

## **The complaint**

Mrs B has complained, with the help of a professional representative, about a transfer of her Phoenix Life Limited ('Phoenix Life') personal pension policies to a small self-administered scheme ('SSAS') in January 2015. Mrs B's SSAS was subsequently used to invest in unquoted shares in a company called Windermere Hydro Hotel Limited and in something called Sustainable Hardwood – believed to be a teak tree cultivation business in Liberia. The investments now appear to have little or no value. Mrs B says she has lost out financially as a result.

Mrs B says Phoenix Life failed in its responsibilities when dealing with the transfer request. She says that it should have done more to warn her of the potential dangers of transferring, and undertaken greater due diligence on the transfer, in line with the guidance she says was required of transferring schemes at the time. Mrs B says she wouldn't have transferred, and therefore wouldn't have put her pension savings at risk, if Phoenix Life had acted as it should have done.

## **What happened**

Around June 2012, Mrs B says she came into contact with an adviser who I'll refer to as Mr H, who offered her a free pension review. She said the contact was initiated by cold call. Mrs B isn't clear exactly which firm the adviser purported to represent. According to the Financial Conduct Authority (FCA) register, the adviser in question did not hold a regulated role after 2010.

Mrs B, who was under 55 at the time, says she met with the adviser and said she was looking to drawdown some of her pension. She says the adviser recommended her pension would be better invested in investments that would be made accessible to her by transferring to a SSAS. She says she understood the pension would provide a guaranteed return. She says because she was convinced by what she was told, she agreed to go ahead.

Mrs B says the adviser told her to contact Phoenix Life to obtain the details of her pension and request the necessary transfer documents.

Phoenix Life sent Mrs B the requested information following her phone calls to its helpline in September 2013 and again in January 2014.

I haven't been provided with the SSAS documentation – unfortunately it isn't available – so the date Mrs B signed documents to open her SSAS and when it was registered with HMRC isn't known. I will come back to this later on.

What is known is that the SSAS administrator was a company called Cranfords and the sponsoring employer of the SSAS, a company I'll refer to as C Limited, was an existing trading business owned and run by Mrs B's partner. Mrs B has told us she was not employed in the business at the time but she was a 1% shareholder. According to Companies House, Mrs B had one share in the business at this time. She is not recorded as an officer of the company or a person with significant control.

On 21 January 2015, Phoenix Life received an electronic request via the Origo Options system from Cranfords to transfer the benefits of Mrs B's pension policy to the SSAS. On 27 January 2015, Phoenix Life contacted Cranfords who confirmed that the transfer request related to both of Mrs B's policies. The same day, Phoenix Life processed the request transferring just under £22,000 to the SSAS.

From the account statements provided, in early February 2015 the transferred sum was invested – £9,000 in Windermere Hydro Hotel Ltd, £6,000 in Sustainable Hardwood and the balance in physical gold (this later appears to have been sold and put in cash.)

It appears that Cranfords has since dissolved, so I don't have any up-to-date account statements and I don't know what has happened to Mrs B's SSAS. But according to Companies House, Windermere Hydro Hotel Ltd was dissolved in September 2024, so this investment has failed. I can find no information about the investment in Sustainable Hardwood investment. But I think it is reasonable to assume, as Mrs B has said, that it is illiquid. I cannot foresee any market for it, even if it transpires to have any kind of residual value.

On 12 December 2019, Mrs B complained to Phoenix Life. Briefly, she said it ought to have spotted, and told her about, a number of warning signs in relation to the transfer. These included but were not limited to: the involvement of unregulated adviser, the intended investments being akin to Ponzi investments and the SSAS being newly registered. Mrs B said if Phoenix Life had properly informed her of these warning signs, she wouldn't have transferred.

Phoenix Life didn't uphold the complaint. In summary it said that Scorpion inserts were included in the transfer packs it sent to Mrs B in September 2013 and January 2014. And following receipt of the transfer request via Origo it clarified some details with the SSAS administrator and transferred the funds as requested. It said it found no issues with the transfer process.

