DRN-3328616

The complaint

Mr P has complained, with the help of a professional third party, about the transfer of his Legal and General Assurance Society Limited ('L&G') deferred annuity to a small self-administered scheme ("SSAS") in October 2014. Mr P's SSAS was subsequently used to invest in an overseas property development with The Resort Group ('TRG'). The investment now appears to have little value and Mr P says he has lost out financially as a result.

Mr P says L&G 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 the transfer, in line with the guidance he says was required of transferring schemes at the time. Mr P says he wouldn't have transferred, and therefore wouldn't have put his pension savings at risk, if L&G had acted as it should have done.

What happened

Mr P says he was cold called and offered a review of his pension. On 28 September 2013, he signed a letter of authority ('LOA') giving permission to L&G to provide details, and transfer documents, in relation to his pension. The letter named four businesses to which information should be made available. The first two were Carrington Mitchell ('CM') and First Review Pension Services ('FRPS'). Both of these were not regulated or authorised by the industry regulator, the Financial Conduct Authority ('FCA'). The other two business were grouped together on the form and named in the LOA as Real SIPP LLP and CIB Life & Pensions Ltd. Both of these businesses were, at the time, registered with the FCA, Real SIPP as an appointed representative of CIB and CIB as a regulated business.

On 27 November 2013, CM sent a copy of this LOA to L&G. And on 26 February 2014, L&G replied to CM providing a transfer quotation, additional information and a list of what was required to complete a transfer. The transfer quotation set out that Mr P's L&G pension was a deferred annuity and had a cash equivalent transfer value ('CETV') of £42,570.

In April 2014, a company was incorporated with Mr P as director. I'll refer to this company as C Ltd. A SSAS was then set up and registered with HMRC on 9 May 2014. C Ltd was the SSAS's principal employer and Bespoke Pension Services Limited ('BPSL') was the administrator. BPSL was also not regulated or authorised by the FCA.

BPSL wrote to L&G on 2 June 2014 enclosing documents to allow Mr P's pensions to be transferred to the SSAS. The documents included a copy of the 'Scorpion' information leaflet (the longer booklet version) titled 'predators stalk your pension' – which gave information, including example scenarios, about pension liberation. This was signed on the front cover by Mr P to confirm he'd read the document and he was not party to pension liberation activity in any way.

Also enclosed was a separate letter signed by Mr P. This letter said he was aware there had been a rise in cases of pension liberation fraud and he was aware of the issues relating to this. The letter said Mr P wanted to confirm he was requesting a transfer to take advantage of investment opportunities, none of which were connected with pension liberation. And it stated he was not seeking to access his pension before age 55 and had not been offered a cash or other incentive to transfer.

On 6 June 2014, L&G wrote to Mr P saying it had received the transfer request from BPSL. It said as part of its process it needed to check that the receiving scheme was correctly registered and it would be contacting HMRC to confirm this.

On 1 October 2014, L&G wrote to BPSL and confirmed Mr P's pension benefits, totalling £42,570, had been transferred as requested.

I've seen a copy of a letter referring to Broadwood Assets Ltd ('BAL') as the *"original advising agent for the investment"*. And I can see that a payment of £120 was made to BAL from the SSAS bank account in November 2014.

Mr P subsequently received a payment of £10,642 on 4 March 2015 – which appears to be the 25% tax-free cash he was entitled to. At that point he'd have been age 61.
The investment in TRG totalling £24,799 was made in two instalments in October 2014 and May 2015. The remainder was left in the SSAS bank account, which was supplemented by some income from the TRG investment – but this income was declining and stopped in May 2019.

In May 2020, Mr P complained to L&G. Briefly, he said at the time of the transfer he was 60, unemployed with no savings or investments and no other retirement provisions. He said he had very little investment experience and a low attitude to risk. Mr P said L&G ought to have spotted, and told him about, a number of warning signs in relation to the transfer. These included but were not limited to: the sponsoring employer not being genuine and only recently having been established and Mr P being unemployed, the SSAS also being newly registered, Mr P having been cold called, involvement of unregulated introducers and advisers and BPSL also being unregulated, Mr P not receiving regulated advice but being told by unregulated parties he would receive better returns and being pressured to proceed, the intended investment being an unregulated, high-risk overseas property investment. Mr P said if L&G had properly informed him of these warning signs, he wouldn't have transferred.

