CAS-81940-Z2S8

Ombudsman's Determination

Applicant	Mr D
Scheme	The British Steel Pension Scheme (**the Scheme**)
Respondents	Open Trustees Limited (**the Trustee**)

Outcome

1. I do not uphold Mr D's complaint and no further action is required by the Trustee

Complaint summary

2. Mr D has complained that the Trustee failed to carry out sufficient due diligence when it transferred his pension fund under the Scheme to a small self-administered pension scheme (**the SSAS**) with Bespoke Pension Services Ltd (**Bespoke**).

Background information, including submissions from the parties

3. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.

4. Mr D is represented by Money Redress Ltd (**MRL**).

5. At the time of the events Mr D has complained about, B.S. Pension Fund Trustee Limited (**BSPFTL**) was acting as the trustee and administrator of the Scheme. Following a restructure, the Scheme was split into the New British Steel Pension Scheme and the Old British Steel Pension Scheme (**the OBSPS**). From 29 March 2018, Open Trustees was appointed as trustee of the OBSPS. Open Trustees submitted its response in respect of Mr D's complaint on behalf of both Open Trustees and BSPFTL. References in this document to 'the Trustee' refer to both Open Trustees and BSPFTL as appropriate.

6. Mr D joined the Scheme on 15 March 2004 and left on 21 January 2008, at which time he became a deferred member.

7. On 21 January 2013, the Trustee received a letter from Pension Matters Associates Limited (**Pension Matters**) enclosing a Letter of Authority (**LOA**) signed by Mr D and asking for details of the transfer value payable. The LOA showed that in addition to

his pension held under the Scheme, Mr D held a number of pensions under the Railways Pension Scheme and a pension with Scottish Widows.

8. A transfer value quotation was issued to Pension Matters on 7 February 2013, but it appears no further action was taken.

9. On 14 August 2013, the Trustee received a letter from The Pensions Specialist (at that time a regulated firm) together with an LOA signed by Mr D, again asking for details of benefits payable including the transfer value. A quotation was issued to the Pensions Specialist on 19 August 2013 together with a copy of the 'Predators stalk your pension' leaflet (**the Scorpion Leaflet**) produced by the Pensions Regulator (**TPR**). Again, it appears no further action was taken.

10. On 26 November 2013, the Trustee received a letter from Serenus Consulting Ltd (at that time a regulated firm), again with an LOA signed by Mr D. As with the previous approaches, Serenus asked for details of the benefits payable and the transfer value. A quotation was issued on 9 December 2013 but once again no further action was taken.

11. Mr D says that in 2014 he received an unsolicited approach from an agent of First Review Pension Services (**First Review**) offering him a free pension review. Mr D agreed and met with a reviewer, who he believed was from First Review, on at least three occasions at his home. He now understands that First Review was not regulated by the Financial Conduct Authority (**FCA**).

12. Mr D was persuaded that his pension under the Scheme was 'frozen' and to transfer his pension to a new scheme in order to invest in a fractional share of an overseas hotel resort which he was told would offer him a considerably better return than the Scheme could offer. Mr D signed and returned documentation to First Review, who in turn provided it to Bespoke.

13. The Trustee says that on 20 June 2014, First Review emailed the scheme administrator and requested a transfer value quotation for Mr D. The email enclosed an LOA signed by Mr D.

14. On 25 June 2014, the administrator wrote to First Review enclosing a transfer value pack (**the transfer pack**) which included a copy of the Scorpion Leaflet.

15. On 11 August 2014, Bespoke wrote to the Trustee. It said:

> "Please accept this letter as a request for the transfer of [Mr D's pension] to [the SSAS] and a confirmation that [the SSAS] is able to accept the transfer including any Protected Rights."

16. Enclosed with Bespoke's letter were:-

- A copy of the SSAS' 'Notification of registration' issued by HM Revenue & Customs (**HMRC**). This showed the SSAS was registered on 5 August 2014 and that its Pension Scheme Tax Reference (**PSTR**) was 00815186RR.

- A copy of the Scorpion Leaflet confirmed as having been read by Mr D and signed dated by him on 5 August 2014.
- A written request from Mr D to transfer his pension (**the transfer request**).
- Confirmation that Mr D was employed by the sponsoring employer
- A copy of the Trust Deed & Rules (**TD&R**) relating to the SSAS.

17. The transfer request was a typed letter (**the Letter**) signed and dated by Mr D on 5 August 2014. The Letter said:

> "The purpose of this letter is to provide you with additional confirmation of the basis upon which I have made this request and to seek to provide a record of the fact that I am aware of the issues relating to pensions liberation. Indeed I have carefully considered my decision to request a transfer to [the SSAS] and have not made it lightly.
>
> …
>
> I therefore wish to confirm that the transfer request is being made in order that I can take advantage of investment opportunities available under [the SSAS], none of which are in any way connected with pensions liberation. I have received detailed information about [the SSAS], how it operates, who administers it and the risks associated with taking a transfer out of my existing pension arrangement.
>
> …
>
> I also confirm that I have not been offered any cash or other incentive by any person as part of my decision to transfer my pension to [the SSAS]."

18. Also on 11 August 2014, Mr D had signed a 'Transfer Value Discharge Form' (**the Discharge**) authorising the Trustee "to pay the transfer value of £41,507.33 from [the Scheme] to [the SSAS]."

19. The Discharge included a 'Member Declaration' (**the Declaration**) signed by Mr D which stated:

- I have read and understood the terms of the Pension Regulator's 'Pensions Liberation Fraud' leaflet.
- I confirm that the transfer value is being paid to a Registered Pension Arrangement.

20. An employment agreement (**the Agreement**), dated 24 July 2014, showed that the registered office of the sponsoring employer of the SSAS was Mr D's home address, that he was the Managing Director of the employer and that he was to work from home. The Agreement was signed by Mr D.

21. The TD&R, dated 4 August 2014, appointed Mr D as sole trustee. Bespoke was appointed as Administrator of the SSAS. Investment powers rested solely with the trustee, although in some instances the consent of the Administrator was required. The TD&R was signed by Mr D.

22. On 1 September 2014, the Trustee wrote to Bespoke to advise that a transfer payment of £41,507.33 was being made to the SSAS via BACS. On the same date it wrote to Mr D to confirm that all his benefits under the Scheme had been transferred.

23. The SSAS appears to have been primarily invested in The Resort Group (**TRG**). An email to Mr D, dated 23 January 2020, showed the total value of the SSAS as £42,137.24 with £6,584.93 held as cash and £35,552.31 (cost price) invested with TRG.

24. On 17 July 2020, MRL complained on Mr D's behalf (**the Complaint**) under stage one of the OBSPS' Internal Dispute Resolution Procedure (**IDRP**). It said that:-

    - The Trustee ought to have assessed Mr D's transfer request carefully and identified warning signs from the Scorpion Leaflet relevant to his case such as:-
        - The receiving scheme was newly registered with HMRC and the sponsoring employer was not incorporated until July 2014.
        - Bespoke was a relatively new business, having operated for only two years, and was not FCA regulated.
        - The sponsoring employer was a dormant company and was not Mr D's genuine employer.
        - Mr D had initially been contacted by cold call, something the Trustee could have identified if it had contacted Mr D.
        - Mr D had been told he could expect much higher returns on his TRG investment. This was a clear warning sign which the Trustee could have identified if it had contacted Mr D.
        - The proposed investment in TRG was unregulated, high risk and non-diversified.
    - The Trustee did not provide Mr D with a copy of the Scorpion Leaflet.
    - The Trustee ought to have contacted Mr D directly to inform him of the warning signs and to establish his understanding of the receiving scheme.

25. The Trustee responded to the Complaint on 25 September 2020. It said:-

    - It was clear the former Scheme administrator took steps to ensure that appropriate warnings had been issued to Mr D about the possibility of pension scams and Mr D had expressly confirmed in writing that he understood them. In particular:

- a copy of the Scorpion Leaflet was enclosed with the transfer quotation and Mr D confirmed that he had read and understood the document by signing the Discharge;
- Mr D had provided a signed copy of the long form Scorpion warning together with a signed statement confirming that he had read and understood it; and
- Mr D had confirmed in the Letter that he understood the implications of transferring his pension benefits and had provided written assurances that his transfer was not connected to a pension scam in any way.

- Mr D appeared to have made a poor financial decision despite having received the Scorpion warning and having expressly confirmed that he was aware of the risks. In the circumstances, it was appropriate that he should take responsibility for his decision to proceed and the losses he claimed to have suffered.
- The Trustee had a statutory duty to carry out Mr D's transfer request.

26. On 27 May 2021, MRL, on Mr D's behalf, appealed under stage two of the IDRP (**the Appeal**). This largely repeated the complaint as set out in stage one of the IDRP. It said that the stage one response did not answer the specific points about the failure to assess the transfer request carefully and identify potential warning signs. These warning signs included:

- Mr D had received an unsolicited approach;
- he had received advice to transfer and invest in unregulated products from First Review, an unregulated firm;
- the SSAS had been registered with HMRC only six days prior to the transfer request;
- the sponsoring employer had only been incorporated on 4 July 2014;
- at all times the sponsoring employer had remained dormant;
- at the time of the transfer, Mr D was employed as a supervisor and was not employed by the sponsoring employer;
- there was a direct link identifiable from Companies House records between First Review and TRG; and
- Mr D had been told by First Review that he could expect high returns on his investments which were high-risk and unsuited to pension scheme investment.

27. In answer to the points made by the Trustee in the stage one response, MRL said:-

- The Scorpion Leaflet had been issued with the transfer pack to First Review rather than to Mr D himself.

- The Scorpion Leaflet provided to Mr D by First Review was part of significant amount of documentation requiring his signature and at no point was he taken through the documentation in any detail.

- The Pensions Ombudsman (**TPO**) had set out in his Determination in case reference PO-12763 that providers had to do more than simply issue the Scorpion leaflet.

- It should have been obvious that the Letter was a precedent on which First Review or Bespoke had filled in the PSTR number of the SSAS and which Mr D had then been asked to sign.

28. On 4 August 2021, in response to a request from the Trustee for further information, MRL emailed the following:-

    - Mr D's position was that he had been the victim of a "scam" because he was persuaded, by advisers who he thought were pension professionals acting in his best interests but were actually an unregulated firm linked to an overseas investment provider, to move away from a valuable defined benefit scheme to a speculative overseas investment where his pension was now wholly inaccessible.

