DRN-5278464

The complaint

Mr T has complained about a transfer of his two Phoenix Life Limited (Phoenix Life) personal pension policies to a small self-administered scheme (SSAS) in August 2014. Mr T's SSAS was subsequently used to invest in The Resort Group (TRG). The investment now appears to have little value. Mr T says he's lost out financially as a result.

Mr T 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 T 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.

Mr T's pension policies were with Abbey Life Assurance Company Limited (Abbey Life), later acquired by Phoenix Life. For ease I've just referred to Phoenix Life, references to which should be taken to include Abbey Life where the context so requires.

What happened

I issued a provisional decision on 31 December 2024. I've repeated here what I said about what happened and my provisional findings.

'*On 19 September 2013 Portal Financial Services (Portal), a regulated firm, wrote to Phoenix Life enclosing a letter of authority (LOA) signed by Mr T on 12 September 2013. The LOA said that Mr T wanted to appoint Portal as his servicing agents for his Phoenix Life policy. Portal asked for details of the policy, including transfer discharge documents. Phoenix Life sent information to Portal on 25 September 2013 enclosing a transfer claim form and plan information.*

Mr T signed a LOA in favour of Wise Review Limited on 29 November 2013. The heading to the LOA indicated that Wise Review was an introducer. Sorensen Financial Services (Sorensen) was also shown on the LOA. And at the foot of the LOA it said that Wise Review is an appointed introducer to Sorensen, who are authorised and regulated by the Financial Conduct Authority (FCA), with Sorensen's FCA number given.

Wise Review Limited wrote to Phoenix Life on 4 December 2013 with the LOA and requesting a transfer value, projections and discharge forms. At the bottom of the letter it said 'Wise Review Limited are Introducer Appointed Representatives to a number of financial service businesses who provides Financial Reviews and Services to clients.'

On 9 December 2013 Phoenix Life sent policy information to Wise Review Limited together with transfer documentation. Phoenix Life says a 'pension scams leaflet' was included.

Wise Review Limited telephoned Phoenix Life on 20 December 2013 requesting full policy information which Phoenix Life sent on 31 December 2013.

In January 2014 a limited company was incorporated with Mr T as the sole director. I'll refer *to this company as T Limited. On 4 February 2014 Mr T, on behalf of T Limited and as a trustee, signed a trust deed and rules establishing a SSAS. T Limited was the sponsoring employer and Bespoke Pension Services Limited (BPS) was the SSAS administrator.*

We've seen a letter from Broadwood Assets Limited (Broadwood). It's undated but Mr T signed it on 9 February 2014 to confirm he'd read and understood it. Broadwood said Mr T was considering an investment in Cape Verde, an overseas commercial property development with TRG and that, under section 36 of the Pensions Act 1995, as a trustee, he was required to take and consider appropriate advice on whether his proposed investment was satisfactory for the aims of the scheme. Broadwood had been appointed to give that advice. Broadwood hadn't advised on the establishment of the SSAS and its opinion on the investment was provided to Mr T in his capacity as a trustee only, and not in his personal capacity as a member of the SSAS. Broadwood also said it wasn't providing advice that would be deemed regulated under the Financial Services and Markets Act 2000 (FSMA) and Broadwood wasn't regulated or authorised by the Financial Conduct Authority (FCA). If Mr T preferred to obtain regulated advice on the suitability of the proposed investment for him as an individual and a member of the SSAS, Broadwood recommended he seek that from an independent financial adviser.

Broadwood said TRG investment was a legitimate, credible and substantive arrangement that didn't facilitate pension liberation and was suitable to be held in a SSAS. Broadwood set out a number of risk factors. And it didn't believe the investment was suitable for a cautious investor due to the loss of consumer and regulatory protections. Broadwood concluded the investment was suitable for more adventurous investors, ideally diversified across alternative holdings according to Mr T's attitude to risk (taking into account his duty to act prudently) and his capacity to withstand loss.

