

The complaint

Mr H has complained about a transfer of his Phoenix Life Limited ("Phoenix") personal pension to a small self-administered scheme ("SSAS") in June 2014. Mr H's SSAS was subsequently used to invest in The Resort Group – fractional hotel room ownership in Cape Verde. The investment now appears to have little value. Mr H says he has lost out financially as a result.

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

What happened

On 9 February 2013, Mr H signed a letter of authority allowing Wise Review to obtain details, and transfer documents, in relation to his pension. Wise Review wrote to Phoenix, enclosing Mr H's letter of authority and information request. Phoenix sent Wise Review the requested information on 26 February 2013. Wise Review wasn't authorised by the Financial Services Authority (FSA) (after 1 April 2013 the Financial Conduct Authority (FCA)).

Mr H says his interest in the transfer followed an unsolicited approach. He says he was attracted by the prospect of improved investment returns.

On 14 March 2014, a company was incorporated with Mr H as director. I'll refer to this company as Firm A. On 8 April 2014, Mr H 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 The Resort Group Cape Verde. The application listed Moneywise Financial Advisors Ltd ("Moneywise") as the trustee adviser. Moneywise was regulated by the FSA. The SSAS application also documented a second personal pension with Prudential to be transferred with a value around £112,000.

Mr H signed a letter of authority for First Review Pension Service (FRPS) on 8 April 2014, and explains that he was passed to FRPS and that he met with an adviser from that company a number of times after being introduced by Wise Review Ltd. Mr H also had contact with Moneywise Financial Advisors Ltd (Moneywise) who, on 17 April 2014, wrote to Mr H providing advice to him as the trustee of the Firm A SSAS. FRPS were not regulated by the FCA.

On 10 June 2014 Rowanmoor Group submitted a transfer request to Phoenix via Origo Options (an electronic, paperless transfer system). That request named Rowanmoor Group Plc as the receiving provider. It also listed the 'Adviser Firm Name' as Moneywise Financial Advisors Limited.

Mr H's pension was transferred on 21 June 2014. His transfer value was around £19,600. He was 59 years old at the time of the transfer.

On 20 June 2014 a second transfer around £117,000 was transfer to the Firm A SSAS from Prudential.

On 26 June £84,008.45 of the SSAS fund was invested with The Resort Group to purchase part ownership of hotel accommodation in Cape Verde. The remaining SSAS funds (around £50,000) were placed into the SSAS bank account.

Investments made in The Resort Group promised returns based on hotel room occupancy which did not materialise. The investments have no secondary market and investors are unable to recover their capital from these investments.

Mr H made a claim to the Financial Services Compensation Scheme ("FSCS") against Moneywise, who were in default. The FSCS upheld Mr H's claim and made an interim payment of £39,944.01 on 21 April 2020 as it was not able to accurately value the investment in The Resort Group at that time.

In January 2020, Mr H complained to Phoenix. Briefly, his argument is that Phoenix ought to have spotted, and told him about, a number of warning signs in relation to the transfer, including (but not limited to) the following: the SSAS was newly registered, there wasn't a genuine employment link to the sponsoring employer, the catalyst for the transfer was an unsolicited call and he had been advised by an unregulated business.

Phoenix didn't uphold the complaint. It said Mr H had a legal right to transfer and that none of the information it had about the transfer at the time gave it cause for concern. It considered that Rowanmoor was a trusted and professional administrator with a good reputation.

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

I issued a provisional decision to both parties to explain what I was likely to decide based on what I'd seen and offered an opportunity to comment or provide additional information.

What I said in my provisional decision

"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 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 indeed 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 booklet issued by TPAS which gives more information, including example scenarios, about pension liberation. Guidance provided by TPR on its website at the time said this longer leaflet was intended to be sent to members who had queries about pension liberation fraud.*
- An ‘action pack’ for scheme administrators that highlighted the warning signs present in a number of transfer examples. It suggested transferring schemes should “look out for” various warning signs of liberation. If any of the warning signs applied, the action pack provided a check list that schemes could use to help find out more about the receiving scheme and how the member came to make the transfer request. Where transferring schemes still had concerns, they were encouraged to write to members to warn them of the potential tax consequences of their actions; to consider delaying the transfer; to seek legal advice; and to direct the member to TPAS, TPR or Action Fraud.*

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

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

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

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

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

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. 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.

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

I am making a decision on events that occurred around ten years ago. So, where evidence is incomplete I am making a decision on what I think was most likely the case, based on a balance of probability.

Mr H's complaint explains that Wise Review called him out of the blue to offer him a pension review. This is in keeping with other cases involving this unregulated firm. It is also clear that Mr H signed a letter of authority for Wise Review. So I am persuaded that Mr H, more likely than not, received an approach, out of the blue, from Wise Review. And that this was a first step on the path that led to this transfer.

