set out how he believed Scottish Widows should put things right.

Scottish Widows didn't accept our Investigator's complaint assessment. So, as he was unable to resolve the dispute informally, the matter was passed to me to decide.

My provisional decision

I issued a provisional decision setting out why I didn't think the complaint should be upheld. I invited the parties' comments. However, neither Scottish Widows nor Mr B, via his representatives, had any substantive remarks to make.

As neither party has objected to my provisional findings I see no reasons to alter those. So, I have repeated my provisional findings below, as my final decision, and have not therefore included any further detail of them in this background summary.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

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

Before I explain my reasoning, it will be useful to set out the environment Scottish Widows was operating in at the time with regards to pension transfer requests, as well as any rules and guidance that were in place. Specifically, it's worth noting the following:

- 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 a member may also have a right to transfer under the terms of the contract). This 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.

- On 10 June 2011, the Financial Services Authority (FSA) issued a warning about the dangers of "pension unlocking" and specifically referred to consumers transferring to access cash from their pension before age 55. (As background to this, the normal minimum pension age had increased to 55 in April 2010.) The FSA said that receiving occupational pension schemes were facilitating this. It encouraged consumers to take independent advice. The announcement acknowledges that some advisers promoting these schemes were FSA authorised.

- At around the same time, TPR published information on its website about pension liberation, designed to raise public awareness and remind scheme operators to be vigilant of transfer requests. The warnings highlighted that websites and cold callers were encouraging people to transfer in order to receive cash or access a loan.

- TPR launched its 'Scorpion' campaign – so called because of the imagery it contained – on 14 February 2013. The aim of the campaign was to raise awareness of pension liberation activity and to provide guidance to scheme administrators on dealing with transfer requests in order to help prevent liberation activity happening. The FSA, and the FCA which had succeeded the FSA, endorsed the guidance. The guidance was subsequently updated, including in July 2014. I cover the Scorpion campaign in more detail below.

- In late April 2014 the FCA started to voice concerns about the different types of pension arrangements that were being used to facilitate pensions scams. In an announcement to consumers entitled "Protect Your Pension Pot" the increase in the use of small self administered schemes (SSASs[3]) and SIPPs in pensions scams was highlighted, as was an increase in the use of unregulated and/or illiquid investments. The FCA further published its own factsheet for consumers in late August 2014. It highlighted the announcement to insurers and advisers in a regulatory round-up published on its website in September 2014.

- Scottish Widows was subject to the 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:

– 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.

<u>The Scorpion guidance</u>

The Scorpion campaign was launched on 14 February 2013, and was initially focused just on pension liberation – namely, the access to pension funds in an unauthorised manner (such as before normal minimum pension age). However, the update to that guidance on 24 July 2014 widened the focus from pension liberation specifically, to pension scams – which it said were on the increase.

The materials in the Scorpion campaign comprised:

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

- A longer booklet issued by TPAS which gives more information, including example

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

scenarios, about pension scams. Guidance provided by TPR said this longer leaflet was intended to be used in ongoing communications with members so they could become aware of the scam risks they were facing.

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

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

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

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

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

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

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

For the reasons given above, I don't think personal pension providers necessarily had to follow all aspects of the Scorpion guidance in every transfer request. However, I do think they should have paid heed to the information it contained.

In deciding how to apply the guidance, firms needed to consider it as a whole, including the various warning signs to which it drew attention, the case studies that highlighted different types of scam, and the checklist and various suggested actions ceding schemes might take. And where the recommendations in the guidance applied, without a good reason to the contrary, it would normally have been reasonable, and in my view good industry practice, for pension providers at least to follow the substance of those recommendations:

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

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

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

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

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

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

As I've said above Mr B told us that a firm made an unsolicited call to him offering a pension review. Mr B couldn't initially remember the name of the firm offering the review. However, he still had its adviser's business card which confirmed he represented API. The adviser visited Mr B and proposed some alternative pension investments.

Mr B said he agreed to invest in Dolphin and API told him he could expect to receive returns of 10 to 13%. He wasn't offered any cash up front or other incentive to transfer. Mr B said the adviser told him that if anything went wrong he could fall back on the pension protection fund (PPF[4]).

Mr B said he began receiving letters telling him that there were issues with Dolphin making payments. He eventually learned that it had gone into liquidation.