On 5 August 2014 BPS wrote to Phoenix Life saying Mr T wanted to transfer to the SSAS and confirming the SSAS was able to accept the transfer. BPS enclosed the following:

- *A letter from HMRC showing the SSAS had been registered on 6 February 2014 and giving the Pension Scheme Tax Reference (PSTR) number.*
- *A copy of the February 2013 longer booklet produced by The Pensions Advisory Service (TPAS) warning about the risks of pension liberation and scams and known as the Scorpion booklet (I mention the Scorpion campaign further below). The first page was signed by Mr T on 6 February 2014 underneath a printed statement which read, 'I can confirm I have read this document. I am not party to any such pensions liberation activity in anyway whatsoever.'*
- *A letter signed by Mr T dated 6 February 2014 (to which I've referred further below) confirming he wanted to transfer and giving his reasons.*
- *Confirmation that Mr T was employed by T Limited, the SSAS sponsoring employer – an agreement dated 28 January 2014 showing he'd been appointed as the managing director of T Limited.*
- *The SSAS trust deed and rules dated 4 February 2014 which had been drafted by a large London law firm.*
- *A letter from that firm confirming they'd drafted the trust deed and rules which conformed to the Finance Act 2004 as a registered pension scheme and hadn't been drafted in a way which knowingly allowed the scheme to be operated other than as a registered pension scheme.*
- *A copy of BPS' 'Policy on Pension Liberation'.*

The letter from Mr T dated 6 February 2014 included the following:

'The purpose of this letter is to provide you with additional confirmation of the basis upon

which I have made this request and to seek to provide a record of the fact that I am aware of the issues relating to pensions liberation. Indeed I have carefully considered my decision to request a transfer to the scheme and have not made it lightly.

I confirm that the scheme is a registered pension for HMRC purposes [PSTR number given] and that the trust deed and rules governing it only allow standard benefit options such as annuities and drawdown in accordance with the applicable legal requirements.

From guidance and information I have received in connection with this decision I appreciate that there has recently been a significant rise in cases of 'pensions liberation' fraud. As a result there is increased concern and scrutiny around transfer requests being made, to ensure members fully understand the implications of making a transfer.

I therefore wish to confirm that the transfer request is being made in order that I can take advantage of investment opportunities available under the scheme, none of which are in any way connected with pension liberation. I have received detailed information about the Scheme, how it operates, who administers it and the risks associated with making a transfer out of my existing pension arrangement.

In making this transfer I am not seeking to access my pension benefits before age 55 and I am aware of the potentially significant tax liabilities that would arise were I to attempt to do so. Indeed the trust deed and rules of the Scheme do not permit benefits to be taken prior to age 55, except in circumstances of ill health which meet HMRC requirements. I also confirm that I have not been offered any cash or other incentive by any person as part of my decision to transfer my pension to the Scheme.

On this basis I would be grateful if you could please proceed to transfer my pension to the Scheme as requested as soon as possible.'

BPS's letter also included transfer forms and bank details for the transfer payment. BPS confirmed they were a co signatory to the account and the trustees were unable to move any funds without BPS's authority which protected the fund against any risk of pension liberation. Phoenix Life processed the transfer on 7 August 2014 and sent £7,790.01 to BPS to be credited to Mr T's SSAS.

Mr T later became concerned about his SSAS and TRG investment. I understand that initially the investment produced some returns but eventually these dried up. The development of the resort didn't proceed smoothly and there are issues with the legal title to the land. Mr T's investment – a fractional share of hotel accommodation at a resort in Cape Verde – is illiquid and there's no market for sale.

In October 2020 Mr T complained to Phoenix Life. Briefly, his argument is that Phoenix Life ought to have spotted, and told him about, a number of warning signs in relation to the transfer, including (but not limited to) the following: the SSAS was newly registered, as was the sponsoring employer, T Limited; there wasn't a genuine employment link to the sponsoring employer; the catalyst for the transfer was an unsolicited call; Mr T had been advised by an unregulated business; and the proposed investment was in unregulated, overseas, high risk and non diversified assets.

Phoenix Life didn't uphold the complaint. It said Mr T had confirmed he was aware of the risks and implications of transferring his pension.

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

At the same time as Mr T's transfer request was made to Phoenix Life, he also made a request to transfer a personal pension held with another provider. That transfer was completed in September 2014. In deciding Mr T's complaint against Phoenix Life, I've taken into account all the information he had from all sources, including in connection with the other transfer. I've also considered the comments made on Mr T's behalf in response to the investigator's view that this complaint shouldn't be upheld.