L&G didn't uphold the complaint. It said, although not scanned to its file, the transfer pack it sent out following receipt of the LOA would have contained the Scorpion insert. It was satisfied it had conducted an appropriate level of due diligence once documents were returned. And Mr P had signed documents, including a copy of the longer Scorpion leaflet, to say he understood the risks involved and why he wanted to transfer. L&G thought it was reasonable of it to accept these documents and complete the transfer.

The complaint was referred to the Financial Ombudsman Service. I issued a provisional decision in August 2024 explaining that I intended to uphold the complaint. Below are extracts from my provisional findings, explaining why.

The relevant rules and guidance

Personal pension and annuity 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 L&G 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 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.

<u>The Scorpion guidance</u>

This 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 focus of the guidance issued in 2013 was predominantly pension liberation. The guidance comprised an insert to be included in transfer packs (the 'Scorpion insert') warning readers about the dangers of agreeing to cash in a pension early and identifying a number of warning signs to look out for, a longer leaflet issued by TPAS which gave more information, including example scenarios, about pension liberation and an 'action pack' for scheme administrators that highlighted the warning signs present in a number of transfer examples.

The guidance was updated on 24 July 2014 - which was after Mr P's transfer had been requested but before the payment was made and the transfer was completed. It widened the focus from pension liberation specifically, to pension scams – which it said were on the increase.

In a similar vein, in late April 2014, the FCA 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 highlighted the announcement to insurers and advisers in a regulatory round-up published on its website in September 2014.

The updated materials in the Scorpion campaign from July 2014 again comprised:

- *An insert to be included in transfer packs (the 'Scorpion insert'). The insert though was updated and warns readers more widely 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 they could become aware of the scam risks they were facing.*

- *Another '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.*

In deciding on the appropriate actions to take when dealing with a transfer request, a ceding scheme needed to be mindful of the material in the Scorpion guidance in its entirety rather than treating the guidance as a series of discrete steps to be worked through in isolation.

TPR issued the Scorpion 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 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 pension providers dealing with transfer requests as a matter of fulfilling their duties under the regulator's Principles and COBS 2.1.1R.

<u>What did FCA-regulated pension providers need to do?</u>

For the reasons given above, I don't think 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 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. *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 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 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.*

As I've mentioned the request for the transfer of Mr P's pension benefits was made at the beginning of June 2014, when the focus of the Scorpion guidance was pension liberation. But it was still ongoing and did not complete until over two months after the guidance was updated to look at scams more generally. As the transfer was still ongoing, I think L&G needed to heed and have regard for the updated guidance. So, not only should it have considered if Mr P was at risk of pension liberation but also whether there were warning signs of a scam more generally, which included the nature of the investment Mr P was making.

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

Mr P says he was contacted unsolicited about a free pension review and a meeting took place at his home. Mr P can't recall for certain which business the person he spoke to worked for. But he believes this it was either FRPS or BPSL – both of whom were unregulated.

As I've explained, the LOA Mr P signed refers to four businesses. Two of these were unregulated, CM and FRPS, while the other two were registered with the FCA in some *capacity. From the information that has been provided the LOA was submitted by one of the unregulated businesses, CM. L&G has provided a call note, which indicates that CM contacted it for an update. And, of the four business that the LOA named, L&G appears to have only corresponded with CM. I haven't seen anything to suggest either of the two businesses named that were registered with the FCA had any involvement in the transfer or in any advice given to Mr P. Nor has L&G suggested it thought either of those business had advised Mr P. I also haven't seen any documents or correspondence bearing FRPS' name. BPSL also doesn't appear to have been involved until the application to transfer was submitted – several months after the LOA was signed and the transfer pack sent out. And none of the transfer documents refer to which firm either introduced Mr P to BPSL or who provided advice.*

As I've mentioned I've seen reference to BAL as being the original advising agent for the investment and it receiving a payment for this. But from what I know about BAL from other complaints that I've seen, it was usually appointed to provide advice under section 36 of the Pensions Act 1995, a provision which requires a SSAS trustee to take and consider advice on whether a proposed investment is satisfactory for the aims of the scheme. Given the timing of the payment to BAL and the description of its involvement in the document that references it, I'm satisfied that any advice it gave would likely have been to Mr P in his capacity as trustee of the SSAS. And in any event BAL was not regulated by the FCA, and any advice it did provide was not regulated under FSMA.

