DRN-5167372

The complaint

Mr P has complained about a transfer of his Standard Life Stakeholder pension to a small self-administered scheme ('SSAS') in June 2014. Standard Life policies have since transferred to Phoenix Life Limited. It is Phoenix Life who are now the respondent party in this complaint, so for ease of reading I will simply refer to Phoenix Life in this decision.

Mr P's SSAS was subsequently used to invest in hotel property with Akbuk Resort Group, and in a Dolphin Trust loan note, a German property development company. The investment now appears to have little value. Mr P says he has lost out financially as a result.

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

What happened

Mr P says his interest in the transfer followed an unsolicited approach from a firm he identifies as Stevenson Pride. He says he was attracted by the prospect of improved investment returns around 12% a year. Stevenson Pride wasn't authorised by the Financial Conduct Authority ('FCA').

On 24 April 2014, a company was incorporated with Mr P as director. I'll refer to this company as Firm A. On 26 April 2014 Mr P signed documents to open a SSAS with Rowanmoor Group. Firm A was recorded as the SSAS's principal employer. The SSAS documents also recorded that the SSAS was to be used to invest in an overseas hotel resort with Akbuk Resort Group and in a Dolphin Trust overseas property investment.

On 20 May 2014 Phoenix Life received a transfer request for Mr P's pension from Rowanmoor via Origo Options. Mr P's pension was transferred on 3 June 2014. His transfer value was around £93,000. He was 50 years old at the time of the transfer.

The transferred funds were used to invest £41,000 in a loan note with Dolphin Capital and £45,494 in Unity Bay with Akbuk Resort Group. Dolphin Capital loan notes stopped paying returns to investors and the funds were not used to develop the intended properties. It meant that the loans were not redeemed at the end of their term in most instances. There is no secondary market and this investment is illiquid and likely to have no value. Investments with Akbuk Resort Group were in fractional hotel suite ownership. These investments also failed to deliver the suggested returns. It is similarly illiquid having no secondary market.

In February 2021, Mr P complained to Phoenix Life. Briefly, his argument is that Phoenix Life ought to have spotted, and told him about, a number of warning signs in relation to the transfer, including (but not limited to) the following: the SSAS was newly registered, there wasn't a genuine employment link to the sponsoring employer, the sponsoring employer was a dormant company, the catalyst for the transfer was an unsolicited call and he had been advised by an unregulated business, Mr P had been promised unrealistically high investment returns, the proposed investment was unregulated and overseas.

Phoenix Life didn't uphold the complaint. It said Mr P had a legal right to transfer and that it had no reason to suspect pension liberation because Rowanmoor were a reputable administration company. It was satisfied it had conducted an appropriate level of due diligence given the requirements of the time.

Our investigator was unable to resolve the dispute informally, so the matter was passed to me to decide.

What I've decided – and why

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

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

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

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

- A longer leaflet issued by TPAS which gives more information, including example scenarios, about pension liberation. Guidance provided by TPR on its website at the time said this longer leaflet was intended to be sent to members who had queries about pension liberation fraud.

- An 'action pack' for scheme administrators that highlighted the warning signs present in a number of transfer examples. It suggested transferring schemes should "look out for" various warning signs of liberation. If any of the warning signs applied, the action pack provided a check list that schemes could use to help find out more about the receiving scheme and how the member came to make the transfer request. Where transferring schemes still had concerns, they were encouraged to write to members to warn them of the potential tax consequences of their actions; to consider delaying the transfer; to seek legal advice; and to direct the member to TPAS, TPR or Action Fraud.

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

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

I take from the above that the content 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 those requests. The guidance was launched in response to widespread abuses that were causing pension scheme members to suffer significant losses. And the guidance's specific purpose was to inform and help ceding firms when they dealt with transfer requests in order to prevent these abuses and save their customers from falling victim to them.