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 FCA. Prior to that they were regulated by the FCA's predecessor, the Financial Services Authority (FSA). As such Phoenix Life was subject to the FSA/FCA Handbook, and under that to the Principles for Businesses (PRIN) and to the Conduct of Business Sourcebook (COBS). There have never been any specific FSA/FCA rules governing pension transfer requests, but the following have particular relevance here:

• Principle 2 – A firm must conduct its business with due skill, care and diligence;

• Principle 6 – A firm must pay due regard to the interests of its customers and treat them fairly;

• Principle 7 – A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading; and

• COBS 2.1.1R (the client's best interests rule), which states that a firm must act honestly, fairly and professionally in accordance with the best interests of its client.

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

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

The guidance was updated on 24 July 2014 (which was before Mr T's transfer). It widened the focus from pension liberation specifically, to pension scams – which it said were on the increase. I cover the Scorpion campaign in more detail below.

In late April 2014 the FCA had also started to voice concerns about the different types of pension arrangements that were being used to facilitate pensions scams. In an announcement to consumers entitled "Protect Your Pension Pot" the increase in the use of SIPPs and SSASs in pensions scams was highlighted, as was an increase in the use of *unregulated and/or illiquid investments. The FCA further published its own factsheet for consumers in late August 2014. It highlighted the announcement to insurers and advisers in a regulatory round-up published on its website in September 2014.*

<u>The Scorpion guidance</u>

The materials in the Scorpion campaign comprised:

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

- *A longer booklet issued by TPAS which gives more information, including example scenarios, about pension scams. Guidance provided by TPR said this longer leaflet was intended to be used in ongoing communications with members so that could become aware of the scam risks they were facing.*

- *An 'action pack' for scheme administrators that highlighted the warning signs present in a number of transfer examples. It suggested transferring schemes should "watch out for" various warning signs of a scam. If any of the warning signs applied, the action pack provided a check list that schemes could use to help find out more about the receiving scheme and how the member came to make the transfer request. Where a transferring scheme still had concerns, they were encouraged (amongst other things) to contact the member to establish whether they understood the type of scheme they were transferring to and – where a member insisted on transferring – directing the member to Action Fraud or TPAS.*

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

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

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

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

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

What did personal pension providers need to do?

For the reasons given above, I don't think personal pension providers necessarily had to follow all aspects of the Scorpion guidance in every transfer request. However, I do think they should have paid heed to the information it contained. In deciding how to apply the guidance, they needed to consider the guidance as a whole, including the various warning signs to which it drew attention, the case studies that highlighted different types of scam, and the checklist and various suggested actions ceding schemes might take. And where the recommendations in the guidance applied, absent a good reason to the contrary, it would normally have been reasonable, and in my view good industry practice, for pension providers at least to follow the substance of those recommendations:

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

2. The Scorpion insert provided an important safeguard for transferring members, allowing them to consider for themselves the scam threat they were facing. Sending it to customers asking to transfer their pensions was also a simple and inexpensive step for pension firms to take and one that wouldn't have got in the way of efficiently dealing with transfer requests. So, all things considered, I think the Scorpion insert should have been sent as a matter of good industry practice with transfer packs and direct to the transferring member when the request for the transfer pack had come from a different party.

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

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

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

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

At the time of the transfer Mr T was 58. He says he was working as a self employed *courier/driver earning less than £25,000 pa, he wasn't a high net worth individual or a sophisticated investor and he had no experience in pensions or investments. He had no savings or investments save for two buy to let properties and a minimal amount in British Gas and Santander shares. His attitude to investment risk was low.*

He received a cold call, offering a free review of his pensions. He was told his pensions were just 'sitting there' and 'doing nothing' in terms of providing for his retirement and it was recommended that he take steps to 'invest' them. Mr T thought it would be a good idea to explore other options and he signed a LOA given to him by Wise Review Limited. They were stated to be an authorised representative of Sorensen, a FCA regulated firm. But that wouldn't have been supported by a review of the FCA register. There's also nothing to suggest that the earlier FCA authorised firm (Portal) went on to give Mr T advice. So, at no time did Mr T receive any advice from a FCA authorised IFA.

Phoenix Life provided information to Wise Review Limited and Mr T met with a representative at his home. The representative wasn't FCA authorised or regulated, the significance of which Mr T didn't understand. At the meetings, it was reiterated to him that his Phoenix Life pension wasn't performing very well. He was told he could achieve better returns by transferring his Phoenix Life policies, together with another fund held with another provider, to a new scheme and investing in a hotel resort development offered by TRG in Cape Verde. He was told he'd make around a 15% pa return on the investment and it would significantly out-perform his Phoenix Life pension. And that by retirement he'd have achieved much better pension savings than with Phoenix Life. No risk assessment was undertaken by the adviser, but Mr T was told the investment was safe because it was "backed by HMRC".