Dissatisfied with its response, Mrs B referred her complaint to the Financial Ombudsman Service. I issued my provisional decision in which I explained why I intended to uphold Mrs B's complaint. Included below are the key extracts from my provisional findings explaining why, which forms part of my final decision.

### **Extracts from my provisional decision**

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

#### The relevant rules and guidance

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

- Principle 2 – A firm must conduct its business with due skill, care and diligence;
- Principle 6 – A firm must pay due regard to the interests of its customers and treat them fairly;

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

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

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

The guidance was updated on 24 July 2014. It widened the focus from pension liberation specifically, to pension scams – which it said were on the increase. I cover the Scorpion campaign in more detail below.

In late April 2014, the FCA had also 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 SIPP and SSASs 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.

### The Scorpion guidance

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 scenarios, about pension scams. Guidance provided by TPR said this longer leaflet was intended to be used in ongoing communications with members so that 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 transferring – 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. 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 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 transfer 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.

#### What did personal pension providers need to do?

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, they needed to consider the guidance 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, 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:

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 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 scams and undertake further due diligence and take 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.

#### The circumstances surrounding the transfer – what does the evidence suggest happened?

Mrs B says she agreed to a pension review with Mr H. She said this came about following a cold call from him. Mrs B says she doesn’t know which business the adviser claimed to be working for. But while the FCA register records this individual holding regulated roles with authorised firms prior to 2010, he did not hold a regulated role after 2010. Mrs B says she came into contact with the adviser in 2012.

So, the individual or adviser Mrs B says she met with what was not FCA authorised at the time in question.

Mrs B says the adviser asked her to request the necessary information from Phoenix Life about her pension policies. She says she made requests in April 2013, January 2014 and September 2014. Phoenix Life’s evidence shows it sent Mrs B policy information in September 2013 and January 2014. Mrs B says she can’t remember the specific details of these requests.

Mrs B says the adviser recommended she transfer her pension to a Cranfords SSAS, which would be better invested in investments that would be accessible to her and give her guaranteed annual returns of up to 8%.

Mrs B says she was convinced by what she was told by the adviser, so she agreed to go ahead. Mrs B says she does not recall receiving any correspondence or communication from Phoenix Life other than in response to her transfer requests.

As I said earlier on, I haven’t had sight of the SSAS paperwork, which might show an adviser name or firm to support what Mrs B says. The transfer documents and pension details

Phoenix Life sent out in 2013 and 2014 were sent to Mrs B direct rather than an adviser or business. And the Origo Options screen printout recorded no adviser involved. So, on the one hand this might suggest that Mrs B acted alone here.

But on the other hand, I don't think it is that unusual for the Origo print out to show no adviser name recorded in transfer requests such as this. In addition, Mrs B says she had no knowledge or experience of pensions or investments and I've seen nothing to contradict this. Neither have I seen anything else in Mrs B's circumstances which leads me to believe that she had the requisite skill or knowledge to have embarked on what is a complicated arrangement on her own – i.e. choosing and opening a SSAS, transferring her existing pension policies and investing in non-mainstream / unusual or esoteric investments.

So, I think the transfer would only have come about following advice to do so. And I find it unlikely that Mrs B would randomly pick a name of an individual and say they gave her advice if that person wasn't the one that did so. While Mrs B hasn't been entirely clear about the timings of the events leading up to the transfer, she has been clear with whom she met and that it was they who recommended she transfer her pension. I find it plausible in the circumstances that Mrs B was told by the adviser to request the information about her pension from Phoenix Life herself. And the fact there were at least a couple of requests for information suggests that Mrs B likely met or interacted with the adviser in question on more than one occasion.

So, taking all of the above into account and in the absence of any evidence to show or suggest the involvement of anyone else, I think it's more likely than not Mr H advised Mrs B to transfer. And he was not authorised to provide such advice at the time.