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

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

For the reasons given above, I don't think personal pension providers necessarily had to follow all aspects of the Scorpion guidance in every transfer request. However, I do think they should have paid heed to the information it contained. And where the recommendations in the guidance applied, absent a good reason to the contrary, it would normally have been reasonable, and in my view good industry practice, for pension providers at least to follow the substance of those recommendations. With that in mind, I take the view that personal pension providers dealing with transfer requests needed to heed the following:

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

2. When TPR launched the Scorpion guidance in February 2013, its press release said the Scorpion insert should be provided in the information sent to members requesting a transfer. It said on its website that it wanted the inclusion of the Scorpion insert in transfer packs to "become best practice". The Scorpion insert provided an important safeguard for transferring members, allowing them to consider *for themselves* the liberation threat they were facing. Sending it to customers asking to transfer their pensions was also a simple and inexpensive step for pension firms to take and one that wouldn't have got in the way of efficiently dealing with transfer requests. So, all things considered, I think the Scorpion insert should have been sent as a matter of good industry practice with transfer packs and direct to the transferring member when the request for the transfer pack had come from a different party.

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

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

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

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

Mr P has explained to us that he was contacted out of the blue by Stevenson Pride. And that it was Stevenson Pride that recommended that he transfer his Phoenix Life pension to a SSAS. And I am persuaded that Mr P was, more likely than not, acting on the transfer advice of Stevenson Pride for the following reasons.

Mr P was in full time employment, but was not a director of a firm until Firm A was incorporated. I think that it is unlikely that a retail customer with a Stakeholder pension would conceive of a SSAS as an alternative pension option when they did not already have a company to act as a sponsoring employer. It is far more likely that this type of transfer would come about where the idea of this was introduced by a third party.

The application form that Mr P completed in April 2014 named Stevenson Pride as the trustee adviser. But also, under the heading '*adviser fee agreement*', it listed a sum of £995 as an arrangement fee. It described this fee as a one-off payment in respect of advice on the establishment of the SSAS. I think that, in this case, it is likely that the advice to establish the SSAS coincided with the advice to transfer the Phoenix Life pension into it. There was no indicated intention for regular contributions. It therefore appeared to exist purely to receive the transferred sum initially. So, I think that the recipient of that £995 arrangement fee is likely to have been the advising firm.

The SSAS transaction history shows that a transfer of £995 was made to Stevenson Pride on 10 June 2014. Which was within days of the transferred funds being received. That transfer is described on the statement as 'IFA FEES'. So, I think this clearly shows that Stevenson Pride was paid a pre-agreed sum, that was described as an adviser fee. There were no other adviser payments made from the SSAS following the transfer. So, I think this clearly supports that it was Stevenson Pride that had advised Mr P on establishing the SSAS and, more likely than not, to transfer his Phoenix Life pension.

I note that the Origo Options request indicated that there was no adviser. But that was an electronic request that was completed by Rowanmoor. Not by Mr P. And would not have been seen by Mr P. I don't think it would have a bearing on whether or not Mr P considered that he was acting on the advice of Stevenson Pride to transfer. Overall, I think that is what he likely considered to have been the case. And, more importantly, had Phoenix Life have asked him, that is what Mr P would likely have said.

Mr P says he was not promised any cash incentive to transfer and his motive to transfer was the indicated improved returns. And there are no payments out of his SSAS to him. There is no indication that there were any payments made from the investments to Mr P either. So, I think that he was simply persuaded to transfer by the investment returns.

The Dolphin Capital loan note agreement initially appeared to be honoured with interest payments being made to the SSAS. But the last of these was received in January 2019. After which the issues with Dolphin Capital had become apparent. The firm became insolvent and subject to investigation. The loan note therefore will likely have nil value, even if it has not yet been valued as such by the SSAS. Akbuk resort group started paying quarterly returns, but these stopped after the payment in May 2016. Payments did not re-start and the investment cannot be sold meaning it is illiquid and likely to have nil value.

<u>What did Phoenix Life 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.