Persuaded by what he'd been told by the representative who he believed was acting in his best interest, Mr T agreed to go ahead with the transfer. He signed and returned the documentation given to him. The paperwork was then provided to BPS who then set up the SSAS expressly for the transfer and liaised with Phoenix Life to facilitate the transfer. Mr T says he wasn't informed about the complex structure of a SSAS or the need to take on responsibilities as a company director and trustee.

Throughout the transfer process, there was no, or no effective, direct contact between Phoenix Life and Mr T. T Limited was a newly set up, dormant company, established in January 2014 solely for the purpose of holding Mr T's pension fund – it wasn't an active employer of Mr T. In addition, the SSAS had only been very recently registered with HMRC. As planned, the funds were invested in a fractional hotel investment operated by TRG. The investment is entirely illiquid and incapable of sale on the open market and thus reasonably considered to be of nil value. The balance of the money Mr T transferred in was held in cash.

I don't have any reason to think that what's been said about what happened isn't a reasonably accurate account. Mr T having been cold called by Wise Review Limited fits with the LOA that Phoenix Life received. Although, as I've noted above, Phoenix Life had earlier received a LOA and request for information from a different (and regulated) firm. I think that tends to suggest Mr T was interested in transferring so he might've been predisposed to transferring away from Phoenix Life. But, even against that background, I still need to consider whether, in dealing with the transfer that actually went ahead, Phoenix Life did all it should've done and, if not, what would've happened if Phoenix Life had acted differently.

I accept what's been said about Mr T not being an experienced investor or having any real knowledge about pensions. I don't see that he'd have come up with the idea of transferring to a SSAS to invest in TRG – an overseas property development – on his own. A SSAS is a relatively complex and unusual pension vehicle for an investor in Mr T's circumstances. And TRG wasn't what might be termed a mainstream investment. I think he'd only have been interested in doing that – or been aware that sort of pension arrangement and investment *was available to him – if it had been suggested to him and put on the basis that he'd be better off in retirement as a result. Essentially that means he was advised to transfer away from Phoenix Life to a SSAS to invest in TRG.*

As to whether any warnings were given to Mr T, it's clear he did see the longer February 2013 Scorpion booklet – he signed a copy to say he'd read it which BPS submitted in support of the transfer request. And there's also the letter from Broadwood I've mentioned above.

<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 says the Scorpion insert would've been sent when the information requests from Portal and Wise Review Limited were received. But there's nothing to evidence that. The insert isn't mentioned as an enclosure and, if it was sent separately, there's no covering letter or anything else to record it was sent, such as a system or file note. And it seems that, in any event, Phoenix Life would've sent any insert to Portal or Wise Review Limited, rather than direct to Mr T.

Sending the insert to the customer who'd asked to transfer their pension was a simple and inexpensive step for providers to take and one which wouldn't have got in the way of efficiently dealing with transfer requests. It would've defeated the purpose of the insert if, instead of sending it to their member, providers sent the insert to the member's representative in the hope that the intermediary would then share it with the client. From what I've seen, I'm not satisfied that Phoenix Life did provide Mr T with a copy of the Scorpion insert.

But it's clear Mr T did see the longer 2013 Scorpion booklet anyway – BPS's transfer request was supported by a copy signed by Mr T to confirm he'd read it. If Phoenix Life had sent the Scorpion insert when it received the information requests from Portal and Wise Review Limited (September 2013 and December 2013 respectively) it would've been the February 2013 insert, the longer version of which Mr T saw anyway.

Due diligence:

In light of the Scorpion guidance, I think firms ought to have been on the look-out for the tell-tale signs of a pension scam and needed to undertake further due diligence and take appropriate action if it was apparent their customer might be at risk. Phoenix Life didn't undertake any further due diligence – Phoenix Life received Mr T's transfer request on 6 August 2014 and processed it the following day without undertaking any further enquiries.

Given the information Phoenix Life had at the time, one feature of Mr T's transfer would've been a potential warning sign of a scam: Mr T's SSAS was recently registered – it had been registered on 6 February 2014, just six months before the transfer request was made on 5 August 2014. Phoenix Life should therefore have followed up on that to find out if other signs of a scam were present.

