DRN-5261544

The complaint

Mr J has complained about a transfer of his personal pension with Phoenix Life Limited (Phoenix Life) to a small self-administered scheme (SSAS) in January 2014. Mr J's SSAS was subsequently used to invest in The Resort Group (TRG), an overseas property development in Cape Verde. The investment now appears to have little value. Mr J says he's lost out financially as a result.

Mr J says Phoenix Life failed in its responsibilities when dealing with the transfer request. He says Phoenix Life should've 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 J 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've done.

Mr J's personal pension was originally held with Standard Life Assurance Limited (Standard Life) but transferred to Phoenix Life in October 2023. For ease, and in the main, I've just referred to Phoenix Life below which should be taken to include Standard Life as appropriate.

What happened

I issued a provisional decision on 7 October 2024. I set out what had happened and my provisional findings. I said I hadn't referred to everything, just what I saw as the key events and correspondence. I've repeated here what I said:

'*On 22 October 2013 Phoenix Life received a request for information from Carrington Mitchell Limited (CML), an unregulated firm, with a letter of authority (LOA) Mr J had signed on 17 October 2013. CML asked for transfer values and discharge documents to be provided to CML and two other firms: First Review Pension Services Limited (FRPS), which wasn't a regulated firm, and Moneywise. At the time Moneywise Financial Advisers Limited was a regulated firm. Phoenix Life sent information to CML on 5 November 2013.*

On 18 November 2013 Mr J signed an application form to establish a SSAS with Rowanmoor Group plc (Rowanmoor). The principal employer would be a company I'll call J Limited. The trustee adviser was shown as Sequence Financial Limited. At the time, Sequence Financial Management Limited (Sequence) was a regulated firm. The proposed investment was in TRG, Cape Verde. Mr J would be transferring benefits held with Phoenix Life and another provider who I'll call Provider B. On the same date Mr J signed an authorisation form for FRPS to submit his application to establish a SSAS to Rowanmoor and authorising FRPS and Rowanmoor to correspond and release information to each other relating to the SSAS.

On 21 November 2013 J Limited was incorporated with Mr J as the sole director. DWL Company Services Limited (DWL) was involved in setting up J Limited and registering it with Companies House. The SSAS was set up on 4 December 2013 by an interim deed. A deed of amendment was later executed along with a deed of appointment.

On 6 December 2013 Rowanmoor wrote to Phoenix Life saying Mr J wanted to transfer to the SSAS and asking for any necessary documentation to be completed or supplied. A transfer in ceding scheme information form and a LOA from Mr J were enclosed. On the same date Rowanmoor wrote to FRPS thanking them for completing the SSAS application forms and saying Rowanmoor had contacted Phoenix Life and Provider B to obtain the information required to process the transfer of Mr J's benefits to the SSAS. Rowanmoor sent a similar letter to Mr J. On the same date Rowanmoor also wrote to Mr J about the proposed investment – fractional ownership of an apartment at Dunas Beach, Cape Verde.

Phoenix Life sent information to Rowanmoor on 9 December 2013, including transfer values and details of what was required to enable a transfer – verbal or written acceptance from the planholder and receiving scheme, bank details and full details of the receiving scheme, including a copy of HMRC's approval and Pension Scheme Tax Registration (PSTR) number.

On 18 December 2013 Rowanmoor wrote to Mr J saying the SSAS had been registered with HMRC and giving the PSTR number. Sequence also wrote to him on the same date. Sequence said it was a requirement under section 36 of the Pensions Act 1995 that Mr J, as trustee, take and consider appropriate advice on whether the proposed investment was satisfactory for the aims of the scheme and he'd appointed Sequence to provide that advice. Under 'Scope of our advice', Sequence said it hadn't advised Mr J on the establishment of his SSAS and its opinion on the particular investment (TRG Cape Verde) was provided to him as a trustee and not in his personal capacity or as a member of the SSAS. Sequence said it wasn't providing advice that would be deemed regulated under the Financial Services and Markets Act 2000 (FSMA). Sequence concluded that TRG was a suitable investment for Mr J's SSAS, albeit for more adventurous investors and ideally with diversification.

On 23 December 2013 Mr J signed an instruction to Rowanmoor to invest £70,500 in TRG. He confirmed he'd considered Sequence's advice letter, a copy of which he signed to say he'd read and understood.

On 7 January 2014 Rowanmoor faxed Phoenix Life forms signed by Mr J and Rowanmoor to transfer his benefits to the SSAS. A copy of HMRC's Notification of Registration was enclosed which confirmed the SSAS had been registered on 5 December 2013 and gave the PSTR number.