Mr P explains that he did not receive the Scorpion insert or any other warnings from Phoenix Life. And Phoenix Life do not claim to have sent any warnings, pointing out that it didn't receive any request for pension information or a transfer pack from any party prior to the transfer request from Rowanmoor. Given the guidance at the time, I appreciate that there was no clear or obvious opportunity for Phoenix Life to have sent the insert. The circumstances mean that Mr P was denied the benefit of the Scorpion warning materials.

Due diligence:

In light of the Scorpion guidance, I think firms ought to have been on the look-out for the tell-tale signs of pension liberation and needed to undertake further due diligence and take appropriate action if it was apparent their customer might be at risk. Phoenix Life didn't undertake any further due diligence.

Given the information Phoenix Life had at the time, one feature of Mr P's transfer that it should have identified as a potential warning sign of liberation activity as identified by the Scorpion action pack was that Mr P's SSAS was recently registered. Phoenix Life should therefore have followed up on this to find out if other signs of liberation were present. Given this warning sign, I think it would have been fair and reasonable – and good practice – for Phoenix Life to look into the proposed transfer and the most reasonable way of going about that would have been to turn to the check list in the action pack to structure its due diligence into the transfer.

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

1. The nature/status of the receiving scheme

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

2. Description/promotion of the scheme

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

3. The scheme member

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

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

I don't think it would always have been necessary to follow the check list in its entirety. And I don't think an answer to any one single question on the check list would usually be conclusive in itself. A transferring scheme would therefore typically need to conduct investigations across several parts of the check list to establish whether liberation was a realistic threat.

I note that at the time of the transfer Rowanmoor was a long established SSAS provider and had some repute in the industry. Rowanmoor Trustees Limited also had legal and fiduciary duties as a professional trustee. There's an argument, therefore, that Phoenix Life could have taken comfort from this. I disagree. The Scorpion guidance gave ceding schemes an important role to play in protecting customers wanting to transfer a pension. It would defeat the purpose of the Scorpion guidance for a ceding scheme to have delegated that role to a different business – especially one that had a vested interest in the transfer proceeding. An important aspect in this is the fact that there is little regulatory oversight of single-member SSASs; they don't have to be registered with TPR. In the absence of that oversight, Phoenix Life was assuming, in effect, that Rowanmoor would want to maintain its standing in the industry and the trustee subsidiary would comply with its legal and fiduciary duties. In the context of guarding against pension scams – and an environment where providers and trustees clearly didn't always act as they should have done – I don't consider this to have been a prudent assumption.

The fact that a different part of Rowanmoor's business was regulated by the FCA doesn't change my thinking on this. The key point is that Rowanmoor Group Plc and Rowanmoor Trustees Limited (both of which were involved in the operation of the SSAS) *weren't* FCA-regulated so I see no reason why they would have operated with FCA regulations and Principles in mind – or why their actions would have come under FCA scrutiny. As such, I'm not persuaded Phoenix Life could, reasonably, have derived sufficient comfort about the Rowanmoor SSAS as a destination for Mr P's transfer.

Given the warning sign that should have been apparent when dealing with Mr P's transfer request, and the relatively limited information it had about the transfer, I think in this case Phoenix Life should have addressed all three parts of the check list and contacted Mr P as part of its due diligence.

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

Enquiries under part 1 (above) would mean that Phoenix Life would have been aware that the sponsoring firm for the SSAS had only recently been set up. It could easily have checked this at Companies House. It is likely that enquiries made of Mr P would have led Phoenix Life to conclude that Mr P wasn't meaningfully employed by Firm A. Investigations under part 2 would likely have disclosed that the intended investment was in overseas property – another potential warning sign under the Scorpion guidance.

