The complaint

Mr H has complained about a transfer of his Phoenix Life Limited personal pension to a small self-administered scheme (SSAS[1]) in November 2015. Mr H's SSAS was subsequently used to invest in an overseas property development. The investment now appears to have little value. Mr H says he has lost out financially as a result.

At the time of the events complained about Mr H's personal pension was branded in the name of another pension provider. However, as Phoenix Life has confirmed it is responsible for responding to the matter I will only refer to it within this decision.

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

What happened

Mr H held two personal pensions: one with Phoenix Life and the other with a firm I'll call provider Z. Mr H has also complained about provider Z's actions in transferring that pension. I am considering that complaint under a separate reference number.

On 28 February 2014, Mr H signed a letter of authority (LOA) allowing two firms, called Moneywise and First Review Pension Services (FRPS) to obtain details, and transfer documents, in relation to his pensions[2]. At that time Moneywise was regulated by the Financial Conduct Authority (FCA). FRPS was not FCA regulated. Mr H says he signed the LOA following an unsolicited approach from FRPS.

On 13 May 2014 FRPS wrote to provider Z enclosing Mr H's LOA. It requested information on his pensions and discharge forms to allow a transfer. FRPS's information request quoted Moneywise's FCA registration number and said that both firms, FRPS and Moneywise, were acting for Mr H. Provider Z sent FRPS the requested information on 18 June 2014.

I've seen no evidence of any further transfer activity until April 2015 when Mr H gave an – at that time – FCA regulated firm, Sequence Financial Management Limited (Sequence),

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[1] A SSAS is a type of occupational pension in which the members are also trustees and therefore take responsibility for operating the scheme. It's an arrangement typically intended to meet the needs of people who run their own companies. SSASs are not regulated by the FCA. They can hold a wider range of investments and assets than many personal pensions. As an occupational pension, a SSAS must be sponsored by an employer company.

[2] I've seen no reference to this 2014 LOA, or Phoenix Life's response to it, on the file of papers Phoenix Life provided. But I've seen a copy of the LOA on provider Z's file. It clearly allowed FRPS to gather information from both provider Z and Phoenix Life. Mr H's representatives have also said that FRPS did send it to Phoenix Life at the time. So, I assume it's simply been omitted from the papers presented to me. Similarly, I've seen no reference at all to the involvement of Sequence on Phoenix Life's file, but I have seen this in provider Z's documents.

authority to request his pension information. Sequence sent a request for that information to provider Z, which it responded to on 11 May 2015. There is no further mention of Sequence's involvement in the transfer from the file of papers I've seen.

On 3 June 2015 Mr H signed another LOA again allowing FRPS to request information about his pension. This LOA did not make any reference to Moneywise. Later that month FRPS sent the LOA to Phoenix Life and provider Z asking for Mr H's pension information in order to effect a transfer.

Phoenix Life sent FRPS the requested information on 6 July 2015. It enclosed a copy of a publication from the Pensions Regulator (TPR) known as the Scorpion insert because of the imagery it contains. I say more about the Scorpion materials below. It also enclosed a copy of a publication produced by the Financial Conduct Authority (FCA) concerning risks associated with transferring a pension to a self-invested personal pension (SIPP) or a SSAS.

On the same day, 6 July 2015, Phoenix Life sent a letter titled 'Retirement Risk Warnings' directly to Mr H. It said Mr H would need to complete the enclosed 'Retirement Risk Warnings Form and Declaration' as well as a transfer application form which it had sent to FRPS. It said that if he had not already done so it recommended he seek advice from a regulated financial adviser or Pension Wise. It said that Pension Wise could only provide guidance and if Mr H needed further help he should seek advice from a regulated financial adviser.

The letter explained the role of authorised advisers and provided information about where Mr H could find such an adviser. The letter said that Phoenix Life couldn't proceed with the transfer unless Mr H returned the enclosed form and declaration.

The form included a number of warnings. For example it warned that Mr H could lose out on bonuses his pension fund had earned and said he may incur charges by transferring. Also, under a title of 'Be Aware Of Pension Scams' it recommended that before transferring Mr H should check that the firms he was investing with and his adviser were FCA regulated. It provided guidance on how to check the FCA's register.

Under the same heading, 'Be Aware Of Pension Scams', it gave a list of things to watch out for. This included: a cold call offering a free pension review; convincing marketing materials offering returns of over 8%; a proposal to put money into a single investment – it said that in most circumstances regulated advisers would suggest diversification of assets; and transfer of money overseas.

Phoenix Life's letter also explained that, if Mr H transferred, the life assurance cover which was currently linked to his personal pension would also stop.

There's no evidence Mr H ever returned the completed form and signed declaration to Phoenix Life.

Later the same month, July 2015, a company was incorporated with Mr H as director. I'll refer to this company as T Ltd. The following month, August 2015, Mr H signed an LOA to allow FRPS to correspond with Rowanmoor Group PLC to set up a SSAS. Mr H also signed a SSAS application form. Rowanmoor Group PLC (Rowanmoor) was the SSAS provider and Rowanmoor Trustees Limited were to be its independent trustee. T Ltd was recorded as the SSAS's principal employer.