    - The methodology for the loss calculation should be an assessment of the actuarial value of the lost Scheme pension (using the FCA approved methodology) less a valuation of the SSAS.

    - The issue was what steps the Scheme administrator took based on the information they were presented with or ought to have asked about at the time of Mr D's transfer.

    - The Trustee did not need to have full details of the structure of the investment to assess the complaint against the administrators – the allegation was not that the administrators ought to have analysed the investment structure in any detail at all, rather the overall intention to invest in an overseas fractional property served as a warning sign.

    - No FCA regulated financial advice was received on the transfer or investments. Consequently, Mr D had not lodged any claim with the Financial Services Compensation Scheme.

    - Mr D did not appoint an investment manager.

    - Mr D's rationale for transferring and investing in TRG was due to the advice he received from First Review. The decision to transfer was not made separately from the decision to invest. First Review recommended both the transfer and investment and the transfer facilitated the investment.

    - It was agreed that Mr D did sign documents relating to the transfer, including the Scorpion Leaflet and the Discharge. It was not alleged that his signature was forged.

29. The Trustee responded to the stage two appeal. It did not uphold the appeal citing the following reasons:-

    - A copy of the Scorpion Leaflet had been included with the transfer value quotations that were provided for Mr D on 19 August 2013 and 25 June 2014.
    - In response to the transfer pack, Bespoke had returned comprehensive documentation including:
        - a letter from HMRC confirming that the SSAS was registered;
        - a copy of the Scorpion Leaflet, signed by Mr D;
        - a letter from Mr D, setting out in detail the rationale for his decision to transfer his Scheme benefits to the SSAS;
        - a transfer value discharge form, signed by Mr D, which included an explicit declaration that he had read and understood the Scorpion Leaflet;
        - the TD&R of the SSAS; and
        - a letter from Addleshaw Goddard LLP, confirming that the TD&R had been drafted by them for Bespoke and were appropriate for use in relation to single-member SSASs.

- Mr D's file indicated there was no reason for the Trustee to suspect anything untoward with his transfer request, meaning it decided to proceed with it in the normal way.
- While Mr D might not have been sophisticated in terms of investments and had no experience in pensions or investments, it was clear that he received numerous warnings about the risks of pension scams and had signed three documents confirming explicitly that he had read them. Had he been unclear about the implications of what he was being asked to sign, he should have asked further questions, including of the Trustee, before deciding to proceed. If Mr D chose not to read or simply ignored these warnings, while unfortunate, it was appropriate that he should take responsibility for making that decision.
- It was of the view that there was no obligation to provide any additional warnings to Mr D. However, even if additional warnings had been provided to Mr D, given the number of warnings that he had already received and appeared to have either not read or ignored, but still signed, it did not consider that this would have changed his decision to proceed with the transfer out.
- It considered that the process followed in respect of making the decision to proceed with Mr D's statutory right to transfer out was reasonable in the circumstances and in line with standard industry practice at the time.
- It had considered TPR’s pension liberation fraud action pack dated February 2013 and TPO’s Determination PO-12763 in coming to this view. It had also reviewed

TPO's Determination PO-28256, which it considered to be very closely aligned with Mr D's complaint and indicative of the decision that TPO was likely to reach.

The Trustee's position

30. While it sympathises with Mr D if part or all of his pension has been lost or misappropriated following his decision to transfer out of the Scheme, it considers that there was no maladministration on the part of the Trustee.

31. Its position and response remain as set out in the stage one and stage two IDRP decision letters.

32. Unfortunately, it appears that Mr D may have made a poor financial decision, including while acting in his capacity as trustee of the SSAS, despite the numerous warnings provided to him. While the Trustee sympathises if this is indeed the case, it considers that no maladministration occurred on the part of the Trustee which should mean that it is held responsible for any loss which Mr D alleges he has suffered.

Mr D's position

33. The Trustee correctly enclosed the short form Scorpion Leaflet in the transfer value quotation packs, but these were not sent directly to Mr D

34. Bespoke's transfer pack was lengthy. Previous TPO decisions relating to Bespoke's transfer packs have accepted that "The information they obtained and reviewed gave them legitimate concerns about the transfer"[1].

35. The Trustee says that Mr D signed warning documents about pension scams and ought to have asked questions if he was unsure. These were presented to him by First Review as part of a significant pack of documentation he was asked to sign to set up the SSAS, effect the transfer and organise the proposed investment. Inherently, a warning provided by a firm which is advocating going ahead with a particular course of action is not going to be read by a consumer as warning against proceeding with the recommended transfer.

36. Effectively, First Review told Mr D that there was nothing wrong with the transfer proposal, and that as it did not involve early release of pensions money, he could sign off the Scorpion literature and the pre-printed letter enclosed the transfer pack.

37. It is not possible to provide direct evidence of how Mr D would have acted if the Trustee had provided better communication because it is a hypothetical question. There is nothing in Mr D's background to suggest that he was a reckless individual or was prepared to take risks with his pension if he had been in an informed position. He unwittingly fell victim to a pension scam while he was in an uninformed position.

38. There is no reason to conclude that he would have ignored warnings if they had been provided by the Trustee. The fact that he decided not to press ahead with a transfer

[1] PO-7126 Hughes v Royal London

in 2013 supports Mr D's position that if he had received warnings, he would have withdrawn his transfer request.

39. The evidence shows an absence of any action in the period between the receipt of the transfer pack and confirmation being provided to Mr D that his pension had been transferred. There was no due diligence process and no communication with Mr D either as part of a due diligence process or to communicate the presence of warning signs to him.

Adjudicator's Opinion

40. Mr D's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustee. The Adjudicator's findings are summarised in paragraphs 41 to 69 below.

41. Mr D had complained that the Trustee failed in discharging its duty of care when he requested to transfer his benefits from the Scheme to a new pension arrangement. Unfortunately, the pension arrangement he transferred his benefits to invested in assets that were now unlikely to be recovered, so it was likely that Mr D had lost some or even all of the value of his pension.

42. It was apparent that Mr D had been the victim of fraud, and no doubt this would have caused him significant distress and affected his retirement plans. However, his complaint was solely based on the question of whether the Trustee's decision to accept the transfer request was reasonable at the time he submitted it. Whatever happened subsequently, and the information that had since become known, could not influence the outcome.

43. It seemed that Mr D was a victim of a persuasive cold caller, which resulted in the fraud. The fact he was most likely told that the SSAS and the underlying investment in a fractional share of an overseas resort hotel room could offer him better returns than the Scheme, was sufficiently compelling for him to agree to go ahead with the transfer. While there was a chance that a purchaser for the asset may be found, it was more likely than not that Mr D would have lost most, if not all, of the value of his pension.

44. However, in considering his complaint it was necessary to consider whether the Trustee's decision to accept Mr D's transfer request was reasonable at the time he submitted it.

45. Section 94 of the Pension Schemes Act 1993 (**PSA 1993**) provides that a member of an occupational or personal pension scheme has a right to a cash equivalent transfer value (**CETV**) of any benefits which have accrued under the transferring arrangement. Section 95(1) of the PSA 1993 says that a CETV can be taken by making an application in writing to the managers of the transferring arrangement. In short, the receiving scheme must be either an occupational pension scheme or a

personal pension scheme and the managers of the receiving scheme must be able and willing to accept the transfer.

46. The SSAS was registered with HMRC, and Bespoke, as the Administrator, provided a copy of the TD&R which confirmed to the Trustee that the SSAS was a defined contribution occupational pension scheme which was able to accept a transfer payment. Bespoke's letter to the Trustee, on 11 August 2014, inferred that it was willing to accept the transfer. So, Mr D's transfer application appeared to comply with the requirements in Section 95(1) of the PSA1993.

47. On this basis, the Trustee was presented with a member who wished to exercise his legal rights, and a receiving scheme that was properly registered with HMRC and that had provided the appropriate declarations and information. To the extent that the Trustee had a duty of care to Mr D, it would have been overridden by the statutory obligation to make the transfer.

48. Mr D's complaint was similar in context to another complaint that TPO had determined in PO-16475 and it was worth repeating paragraphs 40 and 41 of that determination:

> "However, as highlighted by the Adjudicator, this matter cannot be viewed with the benefit of hindsight and it is the circumstances at the time of transfer which are of importance.
>
> Essentially, Prudential had a statutory and contractual duty to transfer Mr T's funds which it was required to act upon when it received his transfer paperwork, unless there were any indications of why the transfer should not go ahead, such as those concerning pension liberation fraud. The page preceding the Checklist in the Scorpion Guide provided an outline of potential warning signs which could suggest pension liberation fraud activity was taking place. However, there is no indication that Prudential had any reason for concern and accordingly, it did not make any of the further enquiries suggested in the Checklist."

49. In this instance, the Trustee had received Mr D's request for a transfer to the SSAS. It had a statutory duty to transfer his funds unless it had any indications that the SSAS was being used as a pension scam or for pension liberation. The Trustee had said that its checks did not provide any indication that the transfer requested by Mr D was a high-risk transfer.

50. TPR's 2013 'Predators stalk your pension' guidance, and later TPR's 'Pensions scams – A lifetime's savings lost in a moment' guidance (**the 2014 Guide**), which was issued in July 2014, were relevant to Mr D's complaint. The 2014 Guide would have been in force at the time of Mr D's transfer and was a relaunch of the earlier Guide to include greater reference to the risks of pension scams.

51. The 2013 and 2014 Guides, set out a two-stage due diligence process. The first stage was to check whether there were any factors that would indicate a pension liberation or scam risk. The Trustee had said that its initial checks had not provided

any indication that the SSAS was a high-risk transfer. In particular, the Trustee had identified a number of checks it had undertaken which included:

- a letter from HMRC confirming that the SSAS was registered;
- a copy of the Scorpion Leaflet, signed by Mr D;
- a letter from Mr D, setting out in detail the rationale for his decision to transfer his Scheme benefits to the SSAS;
- a transfer value discharge form, signed by Mr D, which included an explicit declaration that he had read and understood the Scorpion Leaflet;
- the TD&R of the SSAS; and
- a letter from Addleshaw Goddard LLP, confirming that the TD&R had been drafted by them for Bespoke and were appropriate for use in relation to single-member SSASs.

52. Bespoke had been in existence since 2012. While it was unregulated, as the administrator of the SSAS there was no requirement on it to be so.