On 16 January 2014 Phoenix Life transferred £52,126.01 to Rowanmoor.

Mr J signed Rowanmoor's declaration on 21 January 2013 (I think that should've read 2014) in connection with TRG investment. Amongst other things, he confirmed he'd read the purchase contract and he understood there were inherent risks in the transaction.

On 27 January 2014 Rowanmoor wrote to Mr J confirming that a transfer value of £52,126.01 had been received from Phoenix Life. Rowanmoor wrote to Mr J on 3 March 2014 confirming that a transfer value of £23,124.63 had been received from Provider B.

The bulk of the SSAS fund – £70,500 – was invested in TRG. A residual amount of about £1,200 remained in the SSAS bank account and was later invested in a portfolio with a firm now called Parmenion Capital Partners LLP, a Discretionary Fund Manager (DFM). I think Sequence facilitated that investment which involved Sequence's cash and investment management service. The idea was that any residual funds and any future investment returns could be invested via the DFM with Sequence monitoring the SSAS bank account to ensure the remaining balance was able to meet the SSAS and bank fees.

Initially Mr J's TRG investment provided some returns but eventually these dried up.

Development of the Cape Verde resort has been beset by problems and there's no market for Mr J's investment – fractional ownership of hotel accommodation.

In June 2020 Mr J, with the help of his representative, complained to Phoenix Life. Mr J said he'd been provided with a pension valuation requested via Rowanmoor in conjunction with Sequence/Cantwell Grove Limited (CGL), a regulated firm and a non regulated third party respectively. Within a very short time of Rowanmoor making the transfer request, Phoenix Life had paid over the transfer value. Mr J said Phoenix Life had failed to conduct adequate due diligence into the transfer or give him the Scorpion warnings (I mention the Scorpion campaign further below). Mr J set out what he thought Phoenix Life should've done, which included ensuring any third party had the appropriate permissions, qualifications and skills to carry out the proposed transaction and that he was given appropriate warnings, including the Scorpion insert.

Phoenix Life didn't uphold the complaint. Essentially it said it wouldn't have had any concerns about Rowanmoor. As to CGL, none of the paperwork makes any reference to that firm. Phoenix Life said all of the information provided was considered and it was concluded that the transfer request appeared to meet the requirements for a statutory right to transfer. Phoenix Life was satisfied that the appropriate level of due diligence applicable at the time was exercised in processing the transfer. It recognised that practices had changed since January 2014 but it wouldn't be appropriate to apply a current approach to a past situation.

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

Mr J has also complained about the transfer from Provider B. That complaint was originally submitted to us. But it was then referred to the Pensions Ombudsman so we're no longer dealing with it. But, in deciding Mr J's complaint about Phoenix Life, I've taken into account how his other transfer request was dealt with and what information Mr J was given by Provider B.

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

That said, the launch of the Scorpion guidance was an important moment in so far 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 and who did what?</u>

Mr J didn't give much detail in his complaint to Phoenix Life about what happened. He said he'd been provided with a pension valuation from Phoenix Life which had been requested via Rowanmoor in conjunction with Sequence/CGL, a regulated firm and a non regulated third party respectively.

Looking first at CGL, as Phoenix Life pointed out when it responded to Mr J's complaint, CGL isn't mentioned in the documentation. CGL was a SSAS provider whereas here the SSAS was with Rowanmoor. I haven't seen anything to show that CGL was involved in any capacity. So I think the reference to CGL must've been an error.

But Sequence was clearly involved. There are references to Sequence in the paperwork and, when our investigator spoke to Mr J to try to find out more about what had happened, Mr J said he'd been cold called by Sequence. And he believed it had been Sequence who'd given him advice. He said Sequence had visited him at home and they'd taken a fee which he could evidence. He later emailed a number of documents relating, in the main, to Sequence.

To some extent, I think, based on the documents I've seen, that Mr J's recollection that advice was given by Sequence is correct. And he did pay Sequence a fee. Sequence wrote to him on 20 February 2013 with an invoice for £120 (although Sequence said it had already been settled directly from the SSAS bank account). I've also seen emails between Rowanmoor and Sequence in March 2014 about fees (£120) paid by Rowanmoor to Sequence on behalf of various clients, including Mr J.