The SSAS documents also recorded that a firm called Broadwood Assets was acting as the "trustee adviser". And the SSAS funds would be used to invest £44,450 in an overseas hotel development run by The Resort Group (TRG). The SSAS application included a note advising applicants to seek advice from a suitably qualified adviser before making a transfer.

Mr H said he became interested in a transfer following an unsolicited approach from FRPS offering a free pension review. Mr H said FRPS's adviser called at his home and – during a three hour meeting – introduced the idea of investing in TRG's overseas hotel development. He said the adviser told him he could expect returns of 6% a year, which would far exceed the returns from his personal pensions. Mr H said this sounded like a realistic opportunity to achieve a significant increase on his pension savings.

Rowanmoor sent a request to Phoenix Life to transfer Mr H's pension funds into the T Ltd SSAS via the Origo system[3]. Phoenix Life told us that owing to the passage of time it no longer holds a copy of the original transfer request.

In October 2015 provider Z transferred Mr H's personal pension funds of £23,927 to T Ltd's SSAS.

Phoenix Life transferred Mr H's personal pension fund of £26,496 to T Ltd's SSAS on 17 November 2015. He was 47 years old at the time of the transfer. Subsequently, SSAS funds of £44,450 were invested in the TRG overseas development.

In February 2016 Mr H contacted Phoenix Life to ask it about his life assurance cover. Phoenix Life explained that the cover had ended when he transferred his pension.

The TRG investment did initially provide some returns, but these were lower than expected and appear to have dried up or become sporadic around 2019. The investments are now considered illiquid and incapable of sale on the open market.

In August 2020, Mr H complained to Phoenix Life, via his representatives. 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, there wasn't a genuine employment link to the sponsoring employer, the transfer followed high pressure sales techniques, the catalyst for the transfer was an unsolicited call and an unregulated firm had advised him.

Phoenix Life didn't uphold the complaint. It said it had received the transfer request via the Origo system. As such it said it was the responsibility of the receiving scheme to go through the risks with Mr H.

Mr H brought his complaint to the Financial Ombudsman Service. One of our Investigators looked into it. He didn't think it should be upheld.

Mr H didn't agree with our Investigator's complaint assessment. As our investigator was unable to resolve the dispute informally, the matter was passed to me to decide.

Provisional decision

On 17 December 2024 I issued a provisional decision setting out why I was minded to uphold the complaint. For ease of reference I've copied the relevant extract below.

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

[3] Origo is an electronic platform which allows the transfer of pensions and investments. It can make transfers more efficient and reduce processing times.

In bringing this complaint Mr H – via his representatives – has made a number of detailed points. But in this provisional decision I don't intend to address each and every issue raised. Instead I will focus on what I believe are the key matters at the heart of this complaint and the reasons for my decision.

I've taken into account relevant law and regulations, regulator's rules, guidance and standards and Codes of practice, and what I consider to have been good industry practice at the time. And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

As I've said above I'm also considering Mr H's complaint about provider Z under a separate reference number. But, in this decision my findings are limited to Mr H's complaint about Phoenix Life. However, as the actions on the transfers from both pension providers have a bearing on my findings I have referred to the relevant events relating to the other pension transfers for context purposes. I can confirm that, currently, my provisional findings in both complaints are similar.

<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 how personal pension providers deal with 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 threat 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.*

In February 2013, TPR issued its Scorpion guidance to help tackle the increasing problem of pension liberation, the process by which unauthorised payments are made from a pension (such as accessing a pension below minimum retirement age). In brief, the guidance provided a due diligence framework for ceding schemes dealing with pension transfer requests and some consumer-facing warning materials designed to allow members to decide for themselves the risks they were running when considering a transfer.

The guidance comprised the following:

- *An insert to be included in transfer packs (the 'Scorpion insert').*
- *A longer booklet which gives more information, including example scenarios.*
- *An 'action pack' for scheme administrators that highlighted the warning signs present in a number of transfer examples.*

The Scorpion guidance 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 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.

So the content of the Scorpion guidance was essentially informational and advisory in nature. Deviating from it doesn't therefore mean a firm has necessarily 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 them promptly and in line with a member's rights.

That said, the launch of the Scorpion guidance in 2013 was an important moment in so far as 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. It was launched in response to widespread abuses that were causing pension scheme members to suffer significant losses. And its specific purpose was to inform and help ceding firms, like Phoenix Life, 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 a turning 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.

The Scorpion guidance was updated in July 2014. It widened the focus from pension liberation specifically, to pension scams more generally – which included situations where someone transferred in order to benefit from "too good to be true" investment opportunities such as overseas property developments. An example of this was given in one of the action pack's case studies.

In a similar vein, in 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 self-invested personal pensions (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.

There was a further update to the Scorpion guidance in March 2015, which is relevant for this complaint. This guidance referenced the potential dangers posed by "pension freedoms" (which was about to give people greater flexibility in relation to taking pension benefits) and explained that pension scams were evolving. In particular, it highlighted that single member occupational schemes (SSASs) were being used by scammers.