Mr H has also referred to the involvement of FRPS which is again corroborated by a signed letter of authority. The dates of the letters of authority imply that FRPS' involvement followed that of Wise Review Ltd. So was closer to the point of any recommendation or persuasion to set up a SSAS in order to facilitate the investment in The Resort Group. But, as I will explain, I am not persuaded that it is reasonable to conclude that Mr H was given, what amounted to, financial advice to transfer by either Wise Review or FRPS.

Moneywise was named in the Origo transfer request as the financial adviser. Which would have been the information Phoenix had at the time. I am however aware that the Origo request was submitted by Rowanmoor so not completed by Mr H. So is not, by itself compelling evidence that Moneywise advised Mr H on his pension transfer. But I have seen that prior to the transfer, in April 2014, Moneywise provided Mr H with advice in order to satisfy the requirement under section 36 of the Pensions Act 1995. This was advice in relation to his role as the SSAS trustee. So was not necessarily the same as a personal recommendation to transfer his personal pension to the SSAS. But it does point to the involvement of Moneywise (a regulated financial advice firm) prior to the transfer being requested. And would have been something that Mr H would have been aware of happening shortly before the transfer was requested.

I've also seen additional evidence that Mr H successfully applied to the FSCS for compensation for the unsuitable advice that Moneywise gave him. Part of such an application would require Mr H to confirm that he had not received advice from any other party. I don't think that Mr H would have submitted such an application unless he considered that Moneywise were the party that were responsible for advising him on his pension transfer.

Taking all of the evidence into consideration I accept that there was an involvement of three different firms, but I'm persuaded that Mr H, more likely than not, considered at the time that he had been advised by Moneywise to transfer his pensions to the Firm A SSAS. Which is key here, because I think this is more likely than not the explanation that he would have given to Phoenix if it had asked him about that at the time.

What did Phoenix 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.

I have seen no evidence that Phoenix sent Mr H the Scorpion insert or any other type of information that would have conveyed the same message that the Pensions Regulator's guidance of the time intended. It had received letters of authority from a number of firms in the run up to the transfer, which would have been points at which the information should have been provided. The only response that Phoenix appeared to have sent was to the requesting firms. Which I don't think was adequate to ensure any information would be shared with Mr H. This failure denied Mr H key information the regulator considered to be relevant to consumers.

The focus of the Scorpion insert that would have been sent at the time focussed on the unauthorised access to pension funds before age 55. Mr H was older than 55 so I don't think he would reasonably have considered the message in this material particularly relevant to his circumstances. So I am not persuaded that sending it to him would have made a difference in what he went on to do in this case.

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 didn't undertake any further due diligence. There is no evidence of any additional checks and it explains that it considered Rowanmoor a trusted provider.

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

Phoenix should therefore have followed up on this to find out if other signs of liberation were present. Given this warning sign, I think it would have been fair and reasonable – and good practice – for Phoenix to look into the proposed transfer and the most reasonable way of going about that would have been to turn to the check list in the action pack to structure its due diligence into the transfer.

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

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

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

- 2. Description/promotion of the scheme*

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

3. The scheme member

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

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

I don't think it would always have been necessary to follow the check list in its entirety. And I don't think an answer to any one single question on the check list would usually be conclusive in itself. A transferring scheme would therefore typically need to conduct investigations across several parts of the check list to establish whether liberation was a realistic threat. Given the warning sign that should have been apparent when dealing with Mr H's transfer request, and the relatively limited information it had about the transfer, I think in this case Phoenix should have addressed all three parts of the check list and contacted Mr H as part of its due diligence.

Had it done so, I think it likely that Phoenix would have built up the following information about the transfer – all of which were signs of potential pension liberation under the Scorpion guidance:

- Mr H was transferring to a recently established scheme with a newly incorporated sponsoring employer.*
- Although Mr H was a director of the sponsoring employer, it was unlikely to have been genuinely trading and providing them with an income. It was, essentially, a means to establish a pension arrangement, which the Scorpion guidance indicated could be a sign of liberation activity.*
- Mr H's intended investment was overseas and unregulated.*

Against this, Phoenix would also have known, and established, the following which would have indicated liberation wasn't a concern:

- Mr H's reason for transferring was to access a particular investment and improve returns. He wasn't expecting a cash payment following the transfer.*
- Mr H was getting advice from Moneywise who was regulated.*

So whilst Phoenix would have (had it conducted thorough due diligence) found there to be some liberation warning signs, I think it would have ultimately concluded that the liberation threat was minimal given Mr H's reasons for transferring. So even if it had done all it should have done, I'm satisfied Phoenix wouldn't have considered there to be reason to provide any further warnings to Mr H, over and above those that it ought to have provided in the Scorpion insert.