Given this warning sign, I think it would've been fair and reasonable – and good practice – for Phoenix Life to have looked 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 a scam was a realistic threat. Although BPS included quite a lot of information with the transfer request, much of it was generic, rather than specific to Mr T's transfer request. And, given the warning sign that should have been apparent when dealing with Mr T'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 T as part of its due diligence.

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

I've set out above what we've been told about what happened. I think it's reasonable to assume, had enquiries been made of Mr T, he'd have told Phoenix Life similar to what he said when his complaint was made.

Enquiries under part 1 would've revealed that the receiving scheme was only recently registered with HMRC – just six months before the transfer request was made. T Limited had only been incorporated for about that time too and was shown on Companies House as a dormant company. And although an agreement was supplied showing that Mr T had been appointed as T Limited's managing director, I think Mr T would've told Phoenix Life that he wasn't actually working for T Limited and that the company had been set up just to facilitate *the SSAS.*

If Phoenix Life had asked Mr T the sort of questions suggested in part 2, about how the scheme had been promoted, Mr T hadn't been offered any cash or other incentive. But, he's said he was told that investing in TRG – an overseas property development – would generate returns of about 15% pa. That too would've been a potential warning sign.

And, if Phoenix Life had made enquiries under part 3, I think Mr T would've said he'd been dealing with Wise Review Limited who'd contacted him by way of an unsolicited call offering a free pension review. And that he'd met with someone from Wise Review Limited who'd suggested to him he'd be better off if he transferred to a SSAS to invest in TRG. So essentially he was acting on advice from Wise Review Limited.

The check list recommends that in order to establish whether its member has been advised by a non-regulated adviser, the ceding firm should "check whether advisers are approved by the FCA at www.fca.gov.uk/register". In other words, they should consult the FCA's online register of authorised firms. Phoenix Life should've taken that step, which isn't difficult, and it would quickly have discovered that Mr T'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 guidance itself makes this point.

I don't ignore the request for information, with enclosed LOA, which Phoenix Life received in December 2013 from Wise Review Limited. In my view, the LOA and covering letter were somewhat misleading. The LOA heading indicated that Wise Review Limited was an introducer and Sorensen was shown. And, at the foot of the LOA, it said Wise Review was an appointed introducer to Sorensen who were authorised and regulated by the FCA (the registration number was given, along with Sorensen's registered office address and contact details). Wise Review's covering letter also said it was an introducer appointed representative to a number of financial services businesses. So the impression was that Wise Review Limited was an introducer appointed representative of Sorensen, a FCA regulated firm. If that was the case Wise Review Limited would've been shown as such on the FCA register. But Wise Review Limited didn't appear on the register.

I'm aware that Wise Review Limited had some links with We Review Limited which, at the time, was an appointed representative of Sorensen and shown on the FCA register as such. But, from what I've seen, Wise Review Limited and We Review Limited were separate companies. Wise Review Limited wasn't a registered trading name of We Review Limited.

Information from Companies House indicates there was a controlling director in common and both companies operated from the same premises. Both entered administration in 2014 and appointed the same administrator. Administrators' statements for both companies referred to them as being part of the same group. The statement specific to Wise Review Limited described the nature of its business as being an 'introducer of pension transfer leads to various pension providers and intermediaries'. And the corresponding statement for We Review Limited said it was 'an appointed representative of a particular pension provider' (which the FCA register confirms was Sorensen at the time) and that it received leads and conducted financial reviews for Wise Review Limited.

But the upshot is that Wise Review Limited wasn't regulated. If Phoenix Life had searched the FCA's online register, which, as I've said, would've been an easy step to take, Phoenix

Life would've seen that Wise Review Limited didn't appear, whether as an introducer appointed representative for Sorensen or otherwise.

As I've noted, from how Wise Review Limited presented itself, it would've appeared to be acting for and on behalf of Sorensen, a regulated firm. Phoenix Life might say it was entitled to rely on that and so would've reasonably assumed Mr T had received regulated advice in connection with the transfer to the SSAS. But Phoenix Life would've known that, as an introducer appointed representative of a regulated firm, Wise Review Limited could only carry out a limited range of activities, such as undertaking introductions and distributing financial promotions on behalf of its principal. Wise Review Limited wasn't authorised to give regulated advice itself. So, if Mr T had told Phoenix Life, as I think he would've done, that he'd been advised by Wise Review Limited, that ought to have rung alarm bells in any event.