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. And based on what I've seen I think it's likely that CM was the business that initially contacted Mr P. From what I know about FRPS receiving 'leads' from other firms who cold-called on other complaints our Service has seen, I think it may also have been involved. I note that that it is also named on the letter of authority. So, I think it is likely that it was either CM or FRPS that carried out the 'pension review' he was offered and suggested that he transfer. What that means is that I think any advice Mr P received on the transfer of his deferred annuity was provided by an unregulated business.

Mr P says the person he met with said his L&G pension was not performing well and he'd be better off transferring and investing in the purchase of a hotel room in a TRG development in Cape Verde. Mr P recalls being told he could expect significantly better returns than he would receive through his L&G pension – although he wasn't provided with any monetary comparison. He says he felt under pressure to accept the advice he was given and agreed to go ahead based on the promise of the improved returns. Mr P says he wasn't offered any cash incentive to transfer and was unaware that the parties he spoke to were not FCA authorised. And he says he was presented with a significant number of documents, which he didn't read, and was directed to sign these.

Mr P has said, other than the letter L&G sent him on 6 June 2014 notifying him it would be contacting HMRC for information, he doesn't recall L&G having any further direct contact with him about the transfer.

Mr P's recollections appear to be plausible and consistent with other evidence about the transfer that is available. For instance, I haven't seen anything to suggest that he was offered or received a payment or other incentive to transfer. I also can't see any evidence of L&G contacting him during the transfer process, besides the letter it sent on 6 June 2014. As a result, I think the reason Mr P transferred appears to have been the higher returns that he was told he'd receive. I think he was likely told this by an unregulated business (which for the avoidance of doubt was CM and/or FRPS). And I think this was likely presented to him as advice – as the party carrying out the pension review appears to have commented on his *existing benefits and said that these could be improved upon. I think Mr P likely relied on this advice. This is because I haven't seen anything to indicate Mr P was an experienced investor. Nor have I 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.*

Mr P did sign a letter as part of the application, saying that he was aware of the rise in pension liberation, had carefully considered the request to transfer and decided he wanted to proceed for the investment opportunities this provided. The letter also stated he was aware of the risks of pension liberation and confirmed that he wasn't planning to access his pension before age 55 and asked L&G to complete the transfer promptly.

This letter appears to have been pre-prepared for Mr P to complete. But it is only a page long and expresses that Mr P is aware of what pension liberation is and that he wasn't planning to access his pension early (other than from the legitimate payment of tax-free cash he received).

Mr P also signed a copy of the longer pre-July 2014 Scorpion leaflet saying he'd read it and again confirming he wasn't taking any part in pension liberation. This leaflet explained what pension liberation was, the risks involved, included example scenarios of what pension liberation could look like, the warning signs to watch out for and steps to take to avoid becoming a victim.

We also asked Mr P about the payment of tax-free cash he received. He has explained that he was unemployed at the time of the transfer, and hasn't been able to return to work since as he was caring full time for his wife. He says that whilst he found the tax-free cash useful to assist with his finances at the time, including settling an overdraft and supplementing his bank balance, he didn't go out of his way to transfer because of it. Rather, he was informed that he was entitled to withdraw that sum and he chose to do so. He hasn't sought to take any other benefits from the pension since. And I've seen a transaction log up to 2020 that supports this.
<u>What did L&G do and was it enough?</u>

The Scorpion insert:

For the reasons given above, my view is that pension providers should, as a matter of course, have sent transferring members the Scorpion insert or given them substantially the same information.