But Sequence's invoice said the fee was for providing written advice for the purposes of section 36 of the Pensions Act 1995. That provision requires trustees (and here Mr J was a trustee) of an occupational pension scheme (which a SSAS is) to obtain and consider written advice as to whether an investment is satisfactory having regard to the aims of the scheme. That's consistent with the SSAS application form which showed the trustee adviser as Sequence. Further, Sequence's letter to Mr J dated 18 December 2013 said the advice given was pursuant to section 36. All in all I think it's clear from the documents that Sequence provided the section 36 advice. That advice isn't regulated although at the time Sequence was a regulated firm. And, as I've noted above, Sequence may also have been involved in the Parmenion portfolio investment for the remaining fund after TRG investment had been made.

But my focus is more on what led to Mr J transferring to the SSAS in the first place. Including whether, given what I've said about Sequence's role as evidenced by the paperwork, Mr J's recollection that it was Sequence who cold called him and visited him at home is likely to be accurate. I note here that Sequence's letter of 18 December 2013 expressly said that it hadn't advised in connection with the setting up of the SSAS. If Sequence's role was limited to providing section 36 advice (and leaving aside any role it may have later played in the Parmenion portfolio), Sequence would only have become involved once the decision to transfer to the SSAS and invest in TRG had been made. It's clear from the paperwork that *other firms were involved from the outset. So there's potential for confusion. And, given that it's now over ten years after the event, some difficulty in recalling exactly who did what is understandable.*

I accept that things started off when Mr J received an unsolicited call. We've seen that an information request was made to Phoenix Life by CML – an unregulated firm which was dissolved on 19 April 2016. Although Mr J recalls that cold call as having been made by Sequence, I'd have thought it more likely it was made by CML who then got Mr J to sign the LOA.

That LOA mentioned Moneywise. At the time, Moneywise Financial Advisers Limited was a regulated firm and authorised by the FCA to provide regulated financial advice about pensions. But Moneywise was one of three firms shown on the LOA and it seems that Phoenix Life sent the requested information to CML. No other documents refer to Moneywise. So there's nothing to indicate that Moneywise was actually involved.

But there's documentary evidence to show that the other firm mentioned on the LOA – FRPS – was involved in setting up the SSAS. FRPS was an unregulated firm which was dissolved on 12 September 2017. The SSAS application was submitted by FRPS to Rowanmoor – as noted above, Mr J signed a form of authority on 18 November 2013 authorising FRPS to submit the application which Rowanmoor acknowledged on 6 December 2013. I'd have thought that whoever submitted the application was the party who'd told Mr J about setting up a SSAS so he could invest in TRG. Which would suggest Mr J met with someone from FRPS, not Sequence.

That's supported by a document Mr J has produced. Although, in the main, the documents he supplied to the investigator related to Sequence, one was to do with FRPS. It was the first page of FRPS' terms of business. I don't see why Mr J would've had that document unless he'd been dealing with FRPS and it had been given to him by FRPS.

The document said FRPS was an independent company whose business is to:

- *introduce its customers to third parties who can provide pension scheme services and investment opportunities; and*
- *help customers with the process of establishing a 'SSAS' pension scheme to receive one or more transfers of existing pension funds and then invest those funds in chosen investment opportunities.*

It continued, in bold:

'Our role is to introduce customers to investment opportunities which we believe offer good potential and, if customers wish, to assist with certain steps that are necessary in order for them to take up those opportunities. We do not claim any specialist knowledge or expertise as to the future performance of any investment product or investment opportunity. Any information provided by us is purely factual and available in the open market.'

Given FRPS' role in the matter as set out above, I think it's likely to have been FRPS, not Sequence, who visited Mr J at home and discussed with him the possibility of transferring to a SSAS and investing in TRG. I'd add that J Limited was set up through DLW, which I think is further evidence of FRPS's involvement. DLW was a company formation agent and not authorised by the FCA. DWL was located with FRPS in the same commercial area of Derby. So it would be convenient for FRPS and DLW to work together. On a broader note, by December 2014 DLW and FRPS also had a shared director who had links to TRG. Even if those developments happened after Mr J's transfer, I think it still indicates that FRPS (along with DLW) probably had an interest in securing funds for TRG.

As to how FRPS went about that and what was likely said during a meeting with Mr J, on the face of it, from FRPS' terms of business, FRPS' role didn't extend to giving advice. But, in giving information about a SSAS and TRG investment, it would've been very easy for FRPS to stray into advice territory. I think it would've been difficult for whatever FRPS said about why Mr J might want to set up a SSAS so he could invest in TRG not to amount to an express or implicit recommendation that Mr J transfer his Phoenix Life pension. Especially given what I've said about FRPS having an interest in raising funds for TRG.