I've seen nothing to indicate that Mrs B was offered a cash or other incentive to transfer. And while she said she was interested in drawing down some of her pension – and it appears the adviser may have indicated this was possible by telling her the investments were accessible – Mrs B did not receive funds from the pension. But I think it was these discussions and the prospect of the higher investment returns she was told she would receive, that prompted her to agree to the transfer.

#### What did Phoenix Life 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.

Phoenix Life says that in both of the transfer packs it sent to Mrs B in September 2013 and January 2014, it enclosed the Scorpion leaflet. And looking at the letters it sent, I can see the second sentence of each letter says: "I have also provided some important information that you are advised to read before deciding to transfer your pension." I think it is likely that the important information referred to was the Scorpion insert as Phoenix Life says.

But by the time of the transfer request in January 2015, the Scorpion guidance had since been updated (July 2014.) The 2013 guidance applicable at the time Phoenix Life likely provided Mrs B with the inserts in the transfer packs, was geared towards pension liberation fraud. But the updated guidance was about more broader pension scams.

So, when Phoenix Life ultimately received the transfer request via Origo, I think it should

have provided Mrs B with the updated July 2014 Scorpion insert, or provided her with materially the same information contained within it in a different format. Because Phoenix Life didn't, I don't think it did enough here.

*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 needed to undertake further due diligence and take appropriate action if it was apparent their customer might be at risk.

Phoenix Life doesn't appear to have carried out any due diligence, perhaps beyond the basic checks required, before transferring Mrs B's pension. In the circumstances, I think it ought to have done more.

In my view, I think there was a potential warning sign of a scam present in this case. This is because I think it's likely a feature of Mrs B's transfer was that her SSAS was recently registered. I said earlier on that because the SSAS paperwork isn't available, I couldn't say when the SSAS was opened and then registered with HMRC. Mrs B's interactions with the adviser she says was involved in the process began around the middle of 2012. Given this and the transfer date of January 2015, the SSAS must have been registered at some point between these dates.

It's possible that Mrs B opened the SSAS and it was registered some time prior to the date of the transfer such that it wouldn't reasonably have seemed to Phoenix Life to have been recently registered. But in that scenario, I'd have to believe that Mrs B opened her SSAS and it was registered in the early part of her interactions with the adviser and it remained open with no money deposited or investments made within it until February 2015 following the eventual transfer. But in the circumstances I find this unlikely. In my experience of cases like Mrs B's, that isn't typically how things worked. I think it's likely the SSAS was opened and registered shortly before the transfer date of January 2015 and certainly within what I think could reasonably be described as being recent. According to a SSAS bank statement provided, the anniversary date of the scheme was 8 January, which would support my view. I've taken into account that the SSAS sponsoring employer was an existing company – it wasn't a newly set up company as is typically the case. But I'm not persuaded this would have a bearing on the timing of opening and registering the SSAS.

I can see the registration date wasn't on the Origo request printout. But Phoenix Life should've reasonably checked the SSAS was correctly registered – one of the basic due diligence checks. It isn't reasonable for Phoenix Life to have assumed it was correctly registered or that it had been established for some time. Because it ought to have carried out this basic check, Phoenix Life should be able to say when it was registered. But this information wasn't provided in its business file submission.

So, in light of what I've said above, I think in checking Mrs B's SSAS was correctly registered, more likely than not it would've identified the registration date as being recent. So, given this warning sign, I think it would have been fair and reasonable – and good practice – for Phoenix Life to have looked into the proposed transfer to find out if other signs of a scam were present.

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.

I can see that Phoenix Life said in its final response letter that it described the Origo Options transfer system as being an electronic platform, which enables organisations to carry out pension transfers in a streamlined and efficient manner without the need for lots of

paperwork. It's possible therefore Phoenix Life took some comfort from the request coming via Origo which is why it didn't carry out any due diligence on Mrs B's transfer. But if this was the case, I don't think this reasonably meant Phoenix Life could ignore or dismiss what in my view was a clear warning sign.