I think it's worth noting that there's no reference to API's involvement anywhere on Scottish Widows' file. Mr B had twice asked Scottish Widows for transfer values himself. And there's no evidence of any contact between API and Scottish Widows. Nor is there any mention of API on any of the paperwork it would have seen. So I don't think Scottish Widows was aware of API'S involvement.

However, there is evidence elsewhere of API's role. Apart from Mr B's own evidence to us, I've also had the benefit of seeing provider R's file, in which there is reference to API's actions. And Mr B has helpfully provided the adviser's business card.

I'm also aware from other cases that we've dealt with that API acted as an "introducer" to SIPP providers. API was not FCA regulated. Documents it produced said it didn't give regulated advice. But I accept Mr B's evidence that API gave him advice to transfer. That's because, while API claimed not to provide advice, it's business model involved contacting consumers using direct marketing and an in-house call centre. It then took clients through what it described as a process of educating them about alternative investments. Its materials show that the majority of its business was from pension transfers and it was remunerated by commission from the investments it was offering.

I think the API materials we've seen corroborated Mr B's account that API gave him advice. That is it cold called him (direct marketing) and then recommended that he set up a SIPP and transfer his personal pensions into it so that he could invest in Dolphin. He would not have been able to make the Dolphin investment within his personal pensions.

The Dolphin investments were high risk and illiquid. They were only suitable for high net worth or sophisticated investors as part of a diversified portfolio. Mr B was not a high net worth or sophisticated investor. So it's unlikely he would have known about the existence of the Dolphin investments or how to go about investing in those unless someone recommended that action to him. And given his testimony, and the evidence on provider R's file I'm satisfied it was API that made that recommendation. And making a recommendation to transfer a pension fund is an activity that can only be carried out by an FCA authorised adviser. But API was not authorised. However, as I've said above, from the papers I've seen Scottish Widows did not know about the involvement of an unauthorised adviser.

Mr B did receive some returns from his Dolphin investments and his three year loan note matured without issue. But by 2019 Dolphin itself had begun to tell investors that it would be unlikely to meet its liabilities without delay. It eventually became insolvent. I understand that Dolphin's former managing director was recently indited on 27 counts of commercial fraud in Germany[5] in connection with his Dolphin activities.

---

[4] The PPF acts as a 'lifeboat' for insolvent 'defined benefit' occupational pension schemes. Mr B's SIPP was not a scheme which the PPF covered.

[5] https://staatsanwaltschaft-hannover.niedersachsen.de/startseite/aktuelles/presseinformationen/anklage-gegen-ehemaligen-geschaftsfuhrer-der-german-property-group-236390.html

What did Scottish Widows do and was it enough?

The Scorpion insert:

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

Scottish Widows has acknowledged that it didn't send Mr B the Scorpion insert. It said that as Guinness Mahon was FCA authorised it decided it could proceed with the transfer without issuing the Scorpion materials or the warnings it contained.

Due diligence:

In light of the Scorpion guidance, I think firms ought to have been on the look-out for the tell-tale signs of a pension scam. And they needed to undertake further due diligence and other appropriate action if it was apparent their customer might be at risk.

The Scorpion guidance includes a checklist to help ceding schemes to structure their due diligence when considering the transfer. Some items on the checklist could have been addressed from online resources such as Companies House and HMRC. Others would have required contacting the consumer. Opposite each question, or group of questions, the checklist identified actions that should help the transferring scheme establish the facts.

I don't think it would always have been necessary to follow the checklist in its entirety. And I don't think an answer to any one single question from it would usually be conclusive in itself of a scam threat. And, as I've said above, ceding schemes need to take an appropriate approach to their due diligence.

In this case there was one matter that could potentially have been a warning sign of a scam. That was that the Orbis SIPP scheme was relatively recently registered. And the Scorpion guidance says that where a SIPP is recently registered it recommended the ceding scheme take the following further actions:

- Check the scheme is registered with HMRC for tax purposes.
- Check the scheme operator is authorised with the FCA.

In this instance Scottish Widows told us that it limited its due diligence to taking the following actions:

- It checked to confirm that the Orbis SIPP was an HMRC registered pension scheme.
- It checked that Guinness Mahon was authorised and regulated by the FCA.
- It checked whether the Orbis SIPP or Guinness Mahon were on its internal list of schemes and administrators which were subject to additional checks and actions.
- It confirmed the transfer could be made via the Origo system.