I think it's likely that during the meeting Mr H was advised to transfer his existing pensions to a SSAS so he could invest in TRG and which would perform better than his existing pensions. I say that because what Mr J ended up doing – setting up his own limited company, establishing a SSAS, transferring his existing pension and investing in TRG – were complex and unusual arrangements for someone such as Mr J. He wasn't a sophisticated investor. I can't see he'd have done all that, or even known that sort of arrangement was available to him, unless he'd been told it would be a good idea and he'd end up better off.

Advice to transfer out of his existing Phoenix Life pension would be regulated advice and which should only have been given by an FCA authorised adviser, which FRPS wasn't.

<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. Phoenix Life would've been well aware of the industry guidance to try to combat pension liberation fraud at the time and Phoenix Life had a duty to ensure their member was given appropriate warnings. Sending the insert to customers asking to transfer their pensions was a simple and inexpensive step for pension providers to take and one which wouldn't have got in the way of efficiently dealing with transfer requests. Here Phoenix Life didn't send Mr J the Scorpion insert or equivalent.

As I've mentioned, Mr J has also complained about another transfer. From the information I've seen about that complaint, Provider B did include a copy of the Scorpion insert 'Predators Stalk Your Pension' in its letter to Rowanmoor on 18 December 2013. But the insert should've been sent direct to Mr J. It would've defeated the purpose of the insert if, instead of sending it to the customer, providers sent it to a party involved in the transfer (and who, as here, might have a vested interest in the transfer proceeding) in the hope that the insert would then be shared with the client.

In the circumstances I can't say that Mr J did see the insert. As I've said, Phoenix Life didn't send it to him and I can't be sure that the copy which Provider B sent was passed on to him by Rowanmoor. On balance, I don't think it was passed on to Mr J.

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 established that the receiving scheme was formally registered and approved by HMRC. And Phoenix Life had no concerns about Rowanmoor as the receiving provider. On that point, at the time, 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 J's transfer.

The Scorpion guidance at that time referred to six warning signs and said if any one was present then transferring firms needed to run through the checklist later in the guidance to find out more about the transfer. In this case the first warning sign the guidance refers to was present – that Mr J's SSAS was recently registered. The transfer request was made on 6 December 2013. That was only two days after the SSAS had been set up. And, on 7 January 2014 Phoenix Life received a copy of HMRC's Notification of Registration which showed the SSAS had only been registered on 5 December 2013, only the day before the transfer request was made.

Given this warning sign, I think it would've 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. Given the warning sign that should've been apparent when dealing with Mr J'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 J as part of its due diligence.

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

If Phoenix Life had followed the questions in part 1 above it should've found out that, not only was the SSAS recently established, but so was the sponsoring employer. And that J Limited was registered to Mr J's home address, he was the sole director, it was a dormant company and he wasn't actually employed by it in any meaningful sense.

Investigations into part 2 would've identified that Mr J hadn't been offered any form of cash incentive to transfer nor had he been told he could access his pension funds early. But he'd be investing in an overseas property development – a resort in Cape Verde, a type of investment which might feature in pension liberation (overseas, unregulated and/or involving unusual or creative techniques).

If Phoenix Life had made enquiries under part 3 of the checklist, Phoenix Life would've likely found out that Mr J had been cold called and that he'd been dealing with an unregulated introducer – FRPS. I say that taking into account what I've said above about Mr J now likely being confused about who he'd spoken to and about what. As I've said, Sequence was a regulated adviser. But, from what I've seen, I think Sequence's role was limited to giving section 36 advice (and later in connection with the Parmenion portfolio). Had Phoenix Life made enquiries at the time, I think Mr J would've been far clearer about who he'd been dealing with. As I've said, it's clear from the documentary evidence that FRPS was involved from the outset and I think Mr J would've mentioned that firm. So the position wouldn't have been that Phoenix Life could've been reasonably reassured by the involvement of a regulated adviser, at least in terms of what had driven the transfer and the TRG investment.

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 J'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 FRPS' 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 J – 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 J 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 J that the firm he'd 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 Mr J risked falling victim to illegal activity and losing regulatory protections.

I'm satisfied any messages along these lines would have changed Mr J's mind about the transfer. The messages would have followed conversations with him 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 J aware that there were serious risks in using an unregulated adviser even if he wasn't 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 J would've been any different. I think a warning that the firm he'd been advised by was unregulated and was acting unlawfully in advising him would've raised a very clear red flag to Mr J and made him think about whether what the adviser had said was reliable and if he'd really likely to be acting in Mr J's best interest.