I can't see that L&G sent the Scorpion insert or the warnings it contained directly to Mr P at any stage. L&G said in its response to the complaint that, as part of its process, the Scorpion insert would have been included in the transfer pack. But I haven't seen evidence that everything that formed the transfer pack was passed on to Mr P by the business L&G sent this to.

But L&G had evidence that Mr P had seen the longer, more detailed, Scorpion leaflet in May 2014 – a signed copy confirming this. The information in that leaflet, which focused on pension liberation, wouldn't have been any different to the insert that it ought to have sent to him with the transfer pack, when this was first requested. And indeed it provided some additional information – example scenarios. Mr P also signed a separate letter explaining why he wanted to go ahead with the transfer, part of which declared that he understood the risks of liberation and was not seeking to release pension funds before age 55. Therefore, although it doesn't appear L&G sent the Scorpion insert directly to Mr P at the point the transfer pack was requested, I don't think that it would have made a material difference. This *is because the evidence suggests that Mr P was, more likely than not, already aware of the very risks that the Scorpion insert was intended to warn him of at that time.*

I note though Mr P was already 60 at the time the transfer request was submitted. So, liberating his pension and accessing it before he was allowed to do so wasn't something that affected him. With that in mind, I think it is reasonable that he wouldn't have had much concern about pension liberation, which in my view would explain him signing the documents.

As I've explained the scope of the Scorpion guidance was broadened in July 2014. Its focus was no longer just pension liberation but wider pension scams and ensuring consumers didn't fall victim to these. Given his circumstances, as pension liberation was not a great concern because of his age, this was something that would've been a greater risk to Mr P. But I haven't seen any evidence that L&G had any contact with Mr P, after this was introduced in July 2014. Which, given the transfer didn't complete until 1 October 2014, I think it should've done.

Due diligence:

In light of the Scorpion guidance, I think L&G not only ought to have been on the look-out for the tell-tale signs of pension liberation, but given the broadening of the scope of the guidance while the transfer was ongoing, also should've looked out for the signs of a pension scam. And I think it needed to undertake further due diligence and take appropriate action if it was apparent its customer might be at risk.

When the transfer request was first received, while the guidance was limited to pension liberation, L&G was aware that the SSAS was newly registered, from the documents that BPSL sent. The action pack for business at the time said that this was something to look out for as a potential tell-tale sign of pension liberation. And it suggested if any of these tell-tale signs were present, a business could use the checklist of further warning signs to carry out further due diligence.

I understand L&G contacted HMRC to verify that the receiving scheme was registered. But that appears to be the extent of the due diligence it undertook at that time. Mr P had though signed a copy of the longer Scorpion leaflet and a separate letter which said he was aware of the risks of pension liberation and the transfer was not for this purpose. So, at that stage, L&G was reasonably reassured that Mr P was not at risk of a pension liberation scam.

However, once the guidance was updated and broadened, which took place more than two months before the transfer was completed, I think L&G ought to have looked at the transfer again and undertaken further due diligence. But from what I've seen L&G didn't undertake any further due diligence.

L&G was aware that the SSAS was newly registered. This was a tell-tale sign under the Scorpion guidance issued in 2013 to prompt a business to consider using the checklist for further due diligence (and like I've said seems to have prompted L&G to take some action here). When the guidance was updated in July 2014, the SSAS being newly registered wasn't listed as a specific tell-tale sign to prompt a business to use the check list. But I think L&G ought to have been aware that a SSAS being newly registered, was still a warning sign in the checklist within the action pack. And in the circumstances, as this had prompted L&G to previously carry out some additional due diligence, when the guidance was updated and broadened I think it would've been appropriate for L&G to have followed up on it to find out if other signs of a scam were present.

That's especially the case given that Mr P had signed a letter informing L&G whilst he wasn't liberating his pension, he was transferring to the SSAS to take advantage of an investment opportunity. One-off investment opportunities were also a feature in scams that L&G was being asked to look out for in the July 2014 action pack. And the use of SSAS's to exploit investment opportunities was also the focus of the FCA's campaign during summer 2014, which I mentioned above was highlighted to firms in September 2014.

