DRN-5278539

The complaint

Miss W, through her representatives, has complained about a transfer of her personal pension with Scottish Widows Limited trading as Clerical Medical ('SW') to a Self-Invested Personal Pension ("SIPP") in May 2014. Miss W's SIPP was subsequently used to invest in Dolphin Capital (a loan note investment into overseas property), a car park scheme and The ABC Corporate Bond. The investments appear to have little value now. Miss W says she has lost out financially as a result.

Miss W says SW failed in their responsibilities when dealing with the transfer request. She says that they should have done more to investigate the suitability of the investments and undertaken greater due diligence on the transfer. Miss W says she wouldn't have transferred, and therefore wouldn't have put her pension savings at risk, if SW had acted as they should have done and acted in her best interest.

What happened

In March 2014 Miss W signed a client authorisation form allowing SW to release her pension information to Alternative Pension Investments Ltd ('API') which was an unregulated firm. SW sent this information to API on 4 April. Miss W signed an application form for the Orbis SIPP, administered by Guinness Mahon Trust Corporation Limited on 29 April.

On 15 May, SW received a transfer request from Guinness Mahon through the Origo Options system to transfer Miss W's pension to their SIPP. Origo is a service provider offering an online system that can be used by pension providers to reduce the need for paper-based correspondence during transfers.

SW transferred Miss W's pension worth around £130,000 to the SIPP on 22 May 2014. She subsequently invested the majority of these funds into unregulated investments.

Miss W complained to SW in 2021. They rejected the complaint and said they didn't have any concerns about the transfer. Miss W was transferring to Guinness Mahon, a regulated SIPP provider and so there was no reason to provide any warnings to Miss W. As a pension provider they also weren't providing advice.

Miss W referred his complaint to this service where an investigator upheld his complaint.

She considered that:

• SW should have taken account of The Pension Regulator's (TPR) Scorpion guidance at the time and should have sent Miss W a Scorpion leaflet which contained warnings about pension liberation.

• SW should have spotted that the actual SIPP was recently registered which was a warning sign mentioned in TPR's guidance. SW should have reasonably found out more about the transfer by contacting Miss W and asking more questions.

• SW would have likely found out that Miss W had been cold called and was being advised by API, an unregulated firm. She thought SW should have warned Miss W that she was receiving illegal advice and that her pension might be at risk.

• Warnings from SW to this effect would have likely led Miss W to change her mind on the transfer.

SW disagreed and so the complaint was passed to me for an ombudsman decision.

I previously issued a provisional decision in which I decided not to uphold the complaint. Miss W's representatives agreed to close the complaint, however they had not informed Miss W and when she eventually received the provisional decision, she disagreed and made further comments which is why I'm now issuing a final decision.

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.

In my provisional decision I said the following:

The relevant rules and guidance

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

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

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

fairly;

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

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

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

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

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

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

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

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

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

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

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

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

What did personal pension providers need to do?

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

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

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

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

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

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

<u>The circumstances surrounding the transfer- Miss W’s recollections</u>

Miss W told our investigator she had been cold called at a time when she suffered from severe ill health and was vulnerable. She was inexperienced in pension matters and had a cautious attitude to risk. API had recommended the transfer and investments to her and said by investing her fund of around £130,000 she would receive at least £180,000 to £220,000 in 2019. She didn't realise at the time those were unusual investments. Everything looked highly professional and looked plausible to her.

I don't have any reason to doubt Miss W's recollections. API requested the information and I have seen no involvement of anyone else. Given Miss W's circumstances I think I's unlikely she would have initiated these complex and unregulated investments without assistance.

<u>What did SW do and was it enough?</u>

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. This was an easy step to take and didn't happen here. However, on balance I don't think the insert would likely have made a difference to Miss W's decision here. The Scorpion materials did warn about being contacted out of the blue which had happened to Miss W. However, the warnings at the time were focussed on early release pension liberation including being offered cash incentives or loans and being offered to access pensions before the age of 55 and suffering significant tax consequences as a result. None of this applied to Miss W. She was 59 at the time and hadn't been offered early access to her pension in any way. So I don't think the warnings overall would have resonated with her.

In light of the Scorpion guidance at the time of Miss W's transfer, 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. However, as I said above firms were allowed to take a proportionate approach.

It is correct that a recently registered scheme was a warning sign mentioned in the Scorpion action pack. As I've said above, the Scorpion campaign was developed following concerns about consumers being victims of pension liberation scams-that is to access their pension early in an unauthorised manner. A common route to such a scam was to set up a new scheme for the funds to be transferred to. These schemes tended to be occupational schemes where the sponsoring employer had no genuine link to the scheme member. These schemes aren't FCA regulated and do not offer the same protections as FCA regulated pensions do.