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

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

Had it done more thorough due diligence, there would have been a number of warnings Phoenix Life could have given to Mr T in relation to a possible scam threat as identified by the action pack. Phoenix Life's failure to uncover the threat posed by a non-regulated adviser and failure to warn Mr T accordingly, meant it didn't meet its obligations under PRIN and COBS 2.1.1R.

With those obligations in mind, it would have been appropriate for Phoenix Life to have informed Mr T 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 T risked falling victim to illegal activity and losing regulatory protections.

It's impossible to say now with certainty what would've happened and what Mr T might've done differently if Phoenix Life had given him that warning. As I've noted, it seems that Mr T may have been interested in transferring anyway. But I'm satisfied any messages along those lines – from his existing and reputable pension provider – would've carried weight with Mr T. In my view he'd have taken seriously any indication from Phoenix Life that the firm he was dealing with may not be acting in his best interests. I can't see that he'd have simply ignored such warnings. On balance I think they'd have changed his mind about the transfer. The messages would have followed conversations with him and so would've seemed to him (and indeed would have been) specific to his individual circumstances and would've been given in the context of Phoenix Life raising concerns about the risk of losing accumulated pension savings as a result of untrustworthy advice. This would've made Mr T aware that there were serious risks in using an unregulated adviser.

I think the gravity of any messages along these lines would prompt most reasonable people to rethink their actions. I've seen no persuasive reason why Mr T would have been any different. So, I consider, if Phoenix Life had acted as it should, Mr T wouldn't have proceeded with the transfer out of his personal pension or suffered the investment losses that followed.

In reaching my conclusions I've taken into account that Mr T was shown a copy of the February 2013 longer Scorpion booklet. I'm not sure if he didn't read it at all and simply signed to say he had. Or, and perhaps more likely, if he only paid it limited attention because it was given to him as part of a large amount of documentation to sign and which he was taken through very quickly and given insufficient time to read and digest.

But the central theme was pension liberation fraud – that is, 'cashing in' a pension early – before age 55 – and the offer of loans and cash incentives and the serious tax consequences which could result. That didn't feature in Mr T's case. He was 58 at the time and he didn't receive any cash or other incentive. The warning signs referred to in the booklet did include unsolicited calls and transfers overseas were also highlighted – although the scheme itself wasn't overseas the investment was based overseas. And the 'Five steps to avoid becoming a victim' did suggest checking out any company online, including that they were registered with the FCA. But that was all against the background that there might be a risk of early pension liberation fraud and which, as I've said, Mr T wasn't seeking to do. Given that was the focus, I don't think the booklet would've really resonated with Mr T or prompted him into checking out Wise Review Limited's regulatory status.

There's also the letter Mr T signed on 6 February 2014. Although it was a pre prepared template it was only a page long so it's not unreasonable to say Mr T should've read it before signing it. But again its focus was pension liberation which wasn't the motivation for Mr T's transfer so he may have thought it wasn't relevant to his situation and that he could simply sign it.

Mr T had also signed the letter from Broadwood on 9 February 2014. It did say TRG investment was risky and not suitable for a cautious investor which Mr T says he was. So, arguably, that should've put him on notice that what he'd been told he should do would expose his pension savings to risk. But, on the other hand and to some extent, what Broadwood said would've reassured Mr T – Broadwood said the proposed transfer wouldn't facilitate pension liberation and TRG investment was legitimate and well-resourced. The letter did mention getting regulated advice if he preferred to do so and said Broadwood's advice wasn't regulated, nor was Broadwood itself authorised or regulated by the FCA. But this was explained in the context of whether Mr T wanted advice as an individual rather than as a trustee. There was nothing to suggest there might be any issue with any advice Mr T may have been given by any other party, such as Wise Review Limited, or that there could be concerns that went wider than pension liberation, by which I mean the early access to funds as discussed in the leaflet Mr T had already seen. Or that he should check the regulatory status of any adviser he'd been dealing with and how he could do that. So I don't think Broadwood's letter was enough on its own to have prompted Mr T to question what he'd been told.

Lastly, as I've mentioned, at the same time as Mr T's transfer request to Phoenix Life was made, he also requested a transfer of another pension held with a different provider. That provider did write to Mr T about his transfer request and, amongst other things, went further in recommending Mr T get advice from a UK regulated financial adviser specialising in pensions and gave details of how Mr T could find an adviser. But that wasn't until after Mr T's transfer from Phoenix Life had already been completed. So, as I've said, at the time the transfer from Phoenix Life was made, Mr T hadn't been told in as clear terms that he should seek regulated advice or check anyone he'd been dealing with was FCA registered and authorised to give pension advice. So the other provider's letter came too late to impact on Mr T's decision to transfer away from Phoenix Life.

