Ombudsman's Determination

Applicant	Mr Y
Scheme	Phoenix Life Personal Pension Plans 6000158J, 6000215A, 6000262H and 6026632D (**the Plans**)
Respondent	Phoenix Life Limited (**Phoenix Life**)

Outcome

1. I do not uphold Mr Y's complaint and no further action is required by Phoenix Life.

Complaint summary

2. Mr Y has complained that Phoenix Life did not carry out sufficient due diligence checks when transferring his benefits from the Plans to a Small Self-Administered Scheme (**the SSAS**) in 2014.

3. The complaint arises as the SSAS was invested in a high risk, commercial business, unsuitable as a pension fund investment, which has subsequently failed. Mr Y fears he has lost much of his pension fund as a result.

Background information, including submissions from the parties

4. The Plans were personal pensions established in 1990. Mr Y says that in 2013 he wanted to start up a local business, both as an investment and to support the local community. He discussed the idea with his accountant, who recommended a pension expert, Liddell Dunbar Limited (**Liddell Dunbar**). He says he would not have set up his retail music instrument business (**the Business**) without the pension investment as he did not have access to sufficient funding.

5. Liddell Dunbar was unregulated and appears to have acted primarily in an administration capacity. Mr Y says he met with Liddell Dunbar and that it explained how a Self-Invested Personal Pension (**SIPP**) could be established to facilitate the investment.

6. Mr Y says it was only later that he realised the new arrangement was, in fact, a SSAS.

7. He says that his accountant advised him to proceed with establishing the new arrangement, which was in the name of a company set up in Mr Y's name (**the Company**) and to transfer his funds from three existing pension arrangements, including the Plans, into it. Those funds were subsequently invested into the Business.

8. Mr Y says that Phoenix Life failed to put in place the necessary procedures to reflect the Pensions Regulator's (**TPR**) guidance on pension liberation fraud and wants to be put back in the position he would have been if the transfer had not taken place.

9. He also says he may be liable to tax penalties and asks that these be reimbursed to him.

10. Phoenix Life's file shows that, on 22 July 2014, it received a letter from Liddell Dunbar requesting transfer documents and enclosing an HMRC scheme registration showing the SSAS had been registered on 22 May 2014, trust deed, membership application and Liddell Dunbar Administration Agreement relating to the SSAS.

11. Phoenix Life sent a transfer pack to Liddell Dunbar on 29 July 2014.

12. On 13 August 2014, Phoenix Life received the completed discharge form.

13. On 29 August 2014, the case was reviewed by Phoenix Life's pension technical team. It carried out the following checks:-

    - A review of the Phoenix Life Financial Crime Team Alert List and noted none of the parties involved appeared.

    - The principal employer (Mr Y Limited) which showed Mr Y as the only director and that he had no links to any other companies.

    - Liddell Dunbar appeared on Companies House as active and established on 17 October 2002. It was noted as not being a regulated adviser or provider, merely an administrator.

14. The conclusion was that nothing suspicious was flagged. The Trustees, Mr Y and his accountant, had power to make investment decisions, and Liddell Dunbar was not named as a Trustee. The transfer could therefore proceed.

15. On 4 September 2014, Phoenix Life wrote to Liddell Dunbar to confirm the transfer value of £96,696.36 had been paid into its account. A copy of the letter was sent to Mr Y.

16. Phoenix Life now agrees the fact the SSAS was recently established was a 'red flag'.

17. Correspondence with HMRC shows the potential tax penalties relates to two loans of £5,000 made to the Business in 2015/16 and 2016/17. Companies House records show that Mr Y is a director of the Business. As such HMRC consider the loans to be unauthorised member payments and unauthorised employer payments subject to 40% tax under Section 208 of the Finance Act 2004.

Adjudicator's Opinion

18. Mr Y's complaint was considered by one of our Adjudicators who concluded that no further action was required by Phoenix Life. The Adjudicator's findings are summarised below:-

- The due diligence process had to strike a balance between the protection of customers from fraud, protecting the ability of customers to exercise their statutory right to transfer their pension fund and ensuring that Phoenix Life did not fall foul of competition law requirements by placing restrictions on new providers and schemes entering the market.

- Mr Y said he thought the Scheme was a SIPP and not a SSAS. Given that Phoenix Life would be expected to carry out similar initial checks regardless of the type of scheme, this was not material to the complaint.

- Liddell Dunbar is shown as the Scheme Administrator of the SSAS, the Company is shown as the Provider and the Trustees were Mr Y and his accountant. The Trust Deed and Rules showed that the Trustees had power of investment with the consent of the Provider.

- There was nothing within the documents submitted to Phoenix Life to show how the funds were to be invested.

- In previous Determinations the Pensions Ombudsman has referred to the guidance issued by TPR to providers in February 2013, as being a point of change as to what might be regarded as good industry practice. Mr Y's transfer took place more than a year after that guidance was issued.

- In this case the SSAS had only been registered on 22 May 2014. Phoenix Life has since acknowledged that this was a potential 'red flag'. This should have been enough to prompt Phoenix Life to contact Mr Y to question his reasons for requesting the transfer and to obtain further details as set out in TPR's guidance.

- However, had Phoenix Life contacted Mr Y and made further enquiries, it is unlikely there would have been anything in his responses which would have given cause for concern.

- Mr Y had said that the purpose of the transfer was to enable him to invest in the Business, which he had already established.

