DRN-5266900

The complaint

The estate of Mr B has complained about a transfer of the late Mr B's Scottish Equitable Plc trading as Aegon ('Aegon') pension policy to a Qualifying Recognised Overseas Pension Scheme ('QROPS') in Malta in October 2014. Mr B's QROPS was subsequently used to invest in Dolphin Capital (which later became the German Property Group). The investment now appears to have little value. The estate of Mr B says they have lost out financially as a result.

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

What happened

Around mid-2014, Mr B said that he received an unsolicited call from a business offering him a free pension review. He said he agreed to speak with an introducer from Lead Management North trading as The Pension Helpline. Following the phone call, he said he then met with someone from a business called Portia Financial [1]at his home.

Mr B said his details were then passed to Servatus Limited[2] who recommended he transfer his pension to a QROPS and invest in Dolphin. Mr B says he was told that by transferring it would perform better than his frozen pension. He said because he trusted the advice while at the same time feeling pressured, he agreed to go ahead.

On 8 July 2014, Mr B signed a letter of authority to allow Servatus to obtain details of his Aegon pension. And on 28 July 2014, Aegon provided that information to Servatus.

On 8 August 2014, Servatus provided Mr B with a recommendation report which set out the advice in writing to transfer his pension to the Harbour QROPS and invest 50% of his funds in Dolphin with the other 50% invested in two investment funds via the SEB investment platform.

Mr B applied to start a QROPS with Harbour Pensions. The membership form dated 20 August 2014, names Servatus as the professional adviser.

On 10 October 2014, Aegon received Mr B's transfer papers from Harbour Pensions. Included in the transfer papers were: Mr B's letter of authority; completed and signed transfer discharge forms; completed HMRC forms APSS263 and CA1890; a HMRC letter

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[1] There is no exact match on the Financial Conduct Authority (FCA) register for Portia Financial, so it appears this business was not FCA authorised at the time.

[2] Servatus was a financial adviser authorised in another EEA member state – it additionally held passporting rights to provide services within the UK.

confirming registration of the QROPS from 9 April 2013; and Mr B's identification certified by Servatus.

On 16 October 2014, Aegon transferred Mr B's pension – an amount of around £76,600. Mr B was 51at the time. After fees, around £72,400 was then invested as per the recommendation.

The investment in Dolphin Capital was a loan note to the company. The loan was to be repaid with pre agreed interest from the profits made by the property company. Dolphin Capital later changed its name to the German Property Group (GPG). GPG went into administration having allegedly failed to use investors' money to develop properties. There is no secondary market for these loan notes and, where they have failed to realise the intended returns investors are unlikely to get their investments back.

In July 2020, Mr B complained to Aegon using the services of a professional representative. Briefly his argument is that Aegon ought to have carried out due diligence, spotted and told him about a number of warning signs or risks in relation to the transfer including being advised by an unregulated business regarding a high-risk investment.

Aegon didn't uphold the complaint. In summary it said it had carried out appropriate due diligence at the time and there were very few warning signs to give cause for concern. It said the scheme in this case was a registered QROPS and it was therefore reasonable for it to take comfort from that based on the guidance applicable at the time.

During the course of dealing with the complaint, Mr B sadly passed away. The complaint is now being pursued by the late Mr B's estate.

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.

I've taken into account relevant law and regulations, regulatory rules, guidance and standards, codes of practice, and (where appropriate) what I consider to have been good industry practice at the relevant time. Where the evidence is incomplete or inconclusive, I've reached my decision based on the balance of probabilities – in other words, on what I think is more likely than not to have happened, given the available evidence and wider circumstances.

The estate of Mr B's representative raised a number of points in response to the investigator's assessment that the complaint should not be upheld. Where I deem it necessary to do so, I will specifically refer to and address those points below. But I won't address each and every issue raised – instead I'll focus on what I believe are the key issues at the heart of this complaint.

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

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

An overseas pension scheme is defined in HMRC regulations as being one which is subject to specified regulatory and taxation restrictions in the country of establishment. To become a QROPS it must also be:

- Recognised, meaning in short that it meets specified tests applied by HMRC, including on minimum retirement age and the application of tax relief.
- Qualifying, meaning it must notify HMRC that it is a recognised overseas pension scheme; provide appropriate evidence of this; undertake to adhere to HMRC's requirements; and not be otherwise excluded by HMRC from being a QROPS.

Overseas schemes that have notified HMRC that they qualify to be a QROPS are included in a published list on HMRC's website.

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, which is either registered with HMRC for tax purposes or is a QROPS. 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.

As I've said above, the Scorpion campaign was launched in February 2013 and the guidance was updated regularly over the next few years. The 24 July 2014 guidance update is relevant in this case – this widened the focus from pension liberation specifically, to pension scams more broadly, which it said were on the increase. Transfers of money or investments overseas, were also highlighted as something to watch out for and it explained this was because the money would be harder to recover.

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. 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.

2. 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.

3. 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.