Mr H argues that Phoenix should have done more to warn him about what he was intending to do, even if the liberation threat would have appeared to be minimal. Specifically, Mr H argues that Phoenix should have warned about the unusual nature of the receiving scheme (established not long before the transfer), the lack of a real employment link to the sponsoring employer and the nature of Mr H's intended investments (non-standard and high risk).

But I think those arguments misread what should, reasonably, have been expected of transferring schemes at that time. Investigations into the receiving scheme, sponsoring employer and intended investments were a means to an end: to establish the risk of liberation. Once that threat was discounted then I think it reasonable for ceding schemes to consider the scam threat as being minimal and process the transfer as normal.

I also see no persuasive reason why a ceding scheme needed to share with its members the liberation warnings signs it found – but discounted – during its due diligence process or its reasons why it might have thought at some point liberation was a possibility. 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. Expecting a firm to share its due diligence "workings" in this way would cut across this (and could potentially be viewed as a self-serving tactic to hold on to a customer).

Also, Mr H wouldn't have given the impression to Phoenix that he was being led through a process by another party acting in a potentially unlawful way – which would be the usual pattern for someone falling victim to a scam. Instead, as I've explained, the Origo Options request told Phoenix that Moneywise were the adviser. And I think that Mr H would, more likely than not have confirmed that if asked at the time. I haven't seen anything that the business would, reasonably, have been aware of that should have alerted it to the potential of Mr H being misled in this way. Mr H was entitled to establish an employer for the purposes of being able to act as trustee of their own pension scheme and, on its own, a non-trading employer isn't cause for concern. It's an important point that goes to the heart of this case: Mr H's actions would have appeared to be following regulated financial advice and a business could, reasonably, have taken comfort from that – especially when one considers the threat of pension liberation would also have appeared minimal. In the circumstances, I'm satisfied Phoenix wouldn't, reasonably, have thought a scam was in progress.

It therefore follows that I'm satisfied Mr H wouldn't have stopped the transfer even if Phoenix had done more thorough due diligence in line with the Scorpion action pack. The end result of any such due diligence wouldn't have resulted in any warnings being given to Mr H. And I don't think the mere act of contacting Mr H and asking questions about the transfer would have prompted a change of heart. Any due diligence questions would have been asked with the intention of establishing the liberation risk Mr H was facing – a risk that doesn't appear to apply here.

Similar considerations apply to the sending of the Scorpion insert. As discussed previously, Phoenix should have sent this but didn't do so. However, as the insert was focussed on the threat posed by liberation – and the consequences of taking cash from a pension before the age of 55 in particular – I don't think it would have dissuaded Mr H from transferring given he was transferring for different reasons.

Other arguments

Mr H has suggested that ceding schemes were required to check whether a member had a statutory right to transfer their pension. Which, he argues, meant that Phoenix should have checked his employment status so as to ensure he had a right to transfer. He considers that

the outcome of those checks would have caused Phoenix concerns because of a lack of employment link to the SSAS's sponsoring employer. I've outlined the obligations businesses had earlier in this decision. I won't repeat them here other than to say they didn't include an obligation for ceding schemes to check, as a matter of course, whether the transferring member was earning an income. And Phoenix had no reason to think Mr H wasn't earning either. Indeed, it would have been surprising if it had thought this – he has told us he was employed at the time. So, I see no reason why Phoenix would, or should, have probed this issue any further."

Responses to my provisional decision

Both parties acknowledged receipt of my provisional decision and neither offered any further comment or evidence for me to consider.

What I've decided – and why

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

Having considered all of the evidence and arguments again my final decision is the same as my provisional decision and for the same rationale that I set out in that decision and set out above.

In summary, I don't think that Phoenix did everything that it should have done to properly fulfil its responsibilities in COBS 2.1.1R or the Principles for Businesses. I explained in my provisional decision how I think Phoenix should have approached Mr H's transfer based on the guidance in place at the time. But I also need to consider what the impact of Phoenix's failings would likely have been.

Without repeating the full rationale in the above provisional decision, I am still persuaded that Phoenix's failure to complete adequate due diligence would not, on a balance of probability, have made a difference in this case. I think that the information that Phoenix would have found would not have led it to consider there was a material risk of a scam. I think it would have correctly discounted the risk that Mr H was making any unauthorised access to his pension and would, more likely than not, have established that Mr H was receiving advice from a regulated party.

For the above reasons, including the rationale in my provisional decision, I don't think that Phoenix would have had cause to give Mr H any specific warnings about his transfer. And it would have proceeded in the same way that it did.

My final decision

For the above reasons I am not upholding Mr H's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 9 January 2025.

Gary Lane
Ombudsman