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

1. The nature/status of the receiving scheme

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

2. Description/promotion of the scheme

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

3. The scheme member

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

Opposite each question, or group of questions, the check list identified actions that should help the transferring scheme establish the facts. I don't think it would always have been necessary to follow the check list in its entirety. And I don't think an answer to any one single question on the check list would usually be conclusive in itself. A transferring scheme would therefore typically need to conduct investigations across several parts of the check list to establish whether a scam was a realistic threat.

### What should Phoenix Life have found out?

If Phoenix Life had checked at Companies House it would have revealed that the sponsoring employer of Mrs B's SSAS was long established, trading and located near her home. In other words, it wouldn't have looked like the type of employer that the Scorpion guidance was directing schemes to be on the lookout for.

So, the transfer would, reasonably, have looked orthodox in that light. It would have appeared as though Mrs B was transferring her personal pension to an occupational scheme that was sponsored by a small business that had been operating for a considerable period of time.

I've therefore considered very carefully whether Phoenix Life (had it conducted due

diligence) could, reasonably, have taken comfort from and been reassured by this to the extent that there was no need to investigate the transfer further. But, on balance, I don't think this information would have been quite enough for it to have satisfied itself that there was no scam risk here. This is because Mrs B's involvement in the sponsoring employer appears to have been somewhat limited. And I think the Companies House records supports that. While it would've showed Mrs B as a shareholder in C Limited, she was not an officer or someone who had significant control. I think if she was playing an active part in C Limited and was employed by it, given the family relationship (which would have been clear from the record) she would have likely been recorded as such. Of course, if Phoenix Life had asked Mrs B, she would have said, as she told us, that she wasn't employed by C Limited. The rationale for setting up a SSAS wouldn't have looked quite so orthodox in that light. So, I think further investigation was required.

Investigations into part 2 would at that time have, most likely, identified that although Mrs B wasn't offered any form of cash incentive to transfer, she had been told, or understood from what she'd been told that she could access her pension funds early. In addition she was being advised to invest in an unregulated property investment and an overseas timber cultivation business. In my view, both investments include some features that might be implicated in a pension scam (overseas, unregulated and/or unusual or creative techniques).

If Phoenix Life had asked questions in part 3, it would likely have learned that Mrs B had been cold called and was dealing with Mr H. Mr H didn't need FCA authorisation to advise on the setting up of a SSAS nor, ordinarily, on the purchase of gold or the making of commercial loans. And Mrs B didn't need to take advice to transfer her pension from Phoenix. So, I've considered whether Phoenix Life – had it conducted due diligence – could reasonably have left its investigations on Mr H there. On balance, I don't think that would have been a reasonable response given the number of other warning signs there would have been, specifically: Mrs B had been cold called, she was under the impression she could access her pension early, the investments she intended to make were of the type that the guidance was warning about and her involvement in the sponsoring employer was tangential at best. Yes, the sponsoring employer was a genuine business. And, as I said above, a business didn't necessarily need to follow the action pack in its entirety. But taking everything into consideration, I think Phoenix Life should have gone further and delved deeper into the role played by Mr H and whether he was authorised to carry out that role.

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 approved by the FCA at [www.fca.gov.uk/register](http://www.fca.gov.uk/register)".

In other words, they should consult the FCA's online register of authorised firms. Phoenix Life should have taken that step, which is not difficult, and it would quickly have discovered that Mrs B's adviser hadn't been authorised since 2010.

Being advised by an unauthorised firm or individual 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 guidance itself makes this point.

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

breach occurred here.

It's worth noting at this point that my findings stand even if I assume the check list was followed in a different order. Whatever the sequence the investigation took, I'm satisfied there would have been enough concerns that the most reasonable response would, ultimately, have been to probe Mr H's involvement further.