At the same time, an industry working group initiated a broader piece of guidance covering both TPR and FCA regulated firms: the Pension Scams Industry Group (PSIG)[4] Code of Good Practice. The intention of the PSIG Code was to help firms achieve the aims of the Scorpion campaign in a streamlined way; balancing the need to process transfers promptly with the need to identify those customers at material risk of scams.

<u>The March 2015 Scorpion guidance</u>

The March 2015 update to the Scorpion guidance asked schemes to ensure they provided their members with "regular, clear" information on how to spot a scam. It recommended giving members that information in annual pension statements and whenever they requested a transfer pack. It said to include the pensions scam "leaflet" in member communications. In the absence of more explicit direction, I take the view that the member-facing Scorpion warning materials were to be used in much the same way as previously, which is for the shorter insert (which had been refreshed in March 2015) to be sent when someone requested a transfer pack and the longer version (which had also been refreshed) made available when members sought further information on the subject.

When making a transfer, transferring schemes were also asked to use a three-part checklist to find out more about a receiving scheme and why their member was looking to transfer.

<u>The PSIG Code of Good Practice</u>

The PSIG Code was voluntary. But, in its own words, it set a standard for dealing with transfer requests from UK registered pension schemes. The FCA and the Association of British Insurers (amongst others) "welcomed" the Code. And several FCA regulated pension providers were part of the PSIG and co-authored it. So many of the observations I've made about the status of the Scorpion guidance would, by extension, apply to the Code. In other words, personal pension providers didn't necessarily have to follow it in its entirety in every transfer request and failure to do so wouldn't necessarily be a breach of the regulator's Principles or COBS. Nevertheless, the Code sets an additional benchmark of good industry practice in addition to the Scorpion guidance.

In brief, the PSIG Code asked schemes to send the Scorpion "materials" in transfer packs and statements, and make them available on websites where applicable. The Code goes on to say those materials should be sent to scheme members directly, rather than just to their advisers.

Like the Scorpion guidance, the PSIG Code also outlined a due diligence process for ceding schemes to follow. But, whilst there is considerable overlap between the Scorpion guidance and the Code, there are several differences worth highlighting here, such as:

- *The Code includes an observation that: "A strong first signal of [a scam] would be a letter of authority requesting a company not authorised by FCA to obtain the required pension information; e.g. a transfer value, etc." This is a departure from the Scorpion guidance (including the 2015 guidance) which was silent on whether anything could be read into the entity seeking information on a person's pension.*

- *The Code makes explicit reference to the need for scheme administrators to keep up to date with the latest pension scams and to use that knowledge to inform due*

[4] At the time the group operated under the title of the Pension Liberation Industry Group. But as it later changed its name and is now known as PSIG I will only use that name within this decision.

diligence processes. Attention is drawn to FCA alerts in this area. (I noted the contents of some of those alerts earlier in my decision.)

- *Under the Code, an 'initial analysis' stage allows transferring schemes to fast-track a transfer request without the need for further detailed due diligence, providing certain conditions are met. No such triage process exists in the 2015 Scorpion guidance – following the three-part due diligence checklist was expected whenever a transfer was requested.*

- *The Code splits its later due diligence process by receiving scheme type: larger occupational pension schemes, SIPPs, SSASs and Qualifying Recognised Overseas Pension Schemes (QROPS). The 2015 Scorpion guidance doesn't distinguish between receiving schemes in this way – there's just the one due diligence checklist which is largely (apart from a few questions) the same whatever the destination scheme.*

TPR began referring to the Code as soon as it was published, in the March 2015 version of the Scorpion action pack. Likewise, the Code referenced the Scorpion guidance and indicated staff dealing with scheme members needed to be aware of the Scorpion materials.

So, in order to act in the consumer's best interest and to play an active part in trying to protect customers from scams, I think it's fair and reasonable to expect ceding schemes to have paid due regard to both the Scorpion guidance and the PSIG Code when processing transfer requests. Where one differed from the other, they needed to consider carefully how to assess a transfer request taking into account the interests of the transferring member.

Typically, I'd consider the Code to have been a reasonable starting point for most ceding schemes because it provided more detailed guidance on how to go about further due diligence, including steps to potentially fast-track some transfers which – where appropriate – would be in the interest of both parties.

The considerations of regulated firms didn't start and end with the Scorpion guidance and the PSIG Code. 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 either the Scorpion guidance or the Code – then its general duties to its customer as an authorised financial services provider would come into play and it would have needed to act. Ignoring clear signs of a scam, if they came to a firm's attention, or should have done so, would almost certainly breach the regulator's principles and COBS 2.1.1R.

<u>The circumstances surrounding the transfer: what does the evidence suggest happened?</u>

We haven't spoken with Mr H directly. But, via his representatives, he's told us that at the time of events concerned he was employed earning around £18,000 a year. He was not an experienced investor. He was making the repayments on a loan but otherwise was debt free. He doesn't consider himself to be a high or even medium risk investor and had no savings or other investments.