53. The SSAS had been registered with HMRC on 5 August 2014 and the transfer completed on 1 September 2014. The check list in the 2014 Guide referred to the recent establishment of the receiving scheme being a possible warning sign. But this did not necessarily indicate a pension scam, as it can be the nature of a SSAS that it is set up for a small number of members and is initially funded by transfers from other pension arrangements.

54. Moreover, the Agreement establishing the sponsoring employer of the SSAS was dated 24 July 2014 and showed that the registered office was Mr D's home address, that he was the Managing Director of the employer and that he was to work from home. So, it would appear entirely plausible to the Trustee that Mr D had established his own company and subsequently established the SSAS. We now know that the employer was a dormant company (and had remained so), but the Trustee would not have been aware of this at the time.

55. The Trustee would not have been aware of Mr D's level of financial experience and understanding, but it was reasonable for it to have assumed that he had some understanding of the risks involved due to the Letter he had signed on 5 August 2014 setting out the rationale for the transfer.

56. On 25 June 2014, the Trustee had sent Bespoke an illustration of the transfer value in respect of Mr D's benefits in the Scheme. It had also enclosed a copy of the Scorpion Leaflet. In the Adjudicator's view, best practice would have been to send the Scorpion Leaflet direct to Mr D so that the Trustee could be sure that he had received it. However, a copy of the Scorpion Leaflet had been returned to the Trustee on 11 August 2014 by Bespoke. Mr D had signed the copy confirming that he had read it, so it would have appeared to the Trustee that Bespoke had provided him with it.

57. In fact, Mr D had confirmed on two separate occasions, first on 5 August 2014 and the second on 11 August 2014, that he had read and understood the Scorpion Leaflet. It was not disputed that he had signed these confirmations.

58. The Scorpion Leaflet set out a number of things to watch out for and steps to take to avoid becoming a victim of a scam. These included:

- be wary of unsolicited calls;
- always think carefully about making a pension transfer, take time to understand the consequences and never be rushed;
- never give out financial or personal information to a cold caller;
- find out the company's background through information online – any financial adviser should be registered with the FCA; and
- speak to an adviser that is not associated with the deal offered for unbiased advice.

59. In view of Mr D's confirmation that he had read and understood the Scorpion Leaflet, it was reasonable for the Trustee to have assumed that Mr D appreciated the implications of it to his own situation. Further, he had not made contact with the Trustee to raise any questions so it could be confident that Mr D was aware of the warnings present in relation to scams and that none of the scenarios in paragraph 58 above applied to him.

60. MRL had argued it should have been obvious to the Trustee that the Letter dated 5 August 2014 was a precedent on which First Review or Bespoke had filled in the PSTR number of the SSAS and which Mr D had then been asked to sign. The Adjudicator disagreed. The Letter had been typed and included Mr D's name and address at its head in the same font as the rest of the wording. The Adjudicator accepted that it was likely to have followed a template wording provided to Mr D, but to all intents and purposes it would have appeared to the Trustee as a letter produced and signed by him.

61. Mr D had subsequently said that he signed all the transfer paperwork without reading it, due to the volume of documentation and feeling time pressured when the document handler visited his home. However, there was no reason to expect the Trustee to have been aware of this, and it was reasonable for it to rely on the assurances that Mr D had provided.

62. Moreover, the evidence showed that the documentation was not all completed and signed on the same date and by Mr D's own account he was visited at home on at least three occasions. The Agreement was dated 24 July 2014, the TD&R was dated 4 August 2014, the Letter was dated 5 August 2014 and the Discharge was dated 11 August 2014. Consequently, the Adjudicator was not convinced that Mr D was presented with a significant amount of documentation which he was expected to sign at one time. The process had taken nearly three weeks to complete. Furthermore, the

transfer value was not paid until 1 September 2014 so Mr D had over five weeks from the signing of the Agreement to the transfer payment in which to consider the action he was taking and, if he had any concerns, to ask questions and delay the process or stop it altogether.

63. Furthermore, Mr D could have asked for a copy of the documentation, if one was not provided to him, and read it more carefully when he had time.

64. Mr D had made three requests for a transfer value during 2013, including two in which he was advised by firms regulated by the FCA. MRL had argued that the fact he did not progress with these was an indication he was prepared to walk away if he was unsure. The Adjudicator suggested that an alternative reading was that, while it was unclear why none of these had progressed but the one to the SSAS did, Mr D had a strong desire to transfer his benefits away from the Scheme.

65. Furthermore, Mr D had a number of other pensions which he did not appear to have transferred, or at least not into the SSAS. So, again, this indicated that his main objective was to transfer away from the Scheme.

66. While it could not be said for certain what Mr D would have done, overall it was the Adjudicator's view that, even if the Trustee had discussed the transfer with Mr D, it would only have been to tell him what he already knew and so it was more likely than not that he would have proceeded with the transfer anyway.

67. MRL had cited a number of previous TPO Determinations in its submissions, in particular PO-7126, PO-11134 and PO-12763. The Adjudicator pointed out that TPO is not bound by precedents set in previous cases and that each case is considered on its own merits and circumstances.

68. He noted that there were significant differences between each of the three cases referred to in paragraph 67 above and Mr D's complaint. For example, the complaint in PO-7126 was that the transferring scheme manager had refused to pay a transfer value to which the complainant did not have a statutory right; and in neither PO-11134 or PO-12763 had the transferring scheme provider issued a Scorpion Leaflet, nor was there an employment link between the complainant and the receiving scheme.

69. In Mr D's case, in view of the documentation that had been provided, the checks that were carried out, and the Trustee's understanding of the information that Mr D had been provided with in relation to pension scams, it was reasonable for the Trustee to make the transfer payment to the SSAS.

70. Mr D did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr D and MRL provided their further comments which do not change the outcome. The additional points raised by Mr D and MRL are set out in paragraphs 71 to 84 below.

Additional Submissions

71. Mr D's complaint is that under the guidance in place at the time of the transfer, the Trustee should have carried out due diligence to check for scam warning signs, and communicated the presence of such signs to Mr D in order to put him in an informed position so that he could decide himself whether or not to proceed.

72. In PO-7126, in an almost identical factual situation as Mr D's case, Royal London decided to refuse Miss Hughes' transfer to a single member SSAS. The PO initially agreed that Royal London was right to do so, but the High Court reversed the decision on the basis that, as Miss Hughes was employed, albeit not via her dormant sponsoring employer, a statutory transfer right had been made. Despite having lost the High Court case, Royal London confirmed in a published article that though it could not refuse transfers such as this, it had a duty to carry out due diligence and raise concerns with members. It said: "Nothing within the judgment changes the need to take proper account of the Regulatory Guidance and trustees and providers should continue to raise concerns with their members and policyholders if these arise as a result of the due diligence which they have done. However, if a member is insistent on transferring, they must be allowed to do so where the statutory right exists". This is the basis for Mr D's complaint.

73. The Adjudicator's finding is that because there was technically a statutory transfer right any duty of care owed to Mr D would have been overridden by the statutory obligation to make the transfer. MRL considers this to be a fundamentally flawed finding. Effectively, the Adjudicator is saying that even if the Trustee had a duty to carry out due diligence/communication, that would always be overridden by a duty to make a transfer if all conditions were met. Considered logically, this statement completely neutralises, and renders worthless, the entire purpose and intention of the Scorpion guidance.

74. The Scorpion guidance was designed to combat situations where, though receiving schemes may have been registered with HMRC and notionally appeared to be legitimate schemes, there were still identifiable scam warning signs. Applied properly, that guidance was designed to require pension trustees and administrators to pick up those scam warning signs, inform members of their presence and give those members the opportunity to back out of the transfer request, armed with that knowledge. The Trustee would have been under no obligation to transfer Mr D's pension to a SSAS if, after being informed of the presence of scam warning signs, he had withdrawn his transfer request and decided to remain with the Scheme. Mr D's position is this is what he would have done if the Trustee had communicated effectively with him during the transfer process, to highlight the presence of scam warning signs.

75. The comments relating to the PO decision in PO-16475 do not detract from the validity and merit of Mr D's complaint. The receiving scheme in that case was entirely different to the single member SSAS Mr D applied to transfer to. The quoted passage refers to the statutory transfer duties but mentions the crucially important proviso:

"unless there were any indications of why the transfer should not go ahead…". In that case, the finding was on specific facts of the case that "there is no indication that Prudential had any reason for concern". That is completely contrary to Mr D's situation, that there were a large number of present and identifiable scam warnings which the Trustee could and should have picked up if it had followed the guidance in place at the time.

76. The Trustee's claim that its checks did not provide any indication that the transfer requested by Mr D was a high-risk transfer is strongly disputed. Throughout the complaint process, despite being invited to do so on numerous occasions, the Trustee has failed to provide any evidence that they carried out any checks, of the nature set out in the 2014 Guide, between the time of receiving the transfer request of 11 August 2014 and actioning the transfer on 1 September 2014. Further, there were numerous scam warning signs in Mr D's transfer and the expectation was for schemes to pick up these signs. The article from Royal London supports that this was, or ought to have been industry standard on a SSAS transfer.

77. MRL considers the statement regarding the number of checks undertaken to be both factually inaccurate and contradictory to the Adjudicator's earlier concern that hindsight ought not to be applied to this complaint. The checks referred to, are not proactive steps of the nature expected in the 2014 Guide (such as speaking to Mr D, looking at the FCA register and checking Companies House records); rather, it is simply a list of documentation contained in the transfer pack sent by Bespoke. Further, there is no evidence that the Trustee even carried out any detailed check of the information contained in this transfer pack – the reference to the listed points being checks is made with hindsight. Had the Trustee actually carried out a detailed analysis of the transfer pack from Bespoke, there were a number of scam warning signs visible, for example the presence of an adviser, the very recent registration of the SSAS, the identity of the SSAS sponsoring employer which a Companies House check would have confirmed was dormant and, again, very recently registered.

78. The Trustee should have scrutinised the employment agreement contained in the transfer pack. It is not fair to suggest that the Trustee could take comfort from that to the effect that Mr D had set up a small company and appointed himself Managing Director, to work from home. If the Trustee had scrutinised the Agreement to that extent, there were numerous other points of concern suggesting that this was a sham arrangement, which should have led to scam concerns:-

- The Agreement did not provide any information about the nature of the business the company was supposed to be conducting.
- It provided no specific information about remuneration which is, of course, a fundamental part of any employment relationship.
- The stated duties of the Executive were entirely generic.
- It had been witnessed by a representative of First Review. If this was a genuine employment contract between Mr D and a trading company he had set up, why

would he have asked a representative of an unregulated company involved in the pension transfer to witness it?