As L&G didn't have any more information about the investment Mr P was making, I think it would have been fair and reasonable – and good practice – for L&G to have looked into the proposed transfer further, once the guidance was broadened to cover scams more widely, 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. Given the warning sign that should have been apparent when dealing with Mr P's transfer request, and the relatively limited information it had about the transfer, I think in this case L&G should have addressed all three parts of the check list and contacted Mr P as part of its due diligence.

<u>What should L&G have found out?</u>

Investigations under part one of the check list would've shown L&G that, in addition to the SSAS being newly registered, the sponsoring employer was also newly registered. It would also have shown that the SSAS was connected to an unregulated investment provider – TRG. And L&G should also have already been aware that BPSL was unregulated.

Investigations under the second part of the checklist would also have revealed that the main investment that the consumer was being advised to make under the SSAS was overseas.

And if L&G had contacted Mr P and asked questions under part three of the checklist, it would've become aware that he'd been contacted unsolicited and that he had felt pressured to proceed. I think it would also have come to light that the business that approached Mr P, which I think was likely CM but may have also gone on to involve FRPS, was unregulated. They may have modelled themselves as an introducer. And again there was a reference to BAL being involved. But I'm satisfied that the extent of BAL's involvement was only in relation to Section 36 advice. And as I've explained I think that CM / FRPS, had given Mr P advice to transfer the deferred annuity itself, that he was relying on.

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. L&G should, having contacted Mr P and confirmed which of the businesses referred to in the documentation he had been dealing with, have taken that step, which is not difficult. And it would quickly have discovered that Mr P's adviser was indeed unauthorised.

Mr P's deferred annuity with L&G resulted from the buy-out of a former employer's occupational pension scheme. Whilst this was therefore not a personal pension arrangement in its usual form, my view is that it constituted Mr P having a right to or interest in a contract of insurance. Advice given on such an entitlement is a specified activity under the Regulated Activities Order.

Being advised by an unauthorised firm to transfer benefits which involves giving such advice would have been a breach of the general prohibition imposed by FSMA, which states no one can carry out regulated activities unless they're authorised or exempt. Anyone working in this field should have been aware that financial advisers need to be authorised to give regulated investment advice in the United Kingdom – indeed, the Scorpion insert itself makes this point.

My view is that L&G should have been concerned by CM and 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.

<u>What should L&G have told Mr P – and would it have made a difference?</u>

Had it done more thorough due diligence, there would have been a number of warnings L&G could have given to Mr P in relation to a possible scam threat as identified by the action pack. L&G should also have been aware of the close parallels between Mr P's transfer and the warnings the FCA gave to consumers from late April 2014 onwards about transferring to SSASs (which was brought to the attention of pension providers that September). But the most egregious oversight was L&G's failure to uncover the threat posed by a non-regulated adviser. Its failure to do so, and failure to warn Mr P 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 L&G to have informed Mr P that the business he had been advised by was unregulated and could put his pension at risk. L&G should have said only authorised financial advisers are allowed to give advice on transferring this type of pension entitlement, so Mr P risked falling victim to illegal activity and losing regulatory protections.

I'm aware that Mr P had signed a copy of the February 2013 Scorpion leaflet and a letter saying he was aware of the risks of pension liberation and that wasn't what he was doing. But again, I think the fact that he was 60 at the time, meaning accessing his pension before age 55 was not a concern, was likely to have meant that he didn't think those warnings were concerning. But I believe any messages from L&G along the lines that he was at risk of being a victim of illegal activity and losing regulatory protection would have changed Mr P's mind about the transfer.

The messages would have followed conversations with Mr P – as I think this would've been the most appropriate way for L&G to make enquiries in line with the action pack checklist. So, the warnings would have seemed to Mr P (and indeed would have been) specific to his individual circumstances and would have been given in the context of L&G raising concerns about the risk of losing pension monies as a result of untrustworthy advice. This would have made Mr P aware that there were serious risks in using an unregulated adviser.