4. These were additional requirements over and above what a ceding scheme would always have needed to when processing a QROPS transfer. Those requirements included checking whether the QROPS was on HMRC's published list, and ensuring the necessary HMRC forms were completed.

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?

Mr B said that he agreed to a meeting, which took place at his home with a business called Portia Financial following a cold call from a different business offering him a free pension review. Mr B said that he was told the recommended pension would perform better than his current 'frozen account' and would create huge returns. Mr B told our investigator during a phone call that the person he spoke to was reassuring, and that it felt like "talking to an uncle."

Mr B didn't say when his meeting with Portia Financial took place. But I've seen a copy of a letter from Servatus, addressed to Mr B, dated 8 August 2014, which starts by thanking him for meeting with Portia. It then goes on to provide him with what it described as a Financial Planning Report. This set out a recommendation that he transfer his existing Aegon personal pension to the Harbour Pensions QROPS in order to invest in the way that he went on to do.

So, while it looks like there were a number of businesses involved and there was a face-to-face meeting with a business called Portia, I can see from the evidence that it was Servatus that advised Mr B. And that's what's key here for the reasons I will come on to below.

What did Aegon 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.

Mr B has said that he didn't receive the Scorpion insert. And he said that had he been sent it, he would've called for advice and spoken to Aegon.

It's not disputed that Aegon did not send Mr B the Scorpion insert. But it should have done, so it didn't do enough here. Had Aegon written to Mr B in response to the request from Servatus for a transfer pack, as I think it should have, then it would have sent him the Scorpion insert that was in use at the time. And this was the updated July 2014 version.

But despite what Mr B told our investigator, I'm not persuaded that if Aegon had sent him the 2014 insert it would've had the impact on Mr B to prompt him to make further enquiries. I say this because, while the insert warned about cold calls, offers of a pension review to lure customers into one-off investment opportunities and referred to not being rushed into making a decision, which Mr B might have recognised as warning signs in his transfer. The insert referred to more information being available about pension scams on TPR's website. But the information on the website at that time relevant for customers was still in my view focused towards liberation and still warned of accessing pension benefits early or being promised more tax-free cash – neither of which applied to Mr B. And the recommendation was to seek advice from a regulated adviser. So, I think Mr B, just like Aegon (as I will go on to discuss below) would have taken comfort from the fact that a regulated adviser had advised him.

So, on its own, I don't think the Scorpion insert would've been as impactful as Mr B said it would've been – I think it's unlikely the contents of this document, had Mr B received it, would have prompted him to change his mind about transferring.

Due diligence:

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

Aegon says that, based on the information it received from Harbour Pensions in submitting the transfer request and because the QROPS was a registered one, there was no cause for concern so it went ahead with the transfer. But Aegon knew that Mr B wanted to transfer his pension into an overseas pension scheme – a QROPS based in Malta – and that this very likely involved overseas investments.

So, I think that in exercising reasonable due diligence in line with its obligations under PRIN and COBS, Aegon should've followed up on the warning sign apparent to it at this time – namely that Mr B was planning to transfer his pension overseas, which was a common theme of pension scams and something highlighted in the 2014 Action Pack – to understand more about the 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 recognised by HMRC, or is the receiving scheme connected to an unregulated investment company?

2. Description/promotion of the scheme

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

3. The scheme member

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

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

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

<u>What would Aegon reasonably have discovered?</u>

From a few simple questions, Aegon would have discovered a number of facts about the transfer from Mr B. Under the first section of the checklist, it would've likely found that the prompt for Mr B to transfer his pension to the QROPS was a cold call.

I also think it's likely Aegon would have learned from Mr B that he'd been told by one of the parties he was in contact with that an overseas property investment would perform better than his existing pension and would create high annual returns.

In addition to this, under the third section of the checklist, I think Aegon would've discovered that Mr B had spoken to, or dealt with, two firms about this transfer and he would've said that he had been advised to transfer his pension.

So, it would've been reasonable for Aegon to have asked Mr B who gave the advice. In these circumstances and based on what Mr B told us, I think he would've named both Portia Financial and Servatus as being involved in the process. Mr B had obviously dealt with both firms – he says he met with Portia Financial and then the evidence shows he received a suitability report from Servatus. So, it's not unreasonable that he would've thought both were connected to the advice he'd received.

The Scorpion checklist recommends that, in order to establish whether a member has been advised by a non-regulated adviser, the transferring scheme should consult the FCA's online register of authorised firms. Aegon should have taken that step, which is not difficult. Had it done so it would have discovered that Servatus appeared on the FCA register as a firm that was passported from Ireland to the United Kingdom. This means that for UK purposes throughout the period of this transfer Servatus was an authorised person under s.31(1)(b) of the Financial Services and Markets Act (FSMA) 2000 and Schedule 3 to that Act.

With this information I think Aegon could've reasonably assumed that the advice would've come from only one of the firms and that was most likely Servatus. Portia Financial had referred to Servatus for regulated advice and Servatus was the firm who then issued a suitability report. It wouldn't seem unusual for an unregulated party to introduce consumers to a regulated party for advice.