- Further, it is not applying hindsight to say that it should have been picked up that the company was dormant. A simple and free online check of Companies House, in 2014, would have identified immediately that the company had been registered as dormant – it's SIC code, visible on the summary page, was '99999' (i.e. for a dormant company).

79. The documentation contained in the transfer pack, which was signed by Mr D and designed by the unregulated firms involved, benefitting from the transfer proceeding to give the impression to ceding schemes that he had made an informed decision to transfer. The Adjudicator's decision concludes that it was perfectly acceptable for the Trustee to simply accept these documents as providing comfort that Mr D knew what he was doing. It is relevant to note that Royal London in the Hughes case received an almost identical transfer pack, yet the presence of these documents did not prevent them from having concerns about the transfer after a due diligence exercise. First Review presented its clients with a very substantial amount of paperwork for signature during at least two meetings, operating a very standardised method. It is reasonable to conclude that the same would have applied in Mr D's case.

80. First Review's documentation for the two meetings usually held at the customer's home comprised of at least 200 pages and shows that the Scorpion leaflet was one of the later documents in the pack left with the customer at the first meeting and at the second meeting, it was one of numerous documents the First Review consultant asked the customer to sign. Similarly, the customer declaration letter was presented at the second meeting as requiring a signature. Given the amount of documentation and the probable speed with which the First Review consultant would have taken Mr D through the documents that needed a signature at the second meeting, MRL do not consider it reasonable to attribute any degree of financial awareness or knowledge of the risks of the transfer from signature of these documents. The obvious standardised nature of the process was or ought to have been obvious to the Trustee on receipt of the transfer pack.

81. The 2014 Guide makes it clear that it was the Trustee's responsibility to educate members potentially moving into scam schemes about risks present on their transfers. Suggesting that simply because a signed Scorpion warning document was included in the transfer pack, part of numerous documents Mr D was additionally made to sign by an unregulated agent, the Trustee's responsibilities for any due diligence or communication fell away is unreasonable. That is specifically not what the 2014 Guide said, it is inconsistent with the manner in which Royal London identified concerns on an almost identical transfer pack to a SSAS and it is also inconsistent with the way the Financial Ombudsman Service (**FOS**) currently considers complaints about this type of transfer in 2014.

82. It is correct that the Customer Declaration Letter carried the names of Mr D and the Scheme, typed at the top. However, its content was clearly not bespoke, and the date

and HMRC reference for the SSAS were handwritten, which was unusual if the letter had been individually prepared and written by Mr D.

83. The comments regarding the level of diligence expected from Mr D, a consumer with no pensions experience, do not reflect a reasonable application of the 2014 Guide. The comment that Mr D had over five weeks from the signing of the Agreement to the transfer payment in which to consider the action he was taking entirely reverses the due diligence and communication expectations of the 2014 Guide. The Trustee was the party with the knowledge and experience to be able to spot the warning signs of pension scams and to ask questions and delay the process. Instead, it did nothing with no due diligence nor communication with Mr D to help him make an informed decision.

84. The Adjudicator says that the previous transfer enquiries show that Mr D had a strong desire to transfer his benefits away from the Scheme. Even if Mr D did have a general desire to move away from the Scheme, that would not defeat his complaint. Had he been made aware of the scam warning signs present on this SSAS transfer and pulled out, he may well have continued to look out for other transfer opportunities, but, crucially, he would not have transferred to a scam scheme. Had he moved, say, to a personal pension or a SIPP and invested in a reasonable portfolio of regulated investment products, he would not have lost his pension funds through a scam, as has actually happened.

85. Had a proper communication with Mr D been carried out, the Trustee would not have only been able to tell him what he already knew. In essence, the communication would have been that it had carried out a due diligence exercise on Mr D's proposed pension transfer and had noticed several scam warning signs present which meant that he could be moving into a scam scheme. It is incorrect to suggest that Mr D already knew that the transfer he was embarking on carried scam warning signs.

86. MRL understands that TPO considers cases on their own facts and merits. The Adjudicator's comments, which seek to discredit MRL's references to previous PO decisions, run contrary to his own reference to and reliance on case PO-16475. MRL considers that there is a reasonable expectation that TPO should make decisions which are broadly consistent in principle in order that consumers, in similar circumstances, do not receive outcomes which are significantly different.

Conclusions

The basis of TPO's approach

87. As a preliminary matter, in the response to my Adjudicator's Opinion, while acknowledging that FOS and TPO are separate bodies and not bound by each other's decisions, MRL argues that it is "*relevant for TPO to be aware of FOS's current views on* [upheld] *complaints*" of this type, the inference seeming to be that TPO should follow a similar line of decision making.

88. MRL goes on to make the point that a failure to uphold Mr D's complaint will result in "*consumers who were persuaded to transfer to a SSAS for an investment in TRG being compensated if they transferred from a personal pension, but not if they transferred from an occupational pension*"[2].

89. There is some truth in this latter point – and for two reasons. Firstly, TPO and FOS are separate entities that make decisions on a different basis. Secondly, and importantly, the regulatory regime that surrounds occupational and personal pension arrangements are not the same (and thus can result in different outcomes). Indeed, as I shall go on to explain below, the difference between the regulatory environments is such that I may well conclude that different obligations could apply in respect of a personal pension arrangement when conducting due diligence in the past, when compared to an occupational pension scheme.

90. However, that would not be as a result of some arbitrary decision on TPO's part. Rather, it would stem from an application of the law. TPO was established under Part X of the *Pension Schemes Act 1993*, and its remit is to investigate and determine complaints of maladministration and disputes of fact or law concerning personal and occupational pension schemes. TPO's decisions are made in accordance with relevant legislative provisions, together with common law principles, such as duties of skill and care. I must follow the law – and so those principles, and not FOS's decisions or "*current views*", are key to my thinking.

91. In contrast, FOS was established under Part 16 of the *Financial Services and Markets Act 2000* (**FSMA**), and its remit is the investigation and resolution of consumer complaints concerning regulated financial services businesses, including providers of personal pensions. The trustees of occupational pension schemes are not required to be regulated under FSMA and, unless carrying out a regulated activity, do not fall under the FCA's perimeter.

92. FOS reaches its determinations based on what is, in its opinion, fair and reasonable in all the circumstances of the case. Therefore, although both organisations are independent and impartial, the entities they investigate are in the most part different, and their respective approaches to the investigation and determination of complaints are also different – and it is therefore unsurprising that complaint outcomes can also vary.

The Adjudicator's Opinion

93. I agree with the Adjudicator's view that Mr D would have transferred his benefits in any event, even if the Trustee had engaged with him further (see paragraph's 64 to 66- above). For that reason, I too would not uphold Mr D's complaint. However, in my

[2] That is, of course, not the full point – the issue is who should, if required, compensate the member. MRL's case here and in similar complaints made to FOS, is that the transferring trustee or provider is culpable and should compensate the individual. However, there are of course other parties in this chain, beyond the transferring trustee, who may well bear responsibility - although not all will be parties to a complaint.

view it would not have been (and is not) necessary to make a finding that he would have transferred from the Scheme in any event (such that there was no causal link between any perceived breach of duty and loss suffered), notwithstanding the actions of the Trustee. Rather, for the reasons set out below, I am also of the view that there was no obligation on the Trustee to carry out the due diligence that MRL argues should have taken place – and therefore, in the absence of that, no breach by the Trustee in not doing so. I set out my reasoning in detail below.

Legal analysis

94. As I have made clear in the commentary on the differences between TPO and FOS above, "*it is well settled that … the PO must decide disputes in accordance with established legal principles, rather than by reference to what he himself considers to be fair and reasonable*"[3]. As a result, I must ask myself what are the legal obligations that the trustees of a transferring scheme must follow when asked to make a transfer by one of its members?

95. Clearly, there is no one answer to that question. That is because the specific facts of each transfer will be relevant. For example, the obligations on a transferring trustee will differ where the member has a statutory right to demand a transfer, in comparison to a non-statutory or 'discretionary transfer'. Similarly, picking up on the consistency point made by MRL, where a transferring scheme is subject to FCA's perimeter (of relevance to personal pensions), the nature of the obligations may be different when compared to the vast majority of trust based, occupational pension schemes that are subject to TPR's regime. This case deals with the transfer from an occupational pension scheme, and so my analysis drives at the obligations on trustees of those schemes alone (generally referred to later in my analysis as **transferring trustees**). Different factors are relevant for personal pension schemes, and I shall set out my views on those in a separate determination.

96. The timing of a transfer request will also affect this analysis, as legislation and regulation has changed over time. For example, the changes introduced by *The Occupational and Personal Pension Schemes (Conditions for Transfers) Regulations 2021* (the **2021 Transfer Regulations**) only apply in respect of applications made from 30 November 2021.

97. Similarly, significant changes were made to key parts of the legislation that govern statutory transfers (notably PSA 1993) that took effect in April 2015. At the same time, it also became a requirement for transferring trustees to check that a member has received "appropriate independent advice" in relation to transfers from defined benefit schemes to defined contribution arrangements that are in excess of £30,000 (the **Advice Requirement**)[4].

[3] *Arjo Wiggins* – cited in *Baugniet v Capita Employee Benefits (Teachers' Pensions)* [2017] 059 PBLR (019) at paragraph 4.
[4] See Section 48, *Pension Schemes Act 2015* and *The Pension Schemes Act 2015 (Transitional Provisions and Appropriate Independent Advice) Regulations 2015*.

98. The nature of the transferring scheme and receiving scheme will also govern what requirements apply. For example, PSA 1993, discussed in paragraph 102 below, contains different criteria that must be met depending on the type of both the receiving and transferring scheme.

99. In this case, I am concerned with a transfer from the British Steel Pension Scheme – a trust based, occupational pension scheme. The actions of the Trustee in making this statutory transfer are not regulated activities that fall within the FCA perimeter. Mr D was a deferred member, with defined benefits in the Scheme.