Mr H said that his initial interest in a transfer followed an unsolicited call from FRPS offering a free pension review. And it's not in doubt that Mr H signed FRPS's LOA in 2014. I'll also add that the 2014 LOA referred to the involvement of an authorised adviser in Moneywise. However, while FRPS made reference to Moneywise, I haven't seen anything to suggest

Moneywise ever became involved or gave any advice to Mr H. And in any event, while Mr H signed an LOA allowing FRPS to request information concerning his pensions, it doesn't appear that the matter progressed at that time.

The next sign of transfer activity was in May 2015 when Mr H signed an LOA allowing Sequence to gather information about his pension. It's not clear how this contact came about. However, the LOA only gave Sequence authority to obtain information, it was not an instruction for it to act as his servicing agent. And there's simply no evidence of Sequence giving Mr H advice of any nature. There's no mention of Sequence on the file that provider Z sent me and it isn't mentioned again on Phoenix Life's file. So I'm satisfied that it didn't provide advice to Mr H.

On balance I believe Mr H's recollections that it was FRPS's agent who made the recommendation to invest with TRG. That's because we know that FRPS requested Mr H's pension details, which both Phoenix Life and provider Z supplied. Subsequently, T Ltd was established with Mr H as a director. And Mr H completed a SSAS application. And I've seen Mr H signed a further LOA to allow FRPS to correspond with Rowanmoor concerning the establishment of the SSAS. I'll add that I'm also aware that one of FRPS's directors was also a director of TRG. And, from the many other cases we've seen, I'm aware it was common practice for FRPS's agents to recommend that consumers set up SSASs in order to hold TRG investments. So, on balance, I'm satisfied that FRPS remained involved in the process throughout and certainly to the point where Mr H invested SSAS funds in TRG.

It follows that I'd don't think an FCA authorised firm advised Mr H at any point in the process.

Mr H said the prospect of the TRG investment paying him 6% returns would far exceed the performance of his personal pension and would allow him to significantly increase his pension savings. I haven't seen anything to suggest Mr H had a lot of experience of pensions and investments. And I also haven't seen anything about his circumstances or what he's said that leads me to think he'd likely have embarked on such a complicated arrangement on his own – setting up a new company, opening a SSAS, transferring his existing pension and investing overseas.

So, I think it was likely the promise of better returns that persuaded Mr H to transfer. Advice to transfer out of his personal pensions would be regulated advice which should only have been given by an FCA authorised adviser. But I'm satisfied that, on balance, it was FRPS's unregulated adviser who made that recommendation.

I'm also satisfied that a firm telling Mr H that he would receive better returns, and so have a better retirement income, by transferring away from his personal pensions to a SSAS and investing with TRG represented advice to transfer. For the reasons already given I'm satisfied FRPS gave that advice and it was the catalyst for the transfer. And the documents indicate the SSAS was only established to facilitate the investment in TRG. So, I think it was likely FRPS that recommended this investment and that Mr H transferred his pension in order to invest in TRG.

I think what Mr H has said about the investment now having little value is also likely to be correct. As I've noted, I understand returns from the investment to the pension have most likely stopped or will be sporadic at best. And from what we know about investments through TRG from other complaints we've seen, I think there is no realisable market for re-sale of the investment unit and the investments are now largely illiquid.

What did Phoenix Life 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.

There's no evidence that Phoenix Life sent the Scorpion insert directly to Mr H. It did send it to FRPS when it responded to FRPS's information request in July 2015. But I don't think that action was of much value. The guidance recommended issuing the insert directly to the consumer. That was so that they could consider the important information for themselves[5]. And unregulated advisers might have had a vested interest in preventing their clients from receiving the Scorpion materials.

That's because the Scorpion material highlights concerns for consumers to look out for which are the standard operating practices for the unregulated firms concerned. For example the insert says to watch out for firms making cold calls and offering free pension reviews, which is what FRPS did in this and many other cases we are aware of. So it was in FRPS's interests for Mr H either not to see the Scorpion materials or for those to be given to him in a manner controlled by FRPS itself. It follows that Phoenix Life should have sent the Scorpion insert direct to Mr H as well. Similarly, Phoenix Life also gave the FCAs warning information, concerning transfers to SIPPs and SSASs to FRPS rather than to Mr H himself. So, for the same reason I don't think that was necessarily that helpful.

That said, as I explain below Phoenix Life did send Mr H its Retirement Risk Warnings letter. It sent that directly to his home and was correctly addressed. So I think it's more likely than not that he received it. And, while the information within it was presented in a different format, the letter did raise similar issues to the points the Scorpion insert highlighted. Of particular relevance to this case it said that signs of a scam could be:

- *A cold call offering a free pension review.*
- *Convincing marketing materials offering returns of over 8%.*
- *A proposal to put money into a single investment. It said that in most circumstances regulated advisers would suggest diversification of assets.*
- *Transfer of money overseas.*

And those are all points also made by the Scorpion insert. So, Phoenix Life did send Mr H more or less the same information the Scorpion insert contained although it was in a different format.

Due diligence:

As explained above, I think the PSIG Code was a reasonable starting point for most ceding schemes. I've therefore considered Mr H's transfer in that light. But I don't think it would make a difference to the outcome of the complaint if I had considered Phoenix Life's actions using the Scorpion guidance as a benchmark instead.