Under part 3 Phoenix Life would likely have identified that Mr P had been approached out of the blue and was being advised by a non-regulated adviser. I say this because any contact with Mr P would likely have led to his giving Phoenix Life the same account that he provided us. Which is that Stevenson Pride was the firm that called him out of the blue and was recommending that he transfer his pension. This ought to have been corroborated by the fact that setting up a firm – Firm A – with no intention that it would ever trade, in order to set up a SSAS, was something that Mr P was unlikely to have done without being advised to do. Nor was it likely that Mr P would have considered the intended investments without being advised and guided through the process. So, Phoenix Life should have concluded that Mr P was, most likely, being advised by Stevenson Pride.

The check list recommends that in order to establish whether its member has been advised by a non-regulated adviser, the ceding firm should "*check whether advisers are registered with the FSA at www.fsa.gov.uk/fsaregister*". In other words, they should consult the FSA's online register of authorised firms. Phoenix Life should have taken that step, which is not difficult, and it would quickly have discovered that Mr P's adviser was indeed unauthorised.

Being *advised* by an unauthorised firm to transfer benefits from a personal pension plan would have been a breach of the general prohibition imposed by FSMA, which states no one can carry out regulated activities unless they're authorised or exempt. Anyone working in this field should have been aware that financial advisers need to be authorised to give regulated investment advice in the United Kingdom – indeed, the Scorpion insert itself makes this point.

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

<u>What should Phoenix Life have told Mr P – and would it have made a difference?</u>

I think Phoenix Life's failure to uncover this risk of illegal advice and then warn Mr P about it meant it didn't meet its obligations under Principles 2, 6 and 7 and COBS 2.1.1R. With those obligations in mind, it would have been appropriate for Phoenix Life to have informed Mr P that the firm he had been advised by was unregulated and could put his pension at risk. Phoenix Life should have said only authorised financial advisers are allowed to give advice on personal pension transfers, so he risked falling victim to illegal activity and losing regulatory protections.

I'm satisfied any messages along these lines would have changed Mr P's mind about the transfer. The messages would have followed conversations with Mr P so would have seemed to him (and indeed would have been) specific to his individual circumstances and would have been given in the context of Phoenix Life raising concerns about the risk of losing pension monies as a result of untrustworthy advice. This would have made Mr P aware that there were serious risks in using an unregulated adviser even if he was not liberating his pension. I think the gravity of any messages along these lines would prompt most reasonable people to change their mind. I've seen no persuasive reason why Mr P would have been any different. So, I consider that if Phoenix Life had acted as it should, Mr P wouldn't have proceeded with the transfer out of his personal pension or suffered the investment losses that followed.

<u>The cause of Mr P's loss</u>

I bear in mind that this complaint is similar to the type of claim that in legal proceedings would be treated as a claim for damages for negligent failure to give someone the information or advice to which they were entitled. In that kind of case, the court asks itself whether there is a sufficient connection between the harm for which the claimant seeks damages as compensation and the subject matter of the defendant's duty of care. The court looks to see what risk the defendant's duty was supposed to guard against and whether the claimant's loss represents that particular risk coming to fruition.

So, it's important I bear in mind that the Scorpion guidance was directed towards protecting people from the risk of pension liberation. And I agree with Phoenix Life that it doesn't appear to have happened here. The loss was suffered because Mr P accepted unsuitable advice from an introducer who wasn't authorised to act as a financial adviser at all, and it wasn't (as far as can be established taking into account what Mr P has said) a case of seeking to cash in a pension in an unauthorised way.

Nonetheless, the circumstances that gave rise to this complaint were very similar to those of a pension liberation scam: the transfer followed unsolicited contact from an unauthorised business and involved the setting up of a new pension scheme to house an investment and the involvement of recently established businesses. The Scorpion action pack and insert both recommend checking that financial advice comes only from an authorised person by checking the FSA/FCA register. And Phoenix Life's obligations under the Principles and COBS were of general application and went well beyond just protecting its customers from pension liberation. In the circumstances, even though this doesn't appear to be a case of pension liberation, I'm satisfied there is sufficient connection between the harm Mr P wants to be compensated for and the risk that Phoenix Life had a duty to guard against. So, I do consider it fair and reasonable for Phoenix Life to compensate Mr P for his losses.