100. First Review, on behalf of Mr D, asked for a transfer value quotation in June 2014, with the subsequent request to transfer made on 11 August 2014. The transfer was eventually paid on 1 September 2014. It would appear to be common ground between the parties that it was a statutory transfer for the purposes of the PSA 1993.

101. Therefore, this analysis looks at a 'statutory' transfer made from one occupational pension scheme to another, with the legislation as it stood at that time (and so, for example, the 2021 Transfer Regulations and the Advice Requirement did not apply).

An outline of the statutory obligations on the Trustee

102. Having received the Mr D's application in June 2014, the Trustee was required by Section 93(A) PSA 1993 to provide him with a statement of entitlement, setting out the cash equivalent of the benefits he held in the Scheme. Alongside the statement of entitlement, the Trustee was also required to provide Mr D with certain information relating to the cash equivalent, together with a number of accompanying statements. These disclosure obligations (the **Disclosure Obligations**) were set out in Regulation 11 of *The Occupational Pension Schemes (Transfer Values) Regulations 1996* (the **Transfer Value Regulations**).

103. Within three months of the 'guarantee date' set out in the statement of entitlement (and so in line with the statutory requirements), Mr D, via Bespoke, asked to transfer his benefits in the Scheme to the SSAS. In accordance with Section 95 PSA 1993, Mr D could only transfer his benefits in one of the ways set out in Section 95(2).

104. A SSAS is an occupational pension scheme – and so it needed to fulfil the requirements of Section 95(2)(a) PSA 1993:

> "*In the case of a member of an occupational pension scheme, the ways referred to in subsection (1) are—*
> *(a) for acquiring transfer credits allowed under the rules of another occupational pension scheme—*
> *(i) the trustees or managers of which are able and willing to accept payment in respect of the member's accrued rights, and*
> *(ii) which satisfies prescribed requirements*;"

105. It was incumbent on the Trustee (or, more likely in practice, its administrator) to check that the receiving scheme satisfied these provisions before paying the transfer. In summary, this would involve taking the following steps:

(a) **Occupational Pension Scheme** – it was necessary to check that the receiving scheme, as well as being "*able and willing*" to accept the transfer, was an occupational pension scheme. For these purposes, this is not a particularly high bar to meet, especially following the decision in *Pi Consulting v The Pensions Regulator* [2013] EWHC 3181 (Ch). Indeed, in this case, it has not been argued that the SSAS was not an occupational pension scheme.

(b) **Transfer credits** – the transferring member should be acquiring transfer credits under the rules of the receiving occupational scheme. Again, in light of the decision in *Hughes v Royal London* [2016] EWHC 319 (Ch) (***Hughes***), this is not a significant hurdle. That case set out that members did not need to be in receipt of earnings from the sponsoring employer of the scheme to which they wished to transfer. Earnings from another source were sufficient. Indeed, it may be the case that earnings are not required at all – see the Deputy Pension Ombudsman's analysis in a forthcoming Determination. In any event, the issue of whether or not transfer credits were awarded has, again, not been argued and so is not an issue at play in this case.

(c) **Prescribed requirements** – the receiving scheme also needs to meet the requirements set out in Regulation 12(1) of the Transfer Value Regulations. Notably, this imposes an obligation on the transferring trustees to check that: (i) the receiving scheme is able, if necessary, to receive contracted-out rights; and (ii) that it is a registered pension scheme or qualifying recognised overseas pension scheme under the *Finance Act 2004* (**FA04**)[5]. Again, it has not been argued in this case that these requirements have not been met.

106. PSA 1993, and the Transfer Value Regulations, also set out the method of calculation of the cash equivalent and the timeline in which the transfer had to be made.

107. Having received Mr D's application to transfer benefits under Section 95, the Trustee was then obliged to "… *do what is needed to carry out what the member requires*"[6]. That requirement had a deadline attached to it: as a defined benefit arrangement, it

[5] In order to avoid an unauthorised payments tax charge under FA04, transferring trustees should also ensure that any transfer made is a "recognised transfer" for the purposes of FA04. Notably, like the requirement set out in Regulation 12(1)(d) of the Transfer Value Regulations, this involves checking that the sum is transferred for the benefit of the member in the receiving scheme, and that it is a registered pension scheme or qualifying recognised overseas pension scheme for the purposes of FA04. Although I do not mention this as one of the criteria to be met in the text above, in part as it is already incorporated as a hurdle by dint of Regulation 12(1) of the Transfer Value Regulations, this is a point I would expect to be checked by a transferring trustee. Indeed, in some situations, the rules of a scheme may prevent a payment being made that amounts to an unauthorised payment.

[6] Section 99(2), PSA 1993.

needed to be done "…*within 6 months of the guarantee date…*"[7]. A failure to do this would expose the transferring trustees to the risk of civil penalties[8].

108. It is worth noting that TPR could extend the deadline "*to carry out what the member of the scheme requires*"[9], but only in accordance with "prescribed circumstances". These were set out in Regulation 13 of the Transfer Value Regulations, and did not include the undertaking of additional due diligence of the type suggested by MRL in respect of the receiving scheme.

109. In return for having "*done what is needed*", in accordance with the legislation, a transferring trustee is given the benefit of a statutory discharge (the **Statutory Discharge**):

> "…*the trustees or managers shall be discharged from any obligation to provide benefits to which the cash equivalent related except, in such cases as are mentioned in section 96(2) to the extent that an obligation to provide such guaranteed minimum pension continues to subsist*."[10]

Further duties and obligations

TPR – predators stalk your pension

110. Pension schemes are a repository for considerable wealth – and, as a result, have attracted the interest of wrong doers. Similarly, members of schemes have sought to access the money contained in pension schemes in ways that are not permitted by the pensions' regime.

111. One of the steps in pension liberation, scams and fraud of this type can include a transfer from an individual's existing pension arrangement to another scheme. As is the case with Mr D, it often involves multiple parties: for example, unregulated introducers, regulated financial advisers and the trustees or managers of both the transferring and receiving scheme. However, when things 'go wrong', it is often the case that it is the transferring trustees that are pursued for compensation for the losses suffered by the member, or are asked to reinstate the member in the transferring scheme. Indeed, my office and my predecessors have on occasions upheld complaints against the transferring trustee.

112. However, in many cases the transferring trustees have found themselves in an invidious position – with the member having asserted their statutory right (or trust right) to transfer at one point, and then later being accused of having 'allowed' that transfer to happen when, in the eyes of the member, they should not have done so.

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[7] Section 99(2)(a), PSA 1993. It also goes on to say the deadline is, if earlier, by the date on which the member attains normal pension age.
[8] Section 99(7), PSA 1993.
[9] Section 99(4), PSA 1993.
[10] Section 99(1), PSA 1993.

113. Recognising the risk to members, in 2013 TPR, with other agencies, embarked on a commendable public information programme, highlighting the risk of pensions liberation initially, and then later more general pension scams and fraud. As a part of this, in February 2013 TPR produced[11]:

- A leaflet designed for members, entitled "*Predators stalk your pension*" (the **Scorpion Leaflet**); and

- A separate "*action pack*", entitled "*Pension liberation fraud: The predators stalking pension transfers*", aimed at pension professionals (the **Action Pack**)

114. Updated versions of these documents were produced[12]. Later, elements of the pensions industry itself considered actions that should be taken to limit the risk of fraud and scams of this type – which were set out in the Pension Scams Industry Group's "*Combating Pension Scams: A Code of Good Practice*" (the **PSIG Code**), which was first published in 2015 (and therefore not of relevance to Mr D's complaint).

115. The Scorpion Leaflet and Action Pack are important documents for the purposes of Mr D's complaint, with his representative, MRL, arguing that they imposed an obligation on the Trustee to carry out "…*due diligence to check for scam warning signs, and communicate the presence of such signs to* [Mr D] *in order to put him in an informed position so that he could decide himself whether or not to proceed*" with the transfer. As such, it is worth highlighting key aspects of those leaflets.

116. Before doing so, it is also important to note that a later version of the Action Pack (the 2014 Guide entitled "*Pension scams: A lifetime's savings lost in a moment*") was published on 24 July 2014. In the original complaint to the Trustee, Mr D's representatives based their arguments around the 2013 version of the Action Pack, but in the response to my Adjudicator's Opinion, the argument relies on the updated, 2014 version. In that the transfer was triggered on 11 August 2014 (and paid on 1 September 2014), my view is that it would have been reasonable and appropriate for the Trustee to have still considered the original, 2013 version of the Action Pack. The request to transfer was triggered just over 2 weeks after the updated version had been published (and paid just over a month after publication date), and so it falls within the grace period that my office has historically allowed for trustees and administrators to put in place new processes and procedures. In any event, for

[11] There was awareness of pensions liberation prior to this date, and regulatory attempts to highlight the risks. For example, the Occupational Pensions Regulatory Authority wrote to schemes detailing the risk of pensions liberation in 2002, while what was then Inland Revenue also issued a 'pensions update' in May 2002 dealing with that risk (which it labelled 'trust busting') see: https://webarchive.nationalarchives.gov.uk/ukgwa/20070305221437/http:/www.hmrc.gov.uk/pensionschemes/pso132.pdf

[12] For example, in July 2014, TPR produced an updated version for members entitled "*A lifetime's savings lost in a moment*" – looking at pension fraud and scams more generally, whereas the previous version had looked more specifically at pensions liberation.

reasons I explain below, ultimately it does not alter my analysis of the Trustee's obligations in this case whichever version of the Action Pack was considered.

117. **The Action Pack:** This document included:

- examples of pension liberation;
- warning signs of when members had been targeted. For example, these included members being told of legal loopholes that would allow early access to the funds, the offer of a cash bonus to make the transfer or the offer arising from a 'cold call';
- information on what providers and transferring trustees can do to avoid pensions liberation;
- a checklist for trustees and administrators to help spot liberation arrangements (the **Checklist**); and
- help for trustees and administrators on educating members.

118. In particular, the Action Pack sets out how transferring trustees and administrators may be in a position to identify warning signs of pension liberation. As a result, it highlights that if "*any of the following criteria apply to a transfer request you have received, then you may be about to transfer a member's pension to a scheme designed to liberate their funds. Here are some of the things to look out for*:". It then goes on to set out a list of six warning signs – some of which would, to my mind, only be apparent to a member (such as whether they were approached unsolicited) and others that would only be apparent to the transferring trustees (such as whether the receiving scheme is not registered, or is only newly registered with HMRC).