In saying that I don't overlook that Mr J did receive some warnings. Sequence's letter of 18 December 2013 set out a number of risks attaching to TRG investment and, amongst other things, Sequence said it wasn't suitable for a cautious investor. And in signing Rowanmoor's declaration on 21 January 2014, Mr J confirmed he understood there were inherent risks with the investment. But, in my view, pointing out that the investment carried risks wasn't the same as giving Mr J a message that he was likely being led through a process by those who shouldn't have been advising him and in doing so were acting unlawfully. I think that would've been a very strong warning and would've made Mr J reconsider what he'd been told and if he could really trust those he'd been dealing with. And I haven't seen that Provider B gave Mr J any warnings along the lines I consider Phoenix Life should've done. As I've said, although Provider B did issue the Scorpion insert, it wasn't sent direct to Mr J. I don't think it would've been passed on to him which means he didn't see it. In my view, if Phoenix Life had acted as it should've done, that would've caused Mr J to reflect and he'd have decided against acting on what he'd been told. So he wouldn't have proceeded with the transfer out of his personal pension or suffered the investment losses that followed.

<u>The cause of Mr J'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 that doesn't appear to have happened here. The loss was suffered because Mr J 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 J 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 J 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 J for his losses.'

I went on to set out what Phoenix Life needed to do to put things right for Mr J.

We got a response to my provisional decision from Standard Life who, at the time of the transfer, held Mr J's personal pension before it was later transferred to Phoenix Life. I've treated the comments as having been made on behalf of Phoenix Life, the respondent to this complaint. And so, for ease of reading (and consistency with my provisional decision) I'm just going to refer to Phoenix Life.

- At the time of the transfer Phoenix Life had to be on the lookout for warning signs of pension liberation. The updated guidance about pension scams wasn't introduced until after Mr J's transfer had taken place.
- There were a number of both regulated and unregulated firms involved with the initial transfer request. Mr J's recollections as to who provided the advice to transfer aren't clear. The LOA details three different firms, including Moneywise, who was regulated. But I'd concluded that it was FRPS who'd advised Mr J to transfer to a SSAS, based on the documents I'd reviewed. Phoenix Life didn't have sight of the SSAS application from FRPS to Rowanmoor so wouldn't have been aware of that at the time. Phoenix Life saw nothing to indicate FRPS' involvement, apart from it being one of the firms listed on the LOA.
- Phoenix Life wasn't required to give advice. The purpose of the Scorpion leaflet was to alert the customer to the risks of pension liberation. If the leaflet had been sent to Mr J it's unlikely it would've resonated with him as he wasn't looking to access his pension early.
- Mr J did receive some warnings about the high risk investment and that it was only suitable for adventurous investors but he continued anyway. So it didn't follow that he'd have stopped the transfer if he'd been warned that one of the firms he was dealing with was unregulated. He clearly intended to continue with the particular investment despite the risks and any warnings from Phoenix Life wouldn't have changed his mind.

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.

Looking at Phoenix Life's comments, I don't disagree that, at the time of Mr J's transfer (January 2014), the focus of the Scorpion guidance was pension liberation fraud – that is early access (typically before age 55) to pension benefits. It wasn't until later – July 2014 – that the guidance was widened to cover pension scams more generally. I've looked at what Phoenix Life did (or didn't do) based on the February 2013 Scorpion guidance.

I concluded that it had been FRPS, an unregulated firm, who'd advised Mr J in connection with the transfer. That was based on all the evidence I'd seen, including what we'd been told about what had happened and the contemporaneous documentation. The LOA did mention a regulated firm, Moneywise. But I said there was nothing else to indicate that Moneywise had actually been involved. Whereas, in addition to being shown on the LOA, FRPS had submitted the SSAS application to Rowanmoor. I appreciate that Phoenix Life didn't see the SSAS application form. But it was relevant to my consideration of who'd advised Mr J. I set out why I considered that had been FRPS.

And, given that finding, later on in my provisional decision, I said that's what Mr J would've told Phoenix Life if, as part of its due diligence process, it had made enquiries of him. Including as to how he'd been contacted, what he'd been told and by whom. Here I think he'd have said he'd been dealing with FRPS and they'd visited him at home and recommended he transfer to a SSAS so he could invest in TRG. So it turned on what Phoenix Life should've found out, if due diligence in line with the 2013 Scorpion guidance had been carried out.