Guinness Mahon had been fully authorised by the FSA and FCA and operating in the SIPP market since 2007. So the fact that the specific SIPP Miss W had chosen to transfer to was recently registered reasonably shouldn't have been a concern. Guinness Mahon carried the same responsibility for Miss W's SIPP as for the others it had been operating for a number of years.

The risk of a long-standing regulated SIPP provider being involved in pension liberation was minimal. The FCA also requires authorised SIPP providers to do their own due diligence on the scheme members' advisers and intended investments. And where a SIPP provider failed in its due diligence requirements then the consumer had regulatory protections. In fact I understand Miss W did make a successful claim for compensation through the Financial Services Compensation Service (FSCS) in relation to failures by Guinness Mahon.

I recognise that an unregulated firm had asked for information on Miss W's pension. However, Miss W transferring to a regulated SIPP with a longstanding provider could have reasonably given SW comfort that the risk of pension liberation was unlikely. And so in line with taking a proportionate approach I wouldn't have expected them to make further enquiries with Miss W.

I accept that if SW had contacted Miss W they would have likely found out that she hadn't received regulated advice and that she was investing into unregulated investments. However, based on the information SW had at the time, I don't think they needed to be concerned. They didn't need to check what Miss W was intending to invest in or check whether this was suitable for her.

In summary I think SW's only failure here was that they didn't provide Miss W with the Scorpion insert. And for reasons set out above I don't think this likely would have deterred her from transferring. So even if SW had done everything they should have, Miss W would still likely be in the same position she finds herself in now. Therefore it wouldn't be fair or reasonable to hold SW responsible for the losses Miss W suffered.

Miss W's response to the provisional findings

Miss W spoke again to our investigator and also submitted further comments in writing. I have considered everything she has said carefully, however I remain satisfied with my findings in the provisional decision.

As I said in my provisional decision I have genuine sympathy for Miss W's situation and acknowledge that she was persuaded and likely mislead by unregulated parties to invest in a way that was unsuitable for her. And I by no means underestimate what impact losing significant parts of her retirement provision when she was relatively close to retirement age had on Miss W financially and personally.

It's correct that TPR recommends pension providers should do due diligence into transfers in certain circumstances. However, as I explained in my provisional decision firms are allowed to take a proportionate approach to balance consumer risk and processing transfers quickly efficiently. It wasn't expected that firms would do full due diligence including contact with the consumer on every transfer.

At the time of Miss W's transfer in May 2014, TPR's main focus was still to prevent pension liberation in the form of early unauthorised access to someone's pension. This was the perceived threat at the time. It had set out certain warning signs firms were meant to look out for and conduct further due diligence where such risks were identified. Based on the information SW had, there were no such warning signs for pension liberation in my view. Miss W was transferring to a SIPP with an established and regulated SIPP provider and so the risk of pension liberation could reasonably be seen as unlikely (and notably this isn't what happened here).

TPR's warnings developed over the years to warn about broader pension scams and consumers being lured into high-risk unregulated investments for example into overseas property. Firms were recommended to look at a wider range of warning signs and expectations on the industry have increased over the years. However, this was after Miss W's transfer (warnings started to change from July 2014 onwards and recommended processes and due diligence measures got more and more specific and detailed from 2015 onwards). I need to consider the relevant guidance and expectations in place at the time of Miss W's transfer.
I said in my provisional decision that SW nonetheless should have sent Miss W a Scorpion insert which they failed to do. However, my role isn't to punish SW for any mistakes they made. In order to hold SW responsible for Miss W's losses, I need to be persuaded-on the balance of probabilities- that sending that leaflet would have changed Miss W's mind about the transfer and her investment losses would likely have been avoided.

I recognise that Miss W feels really strongly that the leaflet with its Scorpion image and warnings about dangers to pension savers would have scared her into taking further action. She said she would have talked to her brother about it and heeded any warnings. I genuinely believe Miss W when she says she is risk averse and I have no doubt that she would have read and paid attention to the leaflet if she had received it and possibly even spoken to her brother.

However, the leaflet didn't warn about transfers in general. They warned specifically about signs of early access pension liberation. It warned about being offered access to a pension before the age of 55 for example through loans, savings advances or cash back/incentives from a pension. None of this applied to Miss W. So reasonably I don't think those warnings would have been concerning in her situation.

I understand this will be disappointing. However, I still don't think SW's actions have contributed to or caused Miss W's losses here and so my final decision is not to uphold this complaint.

My final decision

I don't uphold Miss W's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss W to accept or reject my decision before 19 February 2025.

Nina Walter
Ombudsman