I've firstly looked at what due diligence Phoenix Life carried out in this case to consider whether it was sufficient.

[5] I can confirm that provider Z also did not send Mr H the Scorpion materials.

Phoenix Life has argued that as the transfer request came via the Origo system the onus was on the receiving scheme, rather than it, "to go through the risks and implications with the customer". But I find that approach wholly unsatisfactory.

The purpose of the due diligence in question, as set out in the Code and the Scorpion guidance, was aimed at preventing consumers losing money to pension scams and liberation. And, by doing the appropriate due diligence, businesses like Phoenix Life could help consumers to avoid the loss of their entire pension funds.

Phoenix Life had duties under the provisions of the PRIN and COBS 2.1.1R to take the necessary steps to prevent that happening. And the Code was clear what those steps were. But Phoenix Life didn't follow them and instead essentially said it had no part to play and intended to rely on the due diligence carried out by a third party. I don't think that was the right approach. It fell far short of the expectations on ceding schemes like Phoenix Life at the time.

Further, I note that at the time of the transfer Rowanmoor was a long established SSAS provider and had some repute in the industry. Rowanmoor Trustees Limited also had legal and fiduciary duties as a professional trustee. There's an argument, therefore, that Phoenix Life could have taken comfort from this. I disagree. The Scorpion guidance gave ceding schemes an important role to play in protecting customers wanting to transfer a pension. It would defeat the purpose of the Scorpion guidance for a ceding scheme to have delegated that role to a different business – especially one that had a vested interest in the transfer proceeding.

An important aspect here is the fact that there is little regulatory oversight of SSASs; they don't have to be registered with TPR. In the absence of that oversight, Phoenix Life was assuming, in effect, that Rowanmoor would want to maintain its standing in the industry and the trustee subsidiary would comply with its legal and fiduciary duties. In the context of guarding against pension scams – and an environment where providers and trustees clearly didn't always act as they should have done – I don't consider this to have been a prudent assumption.

The fact that a different part of Rowanmoor's business was regulated by the FCA doesn't change my thinking on this. The key point is that Rowanmoor Group Plc and Rowanmoor Trustees Limited (both of which were involved in the operation of the SSAS) weren't FCA regulated. So I see no reason why they would have operated with FCA regulations and Principles in mind – or why their actions would have come under FCA scrutiny. As such, I'm not persuaded Phoenix Life could, reasonably, have derived sufficient comfort about the Rowanmoor SSAS as a destination for Mr H's transfer.

I'm aware that the PSIG Code does allow for ceding schemes to omit a large part of the due diligence process where the transfer is to an accepted 'club' or 'group'. The example the Code gives is to a 'Public Sector Transfer Club'. But it seems to me that the bar for accepting transfers with little or no due diligence is a high one intended to apply to transfers to large, established, occupational schemes. Presumably that's because the scam risk in such transfers is extremely small. So there would be little to gain by holding them up in order to conduct further due diligence.

I don't think the same can reasonably be said to apply to transfers to smaller, more recently established schemes that are promoted and/or run by firms who stand to benefit financially from these transfers, even where the request comes through Origo. The scam risk (and scam activity) is much greater in such schemes. Indeed the March 2015 scorpion action pack makes this point when it says:

“Pension scam models are also changing. Many scammers are directing members to transfer into single member occupational schemes in an attempt to escape scrutiny.”

So in an environment where single member occupational schemes (like Mr H’s SSAS) were being used to “escape scrutiny”, it’s difficult to see how Phoenix Life could suggest its reliance on the involvement of the Origo system or Rowanmoor’s reputation was sufficient. And, despite its assertions, nothing I’ve seen causes me to think that Phoenix Life could have been assured that Origo or Rowanmoor had already carried out or would carry out the necessary checks based on the extremely limited information it received with the Origo transfer request.

Further, Phoenix Life received the Origo transfer request at least a year after the FCA started raising concerns about transfers to SIPPs and SSASs. And Phoenix Life was clearly aware of these concerns as it sent the FCA leaflet warning of such things to FRPS in July 2015. So Phoenix Life should have been on the look out for potential concerns when considering Mr H’s transfer request. But despite that awareness it appears it only carried out minimal checks.

That said, it’s apparent that Phoenix Life did have its own due diligence process in place. And, if conducted properly, that could have gone some way to preventing pension losses or, at the least, to highlighting the risks to the consumer.

I say the above as Phoenix Life sent Mr H a Retirement Risk Warning letter. That enclosed a ‘Retirement Risk Warning Form and Declaration’, which it said Mr H needed to complete before the transfer could go ahead. The form attached asked Mr H to tick boxes appropriately to say whether he had or had not taken certain actions including (amongst others):

- *If he had sought guidance from Pension Wise.*
- *If he had sought regulated financial advice (elsewhere on the form it explained how to check if an investment scheme or adviser were FCA authorised).*
- *If having read the warnings (described in bullet points above) he understood the risks associated with pension scams but still wanted to transfer.*

The form also included a final declaration for Mr H to sign. That said he had carefully considered all the risk warnings raised in the form but wanted to proceed. The declaration repeated that Phoenix Life could not go ahead and pay his retirement benefits unless he’d signed the form. And if he didn't want to go ahead with the transfer it asked Mr H to contact it.