I agree that Phoenix Life wasn't required to give advice (and was presumably precluded from doing so). But I'm not saying that Phoenix Life should've advised Mr J against transferring. What I'm saying is, if Phoenix Life had found out that Mr J had been advised by FRPS and, as the checklist recommends, if Phoenix Life had checked if FRPS was shown on the FCA's register, Phoenix Life would've found out that FRPS was unregulated. And, had Phoenix Life warned Mr J about that, he'd have changed his mind about transferring. I don't think that's an unreasonable conclusion, bearing in mind what I've said about the seriousness of that sort of warning.

As to the Scorpion insert, Phoenix Life didn't send it (or the same information in a different format). And I said that I didn't think Mr J would've seen it in connection with the transfer from the other provider as it seems the insert wasn't sent direct to him. But I don't think anything turns on Phoenix Life's failure to send the insert. Its focus was on early access pension liberation fraud which Mr J wasn't seeking to do. So I don't think the warnings in the insert would've resonated with him.

I did take into account that Mr J did receive some warnings in connection with the investment, including Sequence's letter of 18 December 2013. I agree it indicated that TRG investment was suitable for more adventurous investors, which Mr J wasn't. But I concluded that pointing out that the investment carried risks wasn't the same as a message that the advisers he'd been dealing with shouldn't have been advising him and were acting unlawfully in doing so and which would've been a stronger message.

All in all I haven't been persuaded to depart from the views I set out in my provisional decision. I've repeated above what I said there and it forms part of this decision. For the reasons I've given I'm upholding the complaint. I've set out below what Phoenix Life needs to do to put things right for Mr J and which follows what I said in my provisional decision.

Putting things right – fair compensation

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

The SSAS only seems to have been used in order for Mr J 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 J would have remained in his pension plan with Phoenix Life and wouldn't have transferred to the SSAS.

To compensate Mr J fairly, Phoenix Life should subtract the proportion of the actual value of the SSAS which originates from the transfer of the Phoenix Life pension, from the notional value if the funds had remained with Phoenix Life. If the notional value is greater than the actual value, there's a loss.

Actual value

This means the proportion of the SSAS value originating from Mr J's Phoenix Life transfer (the "relevant proportion") at the date of my Final Decision. To arrive at this value, any amount in the SSAS bank account is to be included, but any overdue administration charges yet to be applied to the SSAS should be deducted. Mr J 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 J 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 investment(s): TRG. This is because there's no market for it. And I don't think it's realistically possible for Phoenix Life to only acquire a part of the investment from the SSAS as I'm only holding it responsible for the loss originating from a transfer in of the Phoenix Life funds. Therefore as part of calculating compensation:

- Phoenix Life should give the illiquid investment(s) a nil value as part of determining the actual value. In return Phoenix Life may ask Mr J to provide an undertaking, to account to it for the relevant proportion of the net proceeds he may receive from those investments in future on withdrawing them from the SSAS. Phoenix Life will need to meet any costs in drawing up the undertaking. If Phoenix Life asks Mr J to provide this undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

- It's also fair that Mr J should not be disadvantaged while he is unable to close down the 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 should pay an upfront sum to Mr J equivalent to the relevant proportion of five years' worth of future administration fees at the current tariff for the SSAS, to allow a reasonable period of time for the SSAS to be closed.

The SSAS contains investments in a Parmenion portfolio. On the basis of what I've seen, it's likely these investments are capable of being sold and representative valuations will be available from the SSAS. Phoenix Life should ask the scheme to provide the most recent value for these investments as at the date of my Final Decision as part of determining the actual value.

Notional value

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

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

Phoenix Life should reinstate Mr J'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 J was invested in).

Phoenix Life shouldn't reinstate Mr J'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 J'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 J'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 J 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 J doesn't incur an annual allowance charge. If Phoenix Life cannot do this, then it shouldn't set up a new plan for Mr J.

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

To make this reduction, it's reasonable to assume that Mr J is likely to be a basic rate taxpayer in retirement. So, if the loss represents further 'uncrystallised' funds from which Mr J 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 J 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 J'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 J how much has been taken off. Phoenix Life should give Mr J a tax deduction certificate in respect of interest if Mr J 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 J'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 J was invested. However, I expect any such reinstatement to be achieved promptly.

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

My final decision

I uphold the complaint. Phoenix Life Limited must redress Mr J as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 13 February 2025.

Lesley Stead
Ombudsman