119. If any of those six statements apply, transferring trustees were then told that "*you can use the* [Checklist] *on the next page to find out more about the receiving scheme and how the member came to make that request*". It is therefore a two-stage process, with the second step only being engaged if warning signs are identified in the first step.

120. The Checklist, if engaged, sets out a number of issues to potentially explore (for example, if the receiving scheme is sponsored by an employer that doesn't employ the transferring member) and how to check that issue (in that particular case, by asking the member).

121. While the Checklist acknowledges that a single "yes" to any of the questions may not necessarily be indicative of liberation, "*if several features are present there may be cause for concern*". If those concerns exist, the transferring trustees are encouraged to contact the member, potentially put them in touch with The Pensions Advisory Service[13] and, if the concerns are not allayed, contact the relevant authorities.

122. The Action Pack recognises that "*Trustees have a duty to carry out a member's transfer request where the legislative requirements are met*". It does, though, seek to

[13] Now the Money and Pensions Service (MAPS).

give transferring trustees some comfort that where they "… *have reason to believe that member funds may be liberated and can evidence their concerns, then this would be a relevant factor to the regulator when deciding whether it would be appropriate to take action in respect to a non-payment of a transfer*".

123. The Action Pack concludes by looking at how members might be educated, and points to the Scorpion Leaflet, which transferring trustees "… *may want to include … with any member correspondence that you issue*". It goes on to say that "*Trustees may wish to contact members directly where they have concerns about a proposed transfer*". I note in passing, that these are not expressed as mandatory obligations – for example, the transferring trustee "*may*" want to include the Scorpion Leaflet. This is in contrast to a later paragraph, which highlights that *"… if you do receive an 'unauthorised payment', you* ***must*** *declare it to HM Revenue & Customs*" (my emphasis).

124. As I mention in paragraph 116 above, there was an updated version of the Action Pack published in late July 2014. For the reasons given in that paragraph, I am content that it was appropriate for the Trustee to have still considered the original version. Nonetheless, for completeness I note that there were differences between the two documents. Notably, the updated document moves focus away from pensions liberation to more general scams. However, it still contains a series of scam signs to 'watch out' for, with a suggestion that "*if any of these features apply, then you can use the checklist on the next page…*". The Checklist is longer and there is more emphasis in the document on proactive member communication. However, again, its contents are not expressed as being an obligation on trustees.

125. **The Scorpion Leaflet**: As I set out in paragraph 123 above, transferring trustees were encouraged to send the Scorpion Leaflet to members as a part of the usual member correspondence.

126. It would appear to have been designed to make individual members think about any potential transfer, and the risks associated with it, before carrying out the transfer. It contained example scenarios of pension liberation fraud, and its consequences for the member, as well as warning signs they should be aware of. It did not contain all of the warning signs that were listed in the Action Pack (for example, looking at when the receiving scheme was established); although this understandable as some of those signs would only be apparent to the professional parties involved in the transaction.

127. The Scorpion Leaflet ends with 'five steps to avoid becoming a victim". For example, suggesting the member speak to an unbiased adviser and checking FCA registrations. None of the suggestions involve the transferring trustees.

128. MRL places considerable weight on the contents of both the Scorpion Leaflet and the Action Pack. It argues that, above and beyond the statutory obligations, "…*pensions*

*administrators also **need to comply with** the very important duties set out in the Pension Regulator's 2013 Guidance in considering and dealing with transfer requests – in organising the manner in which their pension scheme deals with transfer out requests, it ought to be uncontroversial that **these duties have to be complied with as well as the statutory requirements***". (my emphasis)

129. That then is the nub of the complaint made and the issue that confronts me: Is it mandatory to comply with the steps and due diligence in the Action Pack? If there is a failure to follow those steps, or to carry them out to a reasonable standard, does that create a legal cause of action that allows Mr D to seek damages from the Trustee?

A regulatory obligation?

130. In short, it is clear to me that it is not a legislative or regulatory obligation on a transferring trustee of an occupational pension scheme (and thus the Trustee) to follow the due diligence Checklist, or other requests made of it and contained in the Action Pack. Nor is it a legislative or regulatory obligation to provide members with a copy of the Scorpion Leaflet.

131. It is clearly not an obligation that forms a part of, or that is required by, legislation – either primary or secondary. For example, there is no requirement in either PSA 1993 or the Transfer Value Regulations to carry out the steps contained in the Action Pack.

132. Similarly, it is not a requirement of the Disclosure Obligations to provide a copy of the Scorpion leaflet to members as a part of any transfer. It would have been possible to achieve this, had Parliament so desired. For example, when introducing pension freedoms and flexibility, Parliament amended *The Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013* to make it a legislative requirement that schemes send out a guide approved by TPR, or a bespoke version that is materially the same, when members are looking to access defined contribution benefits[14]. That did not happen in respect of the Scorpion Leaflet.

133. Similarly, the contents of the Action Pack were not issued as a 'code of practice' for the purposes of section 90 of *The Pensions Act 2004* (**PA04**)[15]. While doing so would not have made the Action Pack's contents mandatory or created any new legal obligations[16], it would have resulted in any failure to follow its requirements being, potentially, of evidential value when a court (or indeed the Pensions Ombudsman)

[14] See Regulation 18A and Paragraph 14 of Schedule 7 of *The Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013*. The information that must be given to a member that has an opportunity to transfer flexible benefits includes: "*Either (a) a copy of guidance that explains the characteristic features of the options referred to in paragraph 13 that has been prepared or approved by the Regulator; or (b) a statement that gives materially the same information as that guidance*."

[15] Section 90(1) PA04: "*The Regulator may issue codes of practice: (a) containing practical guidance in relation to the exercise of functions under the pensions legislation, and (b) regarding the standards of conduct and practice expected from those who exercise such functions*."

[16] See section 90(4) PA04: "*A failure on the part of any person to observe any provision of a code of practice issued under this section does not of itself render that person liable to any legal proceedings*."

decides whether a party has met its strict legal requirements[17] (in this case the transferring trustees' obligations under PSA 1993).[18]

134. This was reflected in the wording included in the Action Pack. For example, it was only suggested that transferring trustees "*may*" want to include the Scorpion Leaflet (see paragraph 123 above) and it was made clear that the Checklist remains subordinate to the member's statutory right to transfer (see paragraph 122 above).

135. Accordingly, I am content there was no legislative or regulatory requirement on the Trustee to conduct the due diligence contained in the Action Pack, nor indeed to send Mr D the Scorpion Leaflet.

A duty of care?

136. If there is no statutory or regulatory requirement, I also need to ask whether there is another legal mechanism that might oblige the Trustee to carry out the due diligence included in the Action Pack (and/or to also send the Scorpion Leaflet to the member).

137. In this case, as MRL alludes to, that device is a duty of care. As the Trustee is, by its very nature, a trustee of an occupational pension scheme, that might come from two, key sources – either a tortious duty of care (i.e. an implied common law duty to take care to avoid harm to others, which allows the applicant to make a claim in negligence) or an equitable duty of care (i.e. arising from equity)[19]. However, although "*the duty of care imposed on trustees, … developed by the courts of equity …;* [is] *not in all respects the same as the duty of care developed in tort by the common law, it is essentially similar to the common-law duty and each duty of care has been developed by the other*"[20]. In view of that, I concentrate on the duties arising in tort, and comment briefly on equitable duties.

138. For a claim of negligence against the Trustee to succeed, a series of questions need to be answered. Broadly, these are:

- the Trustee needs to owe Mr D a 'duty of care';
- the Trustee must have breached that duty;
- Mr D must have suffered loss as a result of that breach; and
- the loss must be recoverable.

139. So, the first element that needs to be established is whether the Trustee owed a 'duty of care' to carry out due diligence of the type suggested by MRL, and then warn Mr D.

[17] Section 90(5) PA04.
[18] Although not express, the Action Pack and Scorpion Leaflet are more likely issued under Section 12 PA04 – TPR's general ability to provide "information, education or assistance". These do not create legal rights or obligations.
[19] I am not of the view that the statutory duty of care found in the *Trustee Act 2000* would assist Mr D in these circumstances, as it only arises in relation to the activities mentioned in Section 1 of that Act, none of which arise in relation to the Trustee complying with a member's request to transfer. Nor, in the case of this statutory transfer to which the member has a 'right to a transfer payment', do the rules of the Scheme assist in finding a standalone duty.
[20] Tucker, Poidevin and Brightwell (Eds), Lewin on Trusts, 20th Edn (Sweet & Maxwell, 2020) at 34-001

In establishing whether a duty of care exists, it was confirmed in *Robinson v Chief Constable of West Yorkshire Police* (Rev 1) [2018] UKSC 4 (***Robinson***) that the correct approach is to consider whether there is already established precedent for a duty of care to apply in a particular situation. If there is, that precedent should be followed. If there is not, the correct approach is to consider the closest analogies in the existing law and to weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable. In those circumstances it may also be necessary to consider the foundations on which a duty of care is based, as set out in *Caparo Industries v Dickman* [1990] 1 All ER 568:

- damage which is foreseeable;
- a sufficiently proximate relationship between the parties; and
- for it to be fair, just and reasonable in all the circumstances to impose a duty of care.

140. In this particular case, MRL is claiming that there was a duty to conduct the due diligence set out in the Action Pack, and to then warn Mr D of the 'red flags' that, they say, existed – such that Mr D would have been afforded an opportunity to decide, for himself, not to transfer after all. As a result, and thanks to the later actions of other parties involved in the transfer, Mr D suffered economic loss.

141. For the purposes of trying to identify analogous cases in accordance with *Robinson*[21], there are some lines of authority that provide assistance in this case. Notably, cases where a purported duty conflicts with statutory obligations and, closer to home, cases related to pension trusts:

Conflict with a statutory obligation

142. In his Opinion, my Adjudicator pointed to the statutory transfer right and found that "*to the extent that the Trustee had a duty of care to Mr D, it would have been overridden by the statutory obligation to make the transfer*". MRL considered this a "*fundamentally flawed finding*", and argued that the Action Pack and Scorpion Leaflet nonetheless required transferring trustees to carry out the due diligence to pick up the scam warning signs and inform the members of their presence.

143. In essence, I agree with my Adjudicator – in that it is a well-established principle that a common law duty of care will in most circumstances not arise where it would hinder the performance of a statutory obligation.