What should Phoenix Life have told Mrs B – and would it have made a difference?

I think if Phoenix Life had done more thorough due diligence, there would have been a number of warnings it could have given to Mrs B in relation to a possible scam threat as identified by the action pack. For the avoidance of doubt these are: an unregulated adviser gave Mrs B illegal advice; she was intending to invest in the types of schemes often associated with pension scams; and a SSAS, although sponsored by a genuine company, was set up solely for the purpose of making those investments.

Phoenix Life should also have been aware of the close parallels between Mrs B's transfer and the warnings the FCA gave to consumers in August 2014 about transferring to SSASs (which was brought to the attention of pension providers the following month.)

In my view, the gravest oversight was Phoenix Life's failure to uncover the threat posed by a non-regulated adviser. Its failure to do so, and its failure to warn Mrs B accordingly, meant it didn't meet its obligations under PRIN and COBS 2.1.1R.

With those obligations in mind, it would have been appropriate for Phoenix Life to have informed Mrs B that the individual or firm she had been advised by was unregulated and could put her entire pension at risk. Phoenix Life should have said only authorised financial advisers are allowed to give advice on personal pension transfers, so she risked falling victim to illegal activity and losing regulatory protections.

I'm satisfied any messages along these lines from Mrs B's existing pension provider – a firm I think it's reasonable to conclude in the circumstances she would've considered trustworthy – would've carried weight. In my view, they would have set off alarm bells – I don't think Mrs B would've ignored these warnings.

The messages would have likely followed conversations with Mrs B, so would have seemed to her (and indeed would have been) specific to her individual circumstances and would have been given in the context of Phoenix Life raising concerns about the risk of losing pension monies as a result of untrustworthy advice. This would've made Mrs B aware that there were serious risks in using an unregulated adviser. I think the gravity of any messages along these lines would prompt most reasonable people to rethink their actions.

And I've seen no persuasive reason why Mrs B would've acted differently to the majority of people in those circumstances. Mrs B had received an unsolicited call to discuss her pension and she was an inexperienced investor who appears to have been dependant on advice. At the very least, I think she'd have sought further guidance as suggested in the action pack and/or advice from a properly regulated adviser before proceeding.

And I think it's more likely than not that, had she done so, this would've led her to fully appreciate the transfer and the investments being contemplated were of extremely high risk, unwise and so conclude they were unsuitable and not in her best interests. I therefore can't see Mrs B would more likely than not have still gone ahead with the transfer.

So, I consider that if Phoenix Life had acted as it should, Mrs B would not have proceeded

with the transfer out of hers personal pension or suffered the investment losses that followed.

### **Responses to my provisional decision**

Mrs B, through her representative, said she had nothing further to add.

Phoenix Life replied and said it wanted a number of points to be considered. In summary it said:

- There was no evidence available at the time to suggest an adviser, regulated or unregulated, was involved for this to be considered a warning sign. It asks if I have any documentation that would demonstrate it was aware of the involvement of an adviser.
- It highlighted a conflict in Mrs B's recollection of how she came into contact with the adviser – I said it was a result of a cold call whereas in their view, the investigator said she'd been recommended to him by a friend.
- It didn't necessarily agree with my assumption about the registration date of the SSAS – it says it's possible the registration happened before 8 January 2015.
- There was nothing to indicate a further warning sign was present given the SSAS was linked to Mrs B's partner's established business.
- It's possible Mrs B's partner had some involvement in the process.
- It sent Mrs B two Scorpion leaflets prior to the transfer, which warned about pension liberation. Given Mrs B was initially looking to drawdown her pension, these warning should've resonated with her. So, even if a third leaflet had been issued, it says it's unlikely this would've stopped the transfer.

### **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 done so and considered what Phoenix Life has said in response to my provisional findings, I've not been persuaded to change my mind. So, I've decided to uphold this complaint. I'll address below the points Phoenix Life has raised.