So, I think it is reasonable to assume that, if Aegon had made these inquiries, the presence of Servatus, as an authorised person advising Mr B, would've suggested that the transfer was unlikely to be a scam and that Mr B would enjoy some regulatory protections in the unlikely event it turned out to be one.

I accept the regulatory protections would not come via UK's complaints and investor protection institutions, the FOS or the FSCS. But instead through its own regulator, The Republic of Ireland which also has a complaints system, financial services and pensions ombudsman and a statutory investor compensation scheme, which EU countries are required to have under the EU's Investor Compensation Directive. Furthermore, As a firm that was regulated (albeit by a home-state regulator in another EU jurisdiction) the regulatory protections included the fact that Servatus would have been held to a high standard, mandated throughout the EU, by its own regulator.

And as an authorised firm, Servatus would have had to follow the applicable European regulatory standards and conduct its practice in accordance with those standards.

Its operations would have been under some oversight by its regulator to ensure it was acting in the best interest of its client. So, it would've had to meet certain required standards in all of its dealings and be subject to regulation and to investor recourse under the Irish system.

In light of this, I don't think it's unreasonable that Aegon could (and would if it had checked up on Servatus' regulatory standing) have been reassured that Servatus was regulated to EU standards that were accepted for the purpose of authorisation under United Kingdom law.

<u>What should Aegon have done with this information?</u>

Aegon needed to check for the risk of pension liberation and scams in a way that was proportionate to the warning signs. So, while I accept Aegon would likely have (had it conducted thorough due diligence) found there to be some of the pension scam warning signs indicated in the Scorpion Action Pack – e.g. Mr B had been cold called and he was contemplating investing in overseas investments – I think the knowledge Mr B was being advised by a properly authorised adviser in this case reasonably would've given Aegon comfort the risk was minimal and the transfer was unlikely to be a scam. And that as his regulated adviser, they were likely acting in his best interests and would've made him aware of the relevant risks and issues. It wasn't Aegon's responsibility to question or scrutinise that advice.

I can see the estate of Mr B's representative has referred to the phone call the late Mr B had with our investigator where he talked about being reassured by the representative he met with (which they say had to be the one from Portia) and how he felt it was like speaking with his uncle. They say this strongly indicates that the unregulated Portia was giving judgement advice. And they say that if Aegon had carried out the appropriate due diligence exercise, Mr B would've told Aegon this and perhaps provided even more detail about his meeting with Portia. They say this would've put Aegon on notice that there was a potential criminal breach of FSMA.

Firstly I'm not persuaded that, of itself, what Mr B said about being reassured by the Portia representative and having a conversation as if they were a family member, this automatically means Portia was providing advice to Mr B. What Mr B describes suggests to me that he got along with the representative and that they'd built up a good rapport.

Secondly, the representative's argument about the level of detail Mr B might have provided to Aegon had it carried out further due diligence, presupposes that there would have been a phone conversation giving Mr B the opportunity to provide the detail they say he would've given. But it wasn't a requirement in the guidance for Aegon to speak with Mr B over the phone to carry out its due diligence – it could've contacted him in writing or by email instead asking him the necessary and proportionate questions where I think the opportunity or impetus to provide information over and above that being asked was limited. So, I don't think it follows that, had Aegon carried out further due diligence, it would've necessarily obtained the level of detail from Mr B at the time that the representative now argues.

But ultimately and in any event, as I said above, Mr B would most likely have told Aegon that Servatus provided him with advice. And that's what's key here. Because in the knowledge Mr B was ultimately acting on advice from a regulated party, in weighing things up, overall I think it reasonably would've given Aegon comfort the transfer was unlikely to be a scam.

As I've already said, a firm needed to take a proportionate approach to transfer requests, balancing consumer protection with the need to also execute a transfer promptly and in line with a member's statutory rights. So, even if Aegon had done more thorough due diligence in line with the Scorpion Action Pack as it ought to have done here, the end result of any such due diligence would not have resulted in any warnings being given to Mr B – Aegon could reasonably believe the risk was minimal. And I don't think the mere act of contacting him and asking questions about the transfer would have prompted a change of heart. The majority of the responses Mr B would likely have provided would not have given rise to concerns.

It therefore follows that I think Mr B would not have stopped the transfer and would still, more likely than not, have gone ahead if things had happened as they should have. I'm mindful that, in addition, Mr B had a written recommendation from a financial adviser that set out the details of the Dolphin investment. It highlighted, amongst other things, that loan notes provide a high degree of risk, the investment was not protected by the Financial Regulator or by a statutory compensation scheme and loan notes are unquoted, so there was no market to sell them. It would appear Mr B considered those risk warnings and went ahead with the transfer.

My final decision

For the reasons above, I've decided to not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mr B to accept or reject my decision before 14 February 2025.
Paul Featherstone
Ombudsman