144. For example, in *Desmond v The Chief Constable of Nottinghamshire Police* [2011] EWCA Civ 3 (***Desmond***), the Court of Appeal held that "*the common law should not impose a concurrent duty which is inconsistent, or may be in conflict with, the statutory framework*".[22]

[21] And also *Murphy v Brentwood District Council* [1991] UKHL 2.
[22] Sir Anthony May, President of the Queen's Bench Division, in *Desmond*, at 39.

145. Clearly, imposing a duty to carry out due diligence that goes above and beyond that required to meet the statutory criteria to transfer would inhibit transferring trustees from meeting their statutory obligations.

146. A further factor that persuades me that must be the case is that the enquiries required to carry out due diligence must be of a reasonable standard, in order to be of use (and not expose the trustees to the risk of failing to meet the standard required, having embarked on that journey). To do so would take time and, with the other actions required to meet the statutory deadline for doing "…*what is needed to carry out what the member requires*" (see paragraph 107 above), run the risk of going beyond that deadline. Furthermore, as I set out in paragraph 108 above, there is no express power for TPR to extend the time-period for making the transfer to allow for that type of due diligence to be properly completed and then communicated. To my mind this is exactly the sort of purported duty that "*might inhibit the proper and expeditious discharge of* [a] *statutory function*"[23] and so I struggle to see how a duty of care would arise.

147. Other cases also provide support for this view. For example, in *Her Majesty's Commissioners of Customs and Excise v Barclays Bank plc* [2006] UKHL 28 (***Barclays Bank***), the House of Lords held that a bank, that was required to implement a freezing injunction on one of its customers, did not owe a duty of care to carry out its obligations with reasonable care – largely because it had not voluntarily agreed to carry out the injunction's terms, but rather had been obliged to do so. Lord Bingham highlighted that "*a duty of care is ordinarily generated by something which the defendant has decided to do*"[24]. Rather, as Lord Walker commented later in the judgment, Barclays had "… *the freezing order thrust upon it*."[25] The same is true here – the Trustee was obliged to effect the transfer if the statutory criteria was met (as it was) and it would, in my view, not be correct to then impose a duty of care to carry out due diligence beyond those obligations.

148. Indeed, although MRL raises *Hughes* in aid of its arguments[26], my view is that *Hughes* confirms the position that a duty of care does not arise. In that case the administrator had attempted to delay the transfer as it was concerned with the possibility of pensions liberation in the receiving scheme. However, as the statutory requirements for the transfer had been fulfilled, there was nothing that could justify its refusal to transfer.

149. Accordingly, in the absence of any assumption of a duty (a point I shall return to momentarily), the starting position in my mind is that there is no duty of care that

[23] Sir Anthony May, President of the Queen's Bench Division in *Desmond*, at 41.
[24] Lord Bingham, in *Barclays Bank*, at 38.
[25] Lord Walker, in *Barclays Bank*, at 74.
[26] On the basis that, despite having lost the High Court Case, Royal London 'accepted' in an article that "*nothing within the judgment changes the need to take proper account of Regulatory Guidance*…".

arises to compel a transferring trustee to carry out the due diligence set out in the Action Pack and flag its concerns with the member, as suggested by MRL.

Analogous pension cases

150. It is also tolerably clear from pension law cases, where equitable duties were also at play alongside tortious duties, that the courts find it difficult to import a duty of care to do things beyond the obligations imposed on trustees by the law or the scheme's own rules (unless voluntarily assumed). For example:-

- *NHS Pensions Agency v Beechinor* [1997] PLR 95 – where it was originally argued that the administrators had negligently failed to provide an explanation of the advantages and disadvantages of joining a new pension scheme and, if it had been provided, the applicant would have joined that scheme to her advantage. In a brief judgment, Lightman J, held that "*One matter is absolutely clear, … that the Administrators had no duty to advise or warn; and if (contrary to my view) they otherwise might have had such a duty imposed on them, such duty was expressly disclaimed by the letter dated 22 May 1978*."[27]

- *Outram v Academy Plastics* [2000] 38 PBLR – where it was argued that there was a duty (on an employer who was also the trustee of the scheme) to advise a member that he could rejoin a pension scheme. Tuckey LJ held that "*The cases I have so far considered have concerned the employer's duties as employer. Other cases show clearly I think that, in their capacity as trustee of a settlement, employers owe no duty of the kind alleged. Thus in Hawkesley v May [1956] 1 QB 304 it was held that a trustee had no duty to give the plaintiff beneficiary advice about his rights under the trust. This decision was followed by Collins J in Hamar v The Pensions Ombudsman [1996] PLR1 who held that it was not the duty of the trustees of a pension fund to point a beneficiary in the right direction or to tell him of his errors."*[28]

- *Wirral Borough Council v Evans* [2000] 63 PBLR – where a member complained that the administrator of the receiving scheme should have explained that the transfer he was making was not advantageous to him. However, Evans-Lombe J, at paragraph 38, held that "… *there was no duty on the Administrators in this case to give the advice which would have prevented* [the member] *from transferring his pension benefits to the Scheme on such unfavourable terms*."

151. This line of case law shows that there is no general duty of care in tort on the trustee of a pension scheme to advise members on their rights under the trust or whether it is appropriate to transfer their benefits. By extension, this would also mean that transferring trustees were not under a duty to investigate the circumstances of the transfer or the nature of the receiving scheme (other than when that obligation is

[27] *NHS Pensions Agency v Beechinor* [1997] PLR 95, Lightman J, at 13.
[28] *Outram v Academy Plastics* [2000] 38 PBLR, Tuckey LJ, at 18.

imposed, as it was in part later, by the 2021 Transfer Regulations) – as such a duty would only arise where transferring trustees were also under a duty to advise the member in respect of their findings.

Equitable duties

152. There is an equitable duty of care – such as the general duty to take the care of an ordinary prudent businessman would take in managing his own affairs[29]. However, as I have mentioned at paragraph 137, the common law and equitable duties of care are, for these purposes, the same duty – and do not support an argument that a duty of care to conduct due diligence emerges from equity when it does not in common law. For example, in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 14, Lord Browne Wilkinson set out that:

> "*The liability of a fiduciary for the negligent transaction of his duties is not a separate head of liability but the paradigm of the general duty to act with care imposed by law on those who take it upon themselves to act for or advise others. Although the historical development of the rules of law and equity have, in the past, caused different labels to be stuck on different manifestations of the duty, in truth the duty of care imposed on bailees, carriers, trustees, directors, agents and others is the same duty: it arises from the circumstances in which the defendants were acting, not from their status or description. It is the fact that they have all assumed responsibility for the property or affairs of others which renders them liable for the careless performance of what they have undertaken to do, not the description of the trade or position which they hold."*[30]

153. Indeed, this would seem self-evident – as if equity provided a route to requiring a duty to conduct due diligence, then the courts would surely have found that a similar duty of care to advise existed in the *Beechinor*, *Wirral* and *Outram* cases set out above (as all involved trustees).

154. On first glance that may seem an odd proposition – is a trustee's relationship with its beneficiary not exactly the sort of 'special relationship' that leads to an expectation of trustees 'acting in the best interests of the beneficiary'? Does that impose a duty of care to go beyond its statutory obligations (in this case in PSA 1993 and the Transfer Value Regulations) and conduct additional due diligence and to warn?

155. In my view it does not. The courts have moved away from a simplistic formulation of 'acting in the best interests of the beneficiary'. Instead, the courts have decided "*that*

[29] See *Speight v Gaunt* (1883) 9 APP Cas (HL).

[30] Lord Browne Wilkinson, at 205, *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145. Similarly, in *Bristol and West Building Society v Mothew* [1998] Ch 1, at paragraph 17, while it was recognised that there was a different remedy for breach of the equitable duty of care compared to the common law damages, it was set out that "*this is merely the product of history and in this context is in my opinion a distinction without a difference. Equitable compensation for breach of the duty of skill and care resembles common law damages in that it is awarded by way of compensation to the plaintiff for his loss. There is no reason in principle why the common law rules of causation, remoteness of damage and measure of damages should not be applied by analogy in such a case"*

the "best interests of the beneficiaries" should not be viewed as a paramount stand-alone duty". Rather, Asplin J (as she then was) found that "…*it should not be treated as if it were separate from the proper purposes principle. In fact, it seems to me that the way in which the matter was put by Lord Nicholls extra judicially sums up the status of the best interests principle and the way it fits in to the duties of a trustee. It is necessary first to decide what is the purpose of the trust and what benefits were intended to be received by the beneficiaries before being in a position to decide whether a proposed course is for the benefit of the beneficiaries or in their best interests. As a result, I agree with his conclusion that ". . . to define the trustee's obligation in terms of acting in the best interests of the beneficiaries is to do nothing more than formulate in different words a trustee's obligation to promote the purpose for which the trust was created*".[31]

156. Simplistically, the trust is required to pay the benefits in accordance with the rules of the Scheme and overriding legislation. Its purpose is not to act as a holistic financial or retirement solution for the member. There is no suggestion, for example, that a trustee ought to review whether additional voluntary contributions made to a scheme are affordable for the member, or that the proposed use of a tax-free cash lump sum is appropriate. Rather a trustee's role is defined and limited – and I cannot see how a trustee of an occupational pension scheme that meets its obligations to pay a statutory transfer value, when the conditions for payment have been met, is required to go further and conduct additional due diligence because of its status.

157. This is supported by case law in the pensions field specifically – which shows the limitations on imposing a duty of care on a trustee in a similar situation. In *Hamar v The Pensions Ombudsman* [1996] 01 PBLR, a case dealing with a purported statutory transfer right, the trustees' status was not sufficient to find a duty of care:

> *"What is suggested here is that there was a duty on the trustees not only to inform of rights, but also to inform as to how those rights could be properly exercised or, more importantly perhaps, that those rights were not being properly exercised. It seems to me that is to extend, beyond anything that has hitherto been suggested, the supposed duties of trustees. It is certainly the case that there is an obligation to give information to a beneficiary of the existence of the trust and, by showing him documents, to give information. What is, in my judgement, not supported by the authorities is a duty to go further and to give explanations. No doubt the trustees frequently will, but they do not have to. Still less are they obliged, in my judgement, to give information as to how a particular beneficiary may obtain his portion in a particular trust fund or may exercise his statutory rights particularly where, as here, they form the view that it was not in the interests of the remaining beneficiaries that he should be able to obtain the money in question.* ***It is a statutory right that is here under consideration. It is a right in respect of which the beneficiary who wishes to effect the transfer may seek advice. It is up to him to follow the***

[31] *Re Merchant Navy Ratings Pension Fund; Merchant Navy Ratings Pension Trustees Ltd v Stena Line Ltd* [2015] EWHC 448 (Ch) at 228.