Firstly – there was no documentation available at the time to show the involvement of an adviser. As I said in my provisional decision, the Origo Options screen printout recorded no adviser involved. But if Phoenix Life had acted on the warning sign I think was present – namely the recent registration date of the SSAS – and looked into the transfer further by carrying the due diligence that I think it ought reasonably to have done, the involvement of an adviser (and an unregulated one at that) would have become apparent. At this point and in light of its discovery, Phoenix Life should've provided the appropriate warnings to Mrs B.

It's unclear why the investigator reached their conclusion about how Mrs B came into contact with the adviser. Mrs B said in her original complaint form that she had been cold called by the adviser. I've not seen any evidence to contradict this. So, I see no reason to dispute that Mrs B was cold called.

While Phoenix Life has said it doesn't necessarily agree with my assumption about when the SSAS was registered, it's not provided any persuasive evidence to change my findings on this. Importantly, as I said in my provisional decision, because this should have been one of its basic checks it carried out on Mrs B's transfer, Phoenix Life should be able to tell me when it was registered. I also said that it's possible Mrs B opened her SSAS before 8 January 2015 and possibly some time prior to the transfer such that it wouldn't have

seemed to Phoenix Life that it had been recently registered. But I said I thought this was unlikely in the circumstances. And I maintain my view for the same reasons I gave in my provisional decision.

I agree with Phoenix Life that the SSAS was linked to Mrs B's partner's established business. But as I said in my provisional decision, I didn't think, on balance, that this information was quite enough for it to be satisfied there was no scam risk. And again, I maintain my view for the same reasons I gave here.

I've seen no evidence to support the view that Mrs B's partner was involved in the process. I think the transfer would only have come about following advice to do so.

I acknowledged in my provisional decision that Phoenix Life sent Mrs B two Scorpion leaflets in response to the information requests it received. But I'm mindful that these were sent some time prior to the eventual transfer. And although Mrs B who was under 55 at time said she was looking to drawdown her pension and understood from what the adviser said that she could access it, I've not seen anything to suggest the adviser promoted this by using the kind of language referred to in the Scorpion leaflet such as offering a loan, savings advance or cash back from her pension. And we know that Mrs B didn't access her pension early. She said that she was attracted by the promise of high returns, so ultimately I think it was this that prompted her to agree to go ahead. So, I don't think the earlier Scorpion leaflet warnings would've particularly resonated with Mrs B.

I accept it's possible that if Phoenix Life had issued Mrs B with a third Scorpion leaflet, this alone might not have stopped the transfer. Although this version of the leaflet covered scams more generally, it might not have been very impactful on its own given Mrs B might have thought she'd seen it before. But that's not sufficient reason for Phoenix Life not to have sent it to Mrs B – I think the guidance was clear that it should have done.

But in any event, it is Phoenix Life's failure to carry out any kind of due diligence on the transfer – perhaps beyond the basic checks – which is the issue here. Had it done so, it would've likely seen there was a warning sign which, if it had followed that up, would've revealed other issues – in particular, the involvement of an unregulated adviser. And if it had shared those concerns with Mrs B as to why her pension fund might be at risk, I think that would've made Mrs B think again and ultimately decide against proceeding with the transfer and investments. And so Mrs B wouldn't have suffered the investment losses that followed.

So, for the reasons above and in my provisional decision, I uphold this complaint and instruct Phoenix Life to put things right.

### **Putting things right – fair compensation**

My aim is that Mrs B should be put as closely as possible into the position she would probably now be in if Phoenix Life had treated her fairly.

The C Limited SSAS only seems to have been used in order for Mrs B to make an investment that I don't think she would have made from the proceeds of this pension transfer, but for Phoenix Life's actions. So I think that Mrs B would have remained in her pension plan with Phoenix Life and wouldn't have transferred to the C Limited SSAS.