There was also a close parallel between the action Mr P was taking and the updated example of a scam (contained in both the July 2014 action pack and that edition of the longer Scorpion leaflet, which Mr P hadn't seen). That involved an example of a consumer transferring to invest in an overseas hotel development, which I think L&G ought to have cautioned Mr P about.

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 P would have been any different. So, I consider that if L&G had acted as it should, Mr P wouldn't have proceeded with the transfer out of his pension with L&G or suffered the investment losses that followed. I therefore uphold Mr P's complaint.

I've thought about whether the losses Mr P has incurred were partly due to his fault and whether it would be appropriate to reduce any compensation accordingly, due to contributory negligence. But in the specific circumstances of Mr P's complaint, I don't think it would be fair to make a reduction to the compensation.

Mr P did sign a number of documents to enable the transfer. This included a copy of the Scorpion leaflet that BPSL or the adviser provided to him, as well as a pre-prepared letter saying he was aware of the risks of pension liberation and wasn't transferring for these reasons. His representative has said that he was presented with a significant amount of paperwork and just told to sign the documents and didn't have the opportunity to read them. I think a reasonable person, even if they had limited investment knowledge which Mr P says he had, would have taken the time to read documents they were being asked to sign before doing so. So, I think Mr P ought to have read what he was signing. And I don't think him feeling pressured entirely excuses not doing so. But here even if he had read the Scorpion leaflet and letter, I don't think this would've warned him of the dangers affecting him.

The Scorpion leaflet Mr P signed did say that unsolicited contact from an adviser could be a warning sign. But it said this was in the context of pension liberation. Mr P was not being offered a cash or other incentive to transfer. And because he was 60 at the time, was not trying to access benefits early or at risk of penalty taxation because of this. So, I don't think Mr P reading those documents would've led him to consider changing his mind in the same way that warnings from L&G would've done, because the warnings were not the same.

My provisional recommendations for putting things right

I explained in my provisional decision that my aim, to put things right, was to put Mr P, as closely as possible into the position he'd now have been in, had L&G done as I think it should have. I thought on balance he would likely not have transferred his pension. And I believed he'd have drawn benefits – the maximum available tax-free cash and residual annuity – from his L&G pension from age 65 (the normal retirement age of the L&G pension), which for Mr P would've been in November 2018.

To compensate Mr P fairly, I said that L&G should subtract the actual value, at the date of my Final Decision, of the SSAS benefits from the notional value, at the same date, of his L&G benefits had they gone into payment from age 65. Calculating the actual value would involve agreeing a commercial value for illiquid investments, which I thought would likely apply to TRG, so that L&G could buy them from the SSAS. Or assuming a nil value for the TRG investment, in which case I thought it would be reasonable if L&G chose to ask Mr P for an undertaking to pay back any net proceeds he may receive on selling the illiquid investments in the future.

If the notional value were greater than the actual value, there would be a loss. And I explained the loss would potentially be in two parts. A past loss – the result of comparing the net payments with interest Mr P would have received from the L&G pension and the SSAS up to the date of my Final Decision, including tax-free cash. And a future loss – the loss of annuity benefits going forward.

I said I thought any past loss should be paid to Mr P in cash – as I didn't know if L&G would be able to reinstate the deferred annuity back to age 65.

In respect of any future loss, I said L&G should, if possible, reinstate Mr P's deferred annuity for an amount in payment from the date of my Final Decision that is of equivalent value to the residual future loss. The reinstated annuity should have the same features as the benefits Mr P has lost, in terms of spouse's pension and increases in payment.

L&G shouldn't reinstate the deferred annuity in payment if it would cause a breach of any HMRC pension protections or allowances – but my understanding was 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. And it was for L&G to determine whether this is possible.

If it weren't possible to reinstate the deferred annuity in payment, I said L&G should pay the amount of the future loss direct to Mr P with an appropriate notional adjustment for future income tax that Mr P would otherwise have paid.