Having satisfied itself on those points Scottish Widows determined that the transfer could proceed without further action or intervention.

Our Investigator felt that Scottish Widows' due diligence didn't go far enough. He thought it should have asked further questions around who had advised Mr B and his investment choices. But in the specific circumstances of this case I don't think that was something Scottish Widows needed to do or that the Scorpion guidance was advocating.

As I've said above the Scorpion campaign was developed following concerns about the number of people falling victim to pension liberation – that is pension schemes offering access to funds in an authorised manner particularly under the age of 55. And a common route to such a scam was to set up a new scheme for the funds to be transferred to. These schemes were often occupational pension schemes including SSASs, where the sponsoring employer had no genuine link to the scheme member. Such schemes do not fall under FCA regulation and so do not offer the same protections that FCA regulated schemes do. Hence the Scorpion guidance focus on pension providers checking if receiving schemes are appropriately FCA registered.

As the understanding of the scam threat evolved the Scorpion warning changed to warn of the dangers of scams more generally, rather than simply liberation. And while ceding schemes still needed to be on the look out for recently registered schemes, the consideration was different when the scheme was a SIPP as opposed to an occupational scheme.

Where the receiving scheme was a SIPP ceding schemes needed to look at the SIPP provider in particular. And if the provider itself was relatively new to the market and had itself only recently been authorised by the FCA then this could have given cause for further due diligence. But in this case Guinness Mahon had been fully authorised by the FSA and FCA and operating in the SIPP market since 2007. So the fact that the specific SIPP Mr B had chosen to transfer to was recently registered was somewhat incidental, Guinness Mahon carried the same responsibility for the Orbis SIPP as the others it had been operating for a number of years.

In contrast had the transfer been to an occupational scheme, which don't fall under the same regulatory scrutiny nor provide the same protections that an FCA authorised SIPP does, then I would have expected Scottish Widows to do more.

There is a simple explanation for the difference in approach between FCA regulated schemes and occupational schemes. That’s because, as Scottish Widows would have been well-aware, the FCA requires authorised SIPP providers to do their own due diligence on the scheme members’ advisers and intended investments. So the onus rested with Guinness Mahon, and not Scottish Widows, to establish whether Mr B's investments and the firm or individuals that were advising him met the required standards and were in his best interests. And where a SIPP provider fails in its due diligence requirements then the consumer may bring a complaint about that provider to the Financial Ombudsman Service, or if it was in default the FSCS and claim compensation. And in fact that’s what Mr B did.

I also need to be clear that Scottish Widows’ role was not to give Mr B advice about the suitability of a transfer, his chosen investments or his method of making that investment. Its role in doing due diligence would principally have been to ensure Mr B was transferring to an appropriately FCA registered scheme (he was) and to look out for other signs of a scam. But in this case no warning signs would have been apparent to it. Mr B was already over age 55 so there was no indication he was attempting to access his funds in an unauthorised manner.

And, he had only ever dealt with Scottish Widows directly, I've seen no evidence it was aware of the involvement of API at all.

As I’ve said previously, a firm needed 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. So I think it was reasonable in the circumstances for Scottish Widows to be satisfied that as the transfer was to a fully FCA regulated pension provider it didn't need to take further due diligence action.

That said, while I think it was reasonable for Scottish Widows to decide not to take further due diligence, it would have been helpful if it had sent the Scorpion insert. That was a simple step to take on all transfers and as I've said above one I think ceding schemes should have been taking.

But I think the content of the Scorpion insert at that time was unlikely to have changed the course of events. The insert warns consumers to be on the look out for a “variety of tricks” scammers may use to catch people out. One of those did apply to Mr B's situation, that is he was approached by a cold call offering a pension review. But I don’t think anything else in the leaflet would have resonated with him. Mr B was already over 55 years of age, he wasn't offered cash up front or any other form of incentive to transfer, nor was he being offered a “one-off investment opportunity”. Indeed Mr B said that API offered him a number of investment choices. So on balance I don’t think the Scorpion insert would have worried Mr B.

It follows that, while I have great sympathy for the position Mr B finds himself in, I don't think that Scottish Widows is responsible for any losses he’s suffered.

My final decision

For the reasons given above I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr B to accept or reject my decision before 13 December 2024.

Joe Scott
Ombudsman