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

### ***Actual value***

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

My aim is to return Mrs B to the position she would have been in but for the actions of Phoenix Life. This is complicated where an investment is illiquid (meaning it cannot be readily sold on the open market), as its value can't be determined. On the basis of the evidence I have, that is likely to be the case with the following investment(s): Windermere Hydro Hotel Limited, Sustainable Hardwood. This is because both investments have failed and/or have no market value, so are effectively worthless. Therefore as part of calculating compensation:

- Phoenix Life should seek to agree an amount with the C Limited SSAS as a commercial value for the illiquid investment(s) above, then pay the sum agreed to the C Limited SSAS plus any costs, and take ownership of those investment(s). The actual value used in the calculations should include anything Phoenix Life has paid to the C Limited SSAS for illiquid investment(s).
- Alternatively, if it is unable to buy them from the C Limited SSAS, Phoenix Life must give the illiquid investment(s) a nil value as part of determining the actual value. In return Phoenix Life may ask Mrs B to provide an undertaking, to account to it for the net proceeds she may receive from those investments in future on withdrawing them from the C Limited SSAS. Phoenix Life will need to meet any costs in drawing up the undertaking. If Phoenix Life asks Mrs B to provide this undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.
- It's also fair that Mrs B should not be disadvantaged while she is unable to close down the C Limited SSAS. So to provide certainty to all parties, if these illiquid investment(s) remain in the scheme, I think it's fair that Phoenix Life must pay an upfront sum to Mrs B equivalent to five years' worth of future administration fees at the current tariff for the C Limited SSAS, to allow a reasonable period of time for the C Limited SSAS to be closed.

### ***Notional value***

This is the value of Mrs B's funds had she remained invested with Phoenix Life up to the date of my Final Decision.

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

### ***Payment of compensation***

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

Phoenix Life should reinstate Mrs B'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 Mrs B was invested in).

Phoenix Life shouldn't reinstate Mrs B's original plan if it would cause a breach of any HMRC pension protections or allowances – but my understanding is that it might be possible for it to reinstate a pension it formerly administered in order to rectify an administrative error that led to the transfer taking place. It is for Phoenix Life to determine whether this is possible.

If Phoenix Life is unable to reinstate Mrs B'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 Mrs B's original pension.

If Phoenix Life considers that the amount it pays into a **new** plan is treated as a member contribution, its payment may be reduced to allow for any tax relief to which Mrs B is entitled based on her annual allowance and income tax position. However, Phoenix Life's systems will need to be capable of adding any compensation which doesn't qualify for tax relief to the plan on a gross basis, so that Mrs B doesn't incur an annual allowance charge. If Phoenix Life cannot do this, then it shouldn't set up a new plan for Mrs B.

If it's not possible to set up a new pension plan, Phoenix Life must pay the amount of any loss direct to Mrs B. 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 Mrs B is retired. (This is an adjustment to ensure that Mrs B isn't overcompensated – it's not an actual payment of tax to HMRC.)

To make this reduction, it's reasonable to assume that Mrs B is likely to be a basic rate taxpayer in retirement. So, if the loss represents further 'uncrystallised' funds from which Mrs B was yet to take her 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 her in cash.

Alternatively, if the loss represents further 'crystallised' funds from which Mrs B had already taken her 25% tax-free cash, the full 20% reduction should be applied to the compensation amount if it's paid direct to her in cash.

If payment of compensation is not made within 28 days of Phoenix Life receiving Mrs B's acceptance of the Final Decision, interest must be added to the compensation at the rate of 8% per year simple from the date of the Final Decision to the date of payment.

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

This interest is not required if Phoenix Life is reinstating Mrs B'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 Mrs B was invested. However, I expect any such reinstatement to be achieved promptly.

Details of the calculation must be provided to Mrs B in a clear, simple format.

**My final decision**

My final decision is that I uphold this complaint and I direct Phoenix Life Limited to put things right in line with the approach above.

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

Paul Featherstone

**Ombudsman**