I also thought it was fair that Mr P should not be disadvantaged while he was unable to close down the SSAS. So, to provide certainty to all parties, if the illiquid investment with TRG remained in the scheme, I thought it would be fair that L&G pay an upfront sum to Mr P equivalent to 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.

Initial responses to my provisional decision

Neither L&G or Mr P and his representatives made any further comment in respect of the merits of the complaint. And both parties seem to have accepted my decision in that regard. Both though provided further comments regarding how to put things right.

L&G said that it thought a simpler form of redress, that would achieve the same objective of putting Mr P in the position he always ought to have been in, was more appropriate. And this was reinstatement of the deferred annuity from Mr P's normal retirement date (age 65), rather than the date of my final decision. L&G proposed:

- Full reinstatement of Mr P's pension entitlement under the original L&G policy.

- Processing a backdated settlement of Mr P's pension from his normal retirement date on the basis that he took the maximum available pension commencement lump sum. Arrears on these payments plus interest from his normal retirement date at 8% simple per annum would be paid to Mr P. This figure would be less £10,642.00 which is equal to the payment he received following the transfer (without any adjustment to be made to reflect that he received this payment before age 65). The arrears payment would be reported to HMRC and taxed on the PAYE basis. Interest would be taxed at 20% as normal and a certificate confirming the same would be provided upon request by Mr P.

- L&G would assume the investment within Mr P's SSAS has a nil value and would not request any undertaking on future payment from it.

- Pending confirmation, and evidence, from Mr P of the annual administration cost for his SSAS, a payment equal to five times that amount will be paid to him.

Mr P's representatives said that he was currently a non-tax payer because of the level of income he was receiving, which they believed relevant to the notional deduction I'd suggested if the future loss was paid to him in cash. In respect of L&G's proposed resolution, the representative said they thought this would be detrimental to Mr P and thought the complaint should be settled as I'd originally suggested.

Further correspondence

I considered the comments that had been made and wrote again to both parties. I explained that, as I hadn't been sure the reinstatement of Mr P's L&G pension from his normal retirement date was possible, as this date had occurred in the past, I had discounted this option. But that was an oversight.

Having thought about what both parties had said, I explained that I though the methodology for redress which L&G has suggested was largely a fair and reasonable way to resolve the complaint. And I was minded to recommend that the redress to resolve the complaint be paid in largely the way it had suggested. That is because, reinstating Mr P's benefits under the policy from the point I thought he'd have likely retired was actually the most appropriate way of putting him back into the position he'd likely have been in had an error not occurred here. And as L&G had said it would provide written confirmation of the relevant tax deductions, this would enable Mr P to reclaim overpaid tax from HMRC.

I did though say that I thought L&G needed to confirm if it could accept notice of Mr P's current tax code before payment, to minimise any unnecessary tax. And I also said L&G should provide an undertaking to Mr P that, if he is unable to reclaim back tax that he can evidence he would otherwise not have paid, L&G would further compensate him for this amount. And any such payment should be considered compensation, and not be subject to further taxation.

L&G said it couldn't accept a notice of Mr P's current tax code as it was required to commence payment using the standard basic rate tax code. But it noted that moving forward it would be advised of the correct code by HMRC through a real time information link. L&G

confirmed it would provide further compensation to Mr P in the event he was unable to reclaim overpaid tax – subject to him providing documentary evidence.

Mr P's representatives said they were still concerned that the proposed remedy would be detrimental to him. They said it was likely to result in him being inconvenienced by having to approach HMRC to reclaim overpaid tax. And they believed, given the nature of the pension, the appropriate remedy would be to calculate redress in line with the FCA's methodology for non-compliant pension transfer advice and for L&G to pay Mr P a lump sum.

As agreement hasn't been reached, I'm now making my final decision on the matter.

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.

As neither party have provided further comments or objection in respect of the merits of the complaint, I see no reason to depart from my provisional findings on this point that the complaint should be upheld.

I've thought again about how things should be put right, considering the comments the parties have made.