So, if Mr H had ticked the appropriate boxes and signed and returned the declaration then I think Phoenix Life could have taken some comfort that he’d likely made an informed decision to go ahead with the transfer in the knowledge of the risks involved.

However, there’s no evidence that Mr H signed and returned the declaration. So Phoenix Life had no way of knowing if Mr H had read and understood the risk warnings applicable to his situation. And, despite it saying that it could not proceed with the transfer unless he returned the declaration, it went ahead and transferred the funds anyway. This would seem to me to be a significant failure in applying its own due diligence process aimed at preventing pension losses.

Clearly, Phoenix Life was aware that it had a part to play in preventing such losses and had designed its process – involving obtaining the declaration – to try to protect the consumer and itself from the fall-out of losing funds to pension scams. But such a process is of little value if it's not seen through to completion. And while Phoenix Life managed the first half of the process, issuing the form to Mr H, it then entirely omitted to progress the second part of it. That was either receiving the appropriately signed declaration or otherwise refusing to go ahead with the transfer until the declaration was signed or Mr H contacted it.

Instead it seems that, because the actual transfer request came via Origo, Phoenix Life has dismissed the process it had already begun and proceeded directly to making the transfer. It's apparent from its response to Mr H's complaint – saying the onus lay on the receiving scheme to make Mr H aware of the risks and implication of transferring – that Phoenix Life had in effect 'clean listed' any transfer request coming via Origo. But in doing so Phoenix Life has effectively 'clean listed' numerous entities, including many single member SSAS schemes. Its basis for doing so seems to be simply the fact that it believed Origo required the receiving scheme, in this case Rowanmoor, to make the consumer aware of potential risks. But, for the reasons I've already given I don't think that was reasonable. So, I don't think it could have fast-tracked Mr H's transfer on the basis that the "administrator/scheme" didn't present a scam risk when it knew almost nothing about the actual scheme, that is Mr H's SSAS, which would be receiving the funds.

Further, the transfer itself was not to Rowanmoor, it was to T Ltd's SSAS, which was recently registered and previously unknown to Phoenix Life. It follows that I don't think Phoenix Life should have considered the receiving scheme/administrator as being free of scam risk simply because the transfer request came via Origo. So it should have followed the initial analysis process as set out in the Code and described above.

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

With a few simple enquiries I think Phoenix Life would have established that Mr H had been offered the opportunity to invest in an overseas property development that was promising a high rate of return. Also, the SSAS was not only recently established but also connected to a company registered to Mr H's home address, he was the sole director, it wasn't trading and it didn't actually employ him in a meaningful sense. So T Ltd and the SSAS had been set up with the sole purpose of accepting the transferred funds and making an unregulated investment.

But what is of particular significance is it's likely that further due diligence involving asking Mr H to answer reasonable questions, as described in the Code, would have revealed that he was first contacted by a cold call offering a free pension review. He was then visited and an unauthorised adviser gave him advice to transfer his personal pension to an unregulated investment vehicle situated off-shore and offering an overseas development opportunity.

Being advised by an unauthorised firm to transfer benefits from personal pension plans 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, so that includes Phoenix Life, should have been aware that financial advisers need to be authorised to give regulated advice in the UK. The PSIG Code (and the Scorpion guidance) make much the same point. Indeed, the Code says firms should report individuals appearing to give regulated advice that aren't authorised to do so.

My view is that if Phoenix Life had done what it should have, then it should have been concerned by FRPS's involvement because it pointed to a criminal breach of FSMA. On the balance of probabilities, I'm satisfied such a breach occurred here.

What should Phoenix Life have told Mr H?

Had it done more thorough due diligence, there would have been a number of warnings Phoenix Life could have given to Mr H in relation to a possible scam threat as identified by the PSIG Code (and the Scorpion action pack). Phoenix Life should also have been aware of the close parallels between Mr H's transfer and the warnings the FCA gave to consumers in 2014 (and subsequently passed on to firms) about transferring to SSASs in order to invest in unusual investments.

But the most stark oversight was Phoenix Life's failure to uncover the threat posed by a non-regulated adviser. Its failure to do so, and also to warn Mr H 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 H that the firm which had advised him 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 he risked falling victim to illegal activity and losing regulatory protections.

I don't think this would have been a disproportionate response given the scale of the potential harm Mr H was facing and Phoenix Life's responsibilities under PRIN and COBS2.1.1R. And I don't think any such warnings would reasonably have caused Phoenix Life to think it was running the risk of advising Mr H, that it was replicating the responsibilities of the receiving scheme or that it was putting in place unnecessary barriers to exit.

I'm satisfied any messages along these lines would have changed Mr H's mind about the transfer. The messages would have followed conversations or correspondence with him so would have seemed to him (and indeed would have been) specific to his individual circumstances. And Phoenix Life would have imparted those messages in the context of raising concerns about the risk of losing pension monies as a result of untrustworthy advice. So Phoenix Life's information would have carried far more weight than simply being sent the generic risk warnings letter, which posed questions without real context for how that affected Mr H personally.