<u>Summary</u>

- I think that Phoenix Life had a role to play in this transfer by carrying out due diligence. I don't think it could comply with its obligations under PRIN and COBS (set out above) by just processing the transfer. And I don't think it was sufficient to make this transfer with no consideration simply because the administrator and trustee were provided by Rowanmoor Group.

- Phoenix Life performed no due diligence, yet there was established industry good practice that could have been followed. In the absence of any process of its own, I think it's reasonable to consider that Phoenix Life ought to have conducted due diligence broadly in line with that good practice – set out in the Scorpion campaign Action Pack.

- Had Phoenix Life considered the transfer in line with the Scorpion guidance, it may well have satisfied itself that pension liberation was unlikely. But it would instead have uncovered a breach of the general prohibition in FSMA. With PRIN and COBS in mind, I don't think Phoenix Life could have ignored that.

- Phoenix Life should therefore have warned Mr P about the risk of being advised by someone not authorised to do so.

- Phoenix Life was a trusted and respected financial institution. I've seen no reason why Mr P would not have been concerned by such a warning from his pension provider. I think this would, more likely than not, have had the desired effect. Which would be to make him reconsider the transfer or seek guidance from a regulated adviser. I am satisfied that this would, more likely than not, have prevented him from transferring and suffering the financial loss that he did.

Putting things right

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

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

To compensate Mr P fairly, Phoenix Life must subtract the actual value of the Firm A 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 Firm A SSAS value at the date of my Final Decision. To arrive at this value, any amount in the Firm A SSAS bank account is to be included, but any overdue administration charges yet to be applied to the Firm A SSAS should be deducted. Mr P may be asked to give Phoenix Life his authority to enable it to obtain this information to assist in assessing his loss, in which case I expect him to provide it promptly.

My aim is to return Mr P to the position he 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 investments: Akbuk Resort Group and Dolphin Capital. This is because there is no secondary market for these investments. Therefore as part of calculating compensation:

- Phoenix Life should seek to agree an amount with the Firm A SSAS as a commercial value for the illiquid investments above, then pay the sum agreed to the Firm A SSAS plus any costs, and take ownership of those investments. The actual value used in the calculations should include anything Phoenix Life has paid to the Firm A SSAS for illiquid investments.

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

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

Notional value

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

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

Phoenix Life should reinstate Mr P's original pension plan as if its value on the date of my Final Decision was equal to the amount of any loss established from the steps above (and it performs thereafter in line with the funds Mr P was invested in).

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

If Phoenix Life is unable to reinstate Mr P's pension and it is open to new business, it should set up a **new** pension plan with a value equal to the amount of any loss on the date of my Final Decision. The new plan should have features, costs and investment choices that are as close as possible to Mr P's original pension.

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

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

To make this reduction, it's reasonable to assume that Mr P is likely to be a basic rate taxpayer in retirement. So, if the loss represents further 'uncrystallised' funds from which Mr P was yet to take his 25% tax-free cash, then only the remaining 75% portion would be taxed at 20%. This results in an overall reduction of 15%, which should be applied to the compensation amount if it's paid direct to him in cash.

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

If payment of compensation is not made within 28 days of Phoenix Life receiving Mr P'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 Mr P how much has been taken off. Phoenix Life should give Mr P a tax deduction certificate in respect of interest if Mr P asks for one, so he can reclaim the tax on interest from HMRC if appropriate.

This interest is not required if Phoenix Life is reinstating Mr P's plan for the amount of the loss – as the reinstated sum should, by definition, mirror the performance after the date of my Final Decision of the funds in which Mr P was invested. However, I expect any such reinstatement to be achieved promptly.

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

My final decision

For the reasons given above, I uphold this complaint Phoenix Life Limited must now put things right in line with the approach set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 14 March 2025.

Gary Lane

Ombudsman