Mr P's L&G pension was a deferred annuity and offered guaranteed pension benefits. Pension arrangements like this are referred to as defined benefit pensions. DISP App 4 of the FCA handbook sets out rules and guidance for businesses to calculate redress resulting from non-compliant pension transfer advice in respect of defined benefit pension arrangements. And the intention of the methodology in DISP App 4 is to try, as best as possible, to put a consumer back in the position they would have been in, but for the non-compliant advice.

However, L&G didn't provide non-compliant pension transfer advice. It didn't advise Mr P at all about the transfer and wasn't required to. I did say in my provisional findings that the methodology in DISP App 4 could potentially be used by L&G to establish the notional value of the benefits the L&G pension would have provided. But I don't think it'd be appropriate, in this case, to require L&G to calculate redress using the rest of that methodology when that strictly doesn't apply to this type of complaint – which is why I didn't recommend that it do so in my provisional findings.

And the alternative method for calculating redress that L&G has suggested doesn't require the calculation of a notional value or notional tax deduction. It involves the reinstatement and payment of the benefits Mr P ought to have received, less the benefits he's already received. I think this is the most appropriate way to attempt to put Mr P in the position he'd always have been in.

I appreciate this may involve Mr P having to make a claim for overpaid tax. But I don't think that is unreasonable, particularly given L&G has confirmed it is willing to further compensate Mr P, if that claim is unsuccessful, subject to proof being provided. And I have no reason to doubt what L&G has said – about it being required initially to use the standard basic rate tax code and this then being updated with live information from HMRC.

Putting things right

My aim is that Mr P should be put as closely as possible into the position he would probably now be in if L&G had treated him fairly.

The SSAS only seems to have been used in order for Mr P to make an investment that I don't think he would have made from the proceeds of this pension transfer, but for L&G's actions. So, I think that Mr P would have remained in his deferred annuity with L&G and wouldn't have transferred to the SSAS.

On balance, if he had not transferred, I think he'd have likely taken his benefits under the L&G pension at the point he reached age 65, the normal retirement date of the scheme. And I think he'd have taken the maximum tax-free cash and the residual annuity income.

L&G has proposed to reinstate the deferred annuity as if it had been in payment from Mr P's normal retirement date, after the maximum tax-free cash was taken. And I think that is fair.

In summary therefore L&G should:

- Reinstate Mr P's pension entitlement (after commutation for the maximum tax-free cash) under his previous L&G policy.

- Process a backdated settlement of Mr P's pension payments from his normal retirement date including the maximum available pension commencement lump sum. Arrears plus interest, at 8% simple per annum, from the date of each payment to the date the settlement is made should be paid to Mr P, less £10,642.00 being the tax-free cash he had already withdrawn from the SSAS.

- Assume the investment within Mr P's SSAS has a nil value without requiring an undertaking from Mr P on future payment from it, as it has offered.

- Make a payment to Mr P, on receipt of evidence, equal to five times the annual administration cost of the SSAS.

I think it is fair that L&G should report the payments to HMRC and apply tax as normal. But I also think it should:

- Provide Mr P relevant tax certificates confirming the tax that has been applied to these payments and the period for which that tax relates – which it has already suggested it will do. For the avoidance of doubt here, the tax should be separately itemised to show the tax Mr P has paid on the income itself and then the tax on the interest.

- Send Mr P directly a written confirmation that it undertakes to pay further compensation for any overpaid tax he is unable to reclaim from HMRC. This will involve Mr P evidencing what tax he has paid on his other sources of income in the tax year(s) in question and what tax he considers he should have paid as a result on the L&G income.

L&G should implement settlement within 28 days of L&G receiving confirmation of Mr P's acceptance of my decision. If payment of any past sums due is not made within 28 days of L&G receiving Mr P's acceptance of my Final Decision, interest should be added to those payments at the rate of 8% per year simple from the date of my Final Decision to the date of payment.

Details of the calculation should be provided to Mr P in a clear, simple format.

My final decision

For the reasons I've explained, I uphold this complaint and require Legal and General

Assurance Society Limited to pay compensation to Mr P by carrying out the steps outlined in the ‘putting things right’ section of this decision.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr P to accept or reject my decision before 24 October 2024.

Ben Stoker
Ombudsman