In my view, Phoenix Life would've been justified in believing from what it had seen that Mr T knew about pension liberation – that is early access to pension funds – and that he wasn't doing that and so he wasn't about to fall victim to that type of fraud. But, as I've said above, by the time Mr T's transfer request was made, the guidance had widened and Phoenix Life should've been on the lookout for pension scams more generally. And it's against that background that I don't consider Phoenix Life, as the ceding scheme, did enough to protect its member, Mr T. Had Phoenix Life acted as it should've done, Mr T wouldn't have gone ahead with the transfer. Hence I'm upholding his complaint.'

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

Mr T confirmed he accepted my provisional decision. Phoenix Life asked me to reconsider my decision – it pointed to the date of the transfer and said it was so close to the implementation of the updated 24 July 2014 guidance and so the complaint shouldn't have been assessed using that later guidance. Phoenix Life said we'd previously confirmed that we'd tend to allow a business a reasonable time – approximately four weeks – to embed any new guidance.

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.

Phoenix Life is unhappy that I've decided this complaint against the background of the updated July 2014 Scorpion guidance. Phoenix Life points out that was published on 25 July 2014, the transfer request was made on 5 August 2014 and the transfer was completed on 7 August 2014. As to what Phoenix Life has said about four weeks generally being allowed, I think that's a misunderstanding of our approach. We recognised, when the Scorpion guidance was first launched, that it was a new initiative and so it was fair to allow businesses some time to put processes and procedures in place to implement it. But the same isn't true of any updates. Here we'd expect businesses to adopt the refreshed guidance more or less straight away, as it reflected new intelligence on the types of scams it should be looking out for. If Phoenix Life felt that would've been a challenge, it could've considered briefly pausing transfers that were in process to give it more time to review what it should be looking out for in transfer requests.

Here Phoenix Life didn't receive Mr T's transfer request until 5 August 2014, which was almost two weeks after the updated guidance had been issued. And it wasn't the case that Phoenix Life had been looking into the transfer request earlier and when the original guidance was still in place. So it wasn't a question of whether Phoenix Life needed to start over when the new guidance was published part way through Phoenix Life's consideration of a transfer request. And, even if it had mistakenly begun applying the earlier guidance, the same warning sign (recently registered scheme) would still have been triggered and provided an opportunity for Phoenix Life to check and ensure it assessed the transfer against the updated action pack. So I maintain it's appropriate to consider what Phoenix Life did, and if it was enough, against the background of the July 2014 Scorpion guidance.

All in all my views remain as set out in my provisional decision. I've repeated what I said above and it forms part of this decision. For the reasons I've given I'm upholding Mr T's complaint. I've set out below what Phoenix Life needs to do to put things right for Mr T and which follows what I said in my provisional decision and neither party having disputed the assumptions I said I'd make as to Mr T being a basic rate taxpayer in retirement and giving TRG investment a nil value as at the date of my final decision.

Putting things right – fair compensation

My aim is that Mr T 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 T 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 T would have remained in his pension plan with Phoenix Life and wouldn't have transferred to the SSAS.

To compensate Mr T fairly, Phoenix Life must 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 is a loss.

Actual value

This means the proportion of the SSAS value originating from Mr T'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 T 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 T 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 the investment. 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 must give the illiquid investment(s) a nil value as part of determining the actual value. In return Phoenix Life may ask Mr T 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 T to provide this undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

- It's also fair that Mr T 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 must pay an upfront sum to Mr T 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.

Notional value

This is the value of Mr T'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 T 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 T's dissatisfaction with the outcome of the investment it facilitated.

Phoenix Life should reinstate Mr T'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 T was invested in).

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

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

To make this reduction, it's reasonable to assume that Mr T is likely to be a basic rate taxpayer in retirement. So, if the loss represents further 'uncrystallised' funds from which Mr T 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 T 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 T'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 T how much has been taken off. Phoenix Life should give Mr T a tax deduction certificate in respect of interest if Mr T 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 T'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 T was invested. However, I expect any such reinstatement to be achieved promptly.

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

My final decision

I uphold the complaint. Phoenix Life Limited must redress Mr T as I've set out above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr T to accept or reject my decision before 13 March 2025.

Lesley Stead
Ombudsman