I think warnings of the above nature would have made Mr H 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 H would have been any different.

So, I consider that if Phoenix Life had acted as it should, Mr H would have made a mental shift from believing that he was investing in a realistic opportunity to significantly improve his retirement savings to a position where he was putting his pension at risk as a result of untrustworthy advice. And having made that shift I don't think he would have proceeded with the transfer out of his personal pension or suffered the investment losses that followed.

Did Mr H's own actions contribute to his losses and should this affect any compensation payable?

The Law Reform (Contributory Negligence) Act 1945 is relevant for me to take into account in this complaint. It allows for the apportionment of liability in the case of contributory negligence. It says that where any person suffers damage as the result partly of his own fault and partly of the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage. However, the damages *recoverable shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.*

I've taken the above into consideration when looking at Mr H's actions. I've done so not because the Act directly applies to complaints to our service (it applies only to legal claims), but because I consider this complaint raises similar issues to a legal claim in negligence.

I think a relevant consideration here is Mr H's reaction to receiving the Retirement Risk Warning Letter and its enclosures. Phoenix Life sent this to him, asked him to read its contents and sign the declaration before allowing the pension transfer to proceed. Mr H didn't sign or return the declaration. It follows that he either read the letter but decided to transfer on the off chance that Phoenix Life would allow him to do so without the signed declaration despite what it had previously said. Or he didn't read the letter. I think the latter is the most logical explanation.

When arriving at the above conclusion I've noted that one of the warnings the letter contained was that, by transferring, the life assurance cover attached to the pension plan would be lost. And the risk warning form asked Mr H to tick a box to confirm he understood that. So, if Mr H had read and fully digested the information when Phoenix Life had sent it to him he should have realised that, by transferring his life cover would end.

However, in February 2016, around three months after the transfer, Mr H rang Phoenix Life and asked it why his life cover had ceased. But, if he'd read the risk warning letter/form he should already have been aware this had stopped and why. So this would seem to support my finding that Mr H didn't read the Retirement Risk Warning Letter and its enclosures. Importantly, as I've already said, some of the pension scams warnings the risk letter advised Mr H to look out for to be aware of applied to his situation. Those included receiving a cold call offering a free pension review; a proposal to put money into a single investment; and transfer of money overseas. All of those things should have resonated with Mr H and caused him to sit up and take notice that, perhaps, he was taking on more risk than he'd anticipated.

Also, the form included advice about how to check whether an investment provider and adviser were regulated by examining the FCA's register. And while I think Phoenix Life could have presented this information more clearly, it's apparent that Mr H didn't respond to it. That is, he said when he complained that he didn't appreciate that his adviser was not regulated or the implications of that. But the risk form did give Mr H the information he needed in order to check whether FRPS was regulated. But it's apparent Mr H didn't act on this.

On balance I'm therefore satisfied that Mr H didn't read the information Phoenix Life gave in the risk warning letter and enclosures. And if he had done so, and responded accordingly, it's quite likely that matters wouldn't have proceeded, he would have identified the risks and taken some action to stop it, for example by consulting with an appropriately authorised financial adviser. But he didn't do so. And I've thought about how Mr H's omission here should be reflected in the compensation payable.

As I've indicated above, FRPS should not have made a recommendation to Mr H that he transfer out of his personal pensions and invest in TRG. Only an authorised financial adviser could do that. In my view FRPS was in breach of the general prohibition under FSMA by making such a recommendation. It involved a high risk overseas property development which was plainly inappropriate for Mr H, given his lack of investment experience and limited financial resources. And this was just the sort of investment that the Scorpion guidance was warning about. But if Phoenix Life had appropriately concluded its due diligence process then it's probable that the transfer wouldn't have completed. I'm therefore satisfied there is *sufficient connection between the harm Mr H wants to be compensated for and the risk that Phoenix Life had a duty to guard against.*

Nonetheless, I also think it's fair that Mr H should bear some responsibility for the loss he has incurred. As described above I think his failure to act on what he knew (or reasonably should have known) contributed to the loss he's suffered. However, for the reasons already given I think Phoenix Life committed a far more serious breach of the duty it owed to Mr H under PRIN and COBS 2.1.1R.

Essentially, I think both Phoenix Life and Mr H should have done more during the process of the transfer to guard against the risk of a scam and that if either of them had done as they reasonably should, Mr H's losses would have been avoided. But Phoenix Life was the professional party, operating as it did a regulated pensions business in which dealing with members' transfer requests was an inherent feature. So it should have been more familiar with the risks and its requirements than Mr H. And I therefore think its failings were more significant than those of Mr H. And while this isn't an exact science, in the circumstances of this complaint, I propose to reduce the compensation Phoenix Life needs to pay to Mr H by 30%. I think this is a fair way to account for Mr H's own contribution to the loss he's suffered."

I then set out how Phoenix should provide redress.