> ***correct statutory procedure. It is not, in my judgement, the duty of the trustees of the fund to point him in the right direction or to tell him of his errors, if he has made them, even assuming they are aware that those errors existed.*** *It is very difficult to see that it could be a proper obligation to be imposed upon a Trustee that he should give accurate information, as a matter of law, where there may be some doubt…"*[32] (my emphasis)

158. As a result, I am not of the view that equitable duties assist Mr D's argument either.

Exceptions to the general rule – an assumption of responsibility

159. So, as I have set out, there is in my view no general duty of care, whether in equity or in tort, that would require a transferring trustee in these circumstances to conduct due diligence of the type suggested by MRL and Mr D. However, if a transferring trustee says it will do something (such as due diligence), or does something voluntarily but badly, could it not be right that the transferring trustee is held to that promise? This takes us into an exception to the general rule.

160. Mr D's complaint relates to an 'omission' on the part of the Trustee (rather than a positive act causing harm) – i.e. the argument is that the Trustee did not carry out the due diligence and then warn Mr D.

161. In negligence, the starting position is that "*the common law does not impose liability for what are called pure omissions*"[33]. This remains the case today, although the more modern distinction is between, here, making Mr D worse off through an action (an 'act'), as opposed to not conferring a benefit on Mr D (an 'omission').

162. Applying this to the facts, the failure to confer on Mr D the benefit of voluntarily conducting due diligence and to then warn him of the findings (if indeed there was such a failure, which the Trustee in any event disputes) is, on the face of it, an 'omission' that would mean that there is no duty of care in negligence imposed by law, other than in some exceptional circumstances.

163. In this case, the loss suffered by the member is economic and so the principles set out, originally, in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465 (***Hedley Byrne***) may provide for a set of circumstances where, notwithstanding the duty amounts to an omission that would otherwise conflict with a statutory obligation, a duty of care might be found to have arisen.

164. *Hedley Byrne* demonstrated that it is possible in law to find a duty of care for pure economic loss where one party is shown to have 'voluntarily assumed responsibility' to another, such that a court may find a special relationship exists between them that

[32] *Hamar v The Pensions Ombudsman* [1996] 01 PBLR at 46.
[33] *Smith v Littlewoods Organisation Ltd* [1987] AC 241 at 247

gives rise to a duty of care. For these purposes, this could include responsibility for an 'omission' to act if certain conditions are met.[34]

165. However, in order find that such a duty does exist, it would be necessary to find that[35]:
    - the transferring trustees 'voluntarily assumed responsibility' to the member;
    - the member has placed reasonable reliance on the transferring trustees; and
    - it was reasonably foreseeable to the transferring trustees that the member would be relying on them.

166. In this case, for the reasons set out in paragraphs 102 to 106 above, the Trustee had to ensure the criteria in PSA 1993 were met (which by common consent they were). However, as discussed in paragraphs 130 to 135, there was not a legislative or regulatory requirement to either (i) send out the Scorpion Leaflet, nor (ii) carry out the due diligence in the Action Pack (and then discuss or warn the member if there were red flags arising as a result). However, did the Trustee voluntarily assume that responsibility?[36] Did Mr D reasonably rely on any assumption and was it reasonably foreseeable to the Trustee that Mr D would rely on it doing the things that it had 'voluntarily assumed' to do?

167. If the transferring trustees had voluntarily assumed the responsibility to investigate the receiving scheme and warn the member should anything untoward arise from that investigation, and had assured the member that this would happen, those trustees could be under a duty to take reasonable steps in so doing.

168. However, it is important to note that the mere fact that the transferring trustees had (if indeed they had) attempted to carry out the due diligence suggested by, say, the Action Pack would not necessarily be sufficient where the member was unaware that this was happening and had no reason to believe that the transferring trustees would be doing this. Reasonable reliance on the part of the member, and the transferring trustees reasonably foreseeing that reliance, are key elements of finding a duty, alongside the voluntary assumption of responsibility.

169. In this case, I am not of the view that the Trustee has, voluntarily, taken on an assumption of responsibility to carry out the due diligence contained in the Action Pack, or to warn Mr D if red flags emerged as a result of that due diligence.

170. From the information I have been provided with, the Trustee was not carrying out the due diligence. The Trustee was invited to review the Checklist, when TPR published

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[34] See, for example, *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665, *Hamble Fisheries Ltd v L Gardner & Sons Ltd (The Rebecca Elaine)* [1999] 2 Lloyds Rep 1 and *Midland Bank Trust Co Ltd v Hett, Stubbs and Kemp* [1979] Ch 384.

[35] See *Steel v NRAM Limited* [2018] UKSC 13 – particularly paragraphs 18 to 24.

[36] Recognising that the assumption of responsibility is an objective test – for example, see *Williams v Natural Life Foods Limited* [1998] 1 WLR 830 at 835: "*The touchstone of liability is not the state of mind of the defendant. An objective test means that the primary focus must be on things said and done by the defendant or on his behalf in his dealings with the claimant*".

the Action Pack, but it was its choice whether to do so or not. In not doing so, it has not voluntarily assumed a duty of care to Mr D.

171. Furthermore, there was no promise or representation, either implied or explicit, made to Mr D that suggested the Trustee was conducting due diligence above and beyond that required to satisfy itself that the receiving scheme met the requirements for a statutory transfer set out in PSA 1993. This includes the contents of the Scorpion Leaflet, which was provided to Mr D and which I have read carefully, and which does not suggest that the Trustee is taking any additional steps. Indeed, the Scorpion Leaflet very much raises warning flags for Mr D to be aware of – but does not suggest that the Trustee is also looking to ensure that these risk factors do not exist. Accordingly, I cannot see how it could be argued that Mr D could reasonably have relied on the erroneous assumption (if indeed he did believe that, for which I have not seen evidence) that the Trustee was carrying out due diligence.

172. Accordingly, I cannot see that there was a voluntary assumption of responsibility, or any reasonable reliance placed on the actions of the Trustee, such that a duty of care could have arisen.

No duty of care

173. Accordingly, I cannot find in law that a duty of care exists on the Trustee in this situation to carry out the due diligence suggested by the Action Pack – such that it would allow Mr D to mount a claim in negligence against the Trustee.

174. I do not think that this should be a surprise, or amount to a controversial interpretation of the law. Putting aside the limited circumstances in which the common law will impose a liability on a party for a 'pure omission', it is also clear from cases such as *Desmond* and *Barclays Bank* that imposing a duty to 'do' something over and above a statutory obligation is fraught with practical as well as legal difficulties. Indeed, in this case, if the Trustee, despite meeting the statutory obligations in PSA 1993 and obtaining the benefit of the Statutory Discharge as a result, was still found to have an extended duty to do things beyond the requirements of PSA 1993, it would undermine the utility of having that discharge.

Other factual circumstances

175. Similarly, it is important to highlight, just as I did earlier, that different factual situations may affect this analysis. Different circumstances could result in a different outcome. Notably:-

- If a trustee did, voluntarily, decide to carry out the due diligence suggested by the Action Pack (and so potentially assumed responsibility to the member), and communicated that it was doing so to the member, it may be that a duty of care to carry out that due diligence with reasonable skill then exists. However, the member in that case would still need to meet the other requirements of a claim in

negligence for pure economic loss – and many cases seen by TPO fail on causation, with the member being found to have most likely transferred in any event, whether or not a warning had been given.

- The situation where the transfer is from a personal pension scheme that sits within the FCA perimeter, and therefore the transferring trustee or operator is caught by the FCA Handbook which imposes its own regulatory obligations[37]. In those cases, it could be that a duty of care to meet the expectations of the relevant regulator emerges from that different regulatory regime.

- Where the transfer is one that required the consent of the trustee or manager and is not driven by a member's own statutory right – most notably, a non-statutory or discretionary transfer, where the member is not exercising their statutory right under PSA 1993. Here the provisions of the scheme's own rules will be of particular importance.

176. Accordingly, this Determination, while setting out my general view of the imposition of a duty of care in transfers of this type (and hence requiring some more detailed legal analysis than the majority of my Determinations), should not be taken to automatically apply to the situations described above. These will be considered, where necessary, in separate Determinations.

Concluding thoughts

177. In summary, I do not find that there was an obligation, including one imposed via a duty of care, on the Trustee to carry out the due diligence set out in the Action Pack and, if necessary, then warn Mr D of any red flags that might be apparent.

178. In some ways it could be argued that this is an unsatisfactory outcome, although it reflects my role to decide pension complaints on the basis of law. Consumers should be afforded protection. However, as *Philipp v Barclays Bank UK* [2023] UKSC 25 (a case dealing with the responsibility of banks for 'push payment' fraud) highlighted, this is not a job for the courts:

> "*The type of fraud which occurred here is a growing social problem and can undoubtedly cause great hardship to its victims, as the sad facts of this case make all too clear. Whether victims of such frauds should be left to bear the loss themselves or whether losses should be redistributed by requiring banks which have made or received the payments on behalf of customers to reimburse victims of such crimes is a question of social policy for regulators, government and ultimately for Parliament to consider. It is in fact, as I will mention in more detail shortly, the subject of new legislation. But it is not a question for the courts. It is not the role of the courts to formulate such policy, still less to impose on the parties to a contract*

[37] For example, and notably, COBS 2.1.1 "*A firm must act honestly, fairly and professionally in accordance with the best interests of its client*"

an obligation to which they have not consented and cannot reasonably be presumed to have consented since it is inconsistent with the normal and established allocation of risk and responsibility under contracts of the relevant type."[38]

179. In this case there has been an incremental approach to the protection afforded to members, seeking to balance members' rights to transfer their pension to their advantage against the potential risks of doing so, culminating in the 2021 Transfer Regulations. However, as is unfortunately the case here, there will be those that suffer hardship before those protections become live.

180. While Mr D has my considerable sympathy, I do not uphold his complaint.

Dominic Harris

Pensions Ombudsman
26 August 2025

[38] *Philipp*, per Lord Leggatt, at 6.