Developments

Mr H accepted my provisional findings Phoenix Life didn't. It said it had done what the PSIG Code asked it to do by sending its risk warning letter and identifying the things Mr H needed to be on the look out for. It said it was under no obligation to receive the signed declaration before making the transfer. It added that it gave the Scorpion insert to Mr H in May 2015 when it sent him his annual pension statement. So it said that as it had given Mr H the relevant warnings more than once it didn't believe that providing those again would have made a difference.

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'll say first that Phoenix Life has now told us that it had in fact sent the Scorpion insert to Mr H in May 2015. However, this is the first time that it has referred to this action. I find that some what curious as, when our Investigator was looking into the matter he asked Phoenix Life for evidence that it had sent the Scorpion insert to Mr H at any point prior to the transfer. In answer, Phoenix Life did not say, nor provide any evidence, of giving the Scorpion leaflet to Mr H with his annual statement or at any other point.

Instead Phoenix Life provided evidence of sending the insert to FRPS. So its account of events, at that time, was that it had not sent the Scorpion insert directly to Mr H. Similarly, Phoenix Life did not refer to having sent the insert directly to Mr H at any point when responding to the complaint. And if it had evidence of having provided the Scorpion insert directly to Mr H I think it would have done so.

Further, Phoenix Life has not now provided any actual evidence, beyond its comments, that it sent the Scorpion insert to Mr H in May 2015. So I'm not convinced that Phoenix Life did send the Scorpion insert directly to Mr H in 2015. However, even if I were to accept that it did do so, that would not change my findings.

It's possible that Phoenix Life began including the Scorpion insert with annual pension statements in response to TPR's recommendation that pension providers take that action. Although, as I've already said, I've seen no tangible evidence that it did so. But assuming that it did, while that was certainly a helpful practice, it's unlikely that a generic enclosure with an annual pension would carry the same weight as a personalised warning that applied to a consumer's particular circumstances. And, if Mr H did receive the insert with his statement, there's no evidence that he actually read it or understood that it could apply to his situation. In those circumstances I don't think it would be fair to conclude that he was aware of the warnings that it contained.

Also, as I said in my provisional decision, Phoenix Life did clearly attempt to bring some of the appropriate warnings to Mr H's attention by means of its 'Retirement Risk Warnings' letter and enclosures. I agree that it was not under an 'obligation' to receive Mr H's signed confirmation that he was aware of those risks. But I think it's fair to conclude that it had designed its due diligence process to include that step in order to satisfy itself that the consumer concerned had received and understood those warnings. But it failed to follow up on this in Mr H's case. To my mind, there is little point in a firm like Phoenix Life introducing a due diligence process designed to protect consumers from losses, and then to ignore that process. And in doing so, put the consumer at significant risk of suffering exactly the losses that the due diligence process is supposed to be protecting them from.

We know that Phoenix Life did not complete its due diligence process. And my provisional conclusion was that Mr H was unaware of the warnings it had provided or of the other factors which Phoenix Life could reasonably have brought to his attention. As I said in my provisional decision, if Phoenix Life had completed its due diligence process then the outcome could have been different. And it's shown me no evidence in response to my provisional decision – beyond its comments – that would call my provisional conclusions into question. So, for the reasons given above I do not find its remarks persuasive.

It follows that I do not intend to alter my provisional findings.

Putting things right

Fair compensation

My aim is that Mr H should be put as closely as possible into the position he would probably now be in if Phoenix Life had treated him fairly, taking into account that Mr H shares responsibility for his loss.

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

To compensate Mr H fairly, Phoenix Life must subtract the proportion of the actual value of the T Ltd 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. Phoenix Life must then pay 70% of that loss.

Actual value

This means the proportion of the T Ltd SSAS value originating from Mr H's Phoenix Life transfer (the **"relevant proportion"**) at the date of my Final Decision. To arrive at this value, any amount in the T Ltd SSAS bank account is to be included, but any overdue administration charges yet to be applied to the T Ltd SSAS should be deducted. Mr H 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.

Notional value

This is the value of Mr H'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 H received from the T Ltd 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 T Ltd SSAS given Mr H's dissatisfaction with the outcome of the investment it facilitated.

Phoenix Life should reinstate Mr H's original pension plan as if its value on the date of my Final Decision was equal to 70% of the amount of any loss established from the steps above (and it performs thereafter in line with the funds Mr H was invested in).

Phoenix Life shouldn't reinstate Mr H'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 H's pension and it is open to new business, it should set up a **new** pension plan with a value equal to 70% of 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 H'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 H 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 H doesn't incur an annual allowance charge. If Phoenix Life cannot do this, then it shouldn't set up a new plan for Mr H.

If it's not possible to set up a new pension plan, Phoenix Life must pay the amount of 70% of any loss direct to Mr H. 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 H is retired. (This is an adjustment to ensure that Mr H isn't overcompensated – it's not an actual payment of tax to HMRC.)

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

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

My final decision

For the reasons given above I uphold this complaint. I require Phoenix Life Limited to take the steps set out under the heading ‘putting things right’ above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr H to accept or reject my decision before 3 March 2025.

Joe Scott
Ombudsman