- Mr Y had not received an unsolicited approach. He had sought advice from his accountant, who he had been with for several years and who he trusted. His accountant, in turn, had introduced him to Liddell Dunbar, which had been established for 12 years and appeared to be reputable.

- Had Phoenix Life explained the risks of transferring to Mr Y this was unlikely to have dissuaded him from going ahead as none of the warnings would have appeared to apply to him. Phoenix Life could not have provided advice and therefore, even if it had known about his investment plans it would not have been able to comment on them to any extent. It was, therefore, more likely than not that Mr Y would have gone ahead with the transfer.

- With regards to Mr Y's claim regarding any tax liability, this clearly arose as a result of unauthorised loans to the Business and were much later transactions. Phoenix Life was not responsible for those transactions or for the decision to make them and could not be held responsible for any tax liabilities arising as a result.

19. Although Phoenix Life accepted the Adjudicator's Opinion, Mr Y did not; he made the following comments:-

    - The assumption the Adjudicator had made on the facts in the decision was not correct.
    - In accordance with TPR's guidance there were at least three warning signs: he was under the age of 55; he had been approached unsolicited; the receiving scheme was unknown to Phoenix Life and there was more than one transfer request.
    - He trusted his accountant completely. His accountant had put him in touch with Liddell Dunbar who started to engage him in the process which the HMRC now know is a pension liberation scheme. The only reason HMRC did not fine him was because, as a matter of fact, he had not taken any of the money himself.
    - Liddell Dunbar charged a premium for the transfer because it was a pension liberation scheme. He felt that agreement to transfer from the three transferring pensions meant all must be above board.
    - He is usually very cautious by nature. He firmly believed that Phoenix Life should have done more and at the very least suggested to him that he got further advice.
    - The advice from Liddell Dunbar was, at the very least, conflicted as they were after premium fees for the pension liberation and not acting in his best interest. He believes that if any doubt had entered his mind, he would have obtained further advice.
    - It would have been clear to any independent adviser that this was a pension liberation scam and all they had to do was question the process and he would have stopped the transfer, not least because at that time a significant portion of his pension was put at risk
    - It is true that the transfer was part of the investment in the Business, but it is his view that, if other advisers had caused him to question the transfer, he would not have gone ahead. This would not have been fatal to the Business as it was up and running.

- He was Phoenix Life's customer, being exploited by a well-known pension liberation scam company and yet Phoenix Life did not even suggest he get further advice. He cannot understand this passes any test of required duty of care to customers.

20. The complaint has now been passed to me to consider. I agree with the Adjudicator's Opinion and I will therefore only respond to the points made by Mr Y for completeness.

Ombudsman's decision

21. Mr Y's comments are based on the premise that the transfer was a 'pension liberation scam' and that Liddell Dunbar was a 'well-known pension liberation scam company'. I disagree with both assertions.

22. Whether or not it had always been Mr Y's intention to invest his pension fund in the Business is unclear as he has given differing accounts. But he has said that he discussed the idea of investing his pension fund in the Business with his accountant, and that it was the accountant who introduced him to Liddell Dunbar.

23. There is no doubt that Mr Y approached Liddell Dunbar having already formed the idea of using his pension fund as a way of investing additional funds into the Business. This is not the characteristic of a pensions liberation scam which typically involves an unsolicited approach by an unregulated adviser and subsequent investment in a high risk, unregulated asset unknown to the member.

24. Furthermore, there is nothing to indicate that HMRC consider this to be a pension liberation scheme. The correspondence from HMRC shows that its concerns relate to loans made to the Business on 8 September 2015, 21 December 2015 and 6 July 2016. As the first of these loans was made more than a year after the transfer, it is clearly unreasonable to expect Phoenix Life to have been aware of Mr Y's intentions.

25. It seems, from Mr Y's account, that it was his accountant who advised him and that Liddell Dunbar acted in an administration capacity, establishing the Scheme and then running it. It does seem that Liddell Dunbar met with Mr Y and presented a way forward to him. I am not convinced that this constituted advice, but rather a way of achieving the investment in his business that Mr Y was seeking. Whether or not the fee it charged for this service was excessive is not something for me to consider. Presumably, Mr Y was happy with it at the time.

26. Although, Liddell Dunbar has come to my attention, this has been as a result of it acting as an administrator for a number of schemes taken over from a company called T12, which was involved in pensions liberation and its administration of other schemes, Phoenix Life would not have been aware of this or had any reason to question its involvement

27. Phoenix Life has accepted that it should have carried out further due diligence. However, this would only be on the basis that the SSAS was recently established.

The question of Mr Y being aged less than 55 would have been an issue only if he had been promised some form of immediate payment from his pension on completion of the transfer. That was not the case and Mr Y clearly did not receive an unsolicited approach, by his own admission, nor is there any evidence of Phoenix Life receiving more than one request to transfer funds to the SSAS.

28. There is no doubt that transferring his pension fund in order to invest it entirely in his recently established retail business was a very high risk, and probably, an unsuitable, strategy. Mr Y has previously said it was necessary for the success of the Business, but has since said this was not the case. But that was not something for Phoenix Life to have questioned or commented upon.

29. Unfortunately, Mr Y has lost much of his fund as a result, and he has my sympathies for that. But this was not a pension liberation scam and there was nothing apparent which would have led Phoenix Life to conclude otherwise.

30. I do not uphold Mr Y’s complaint.

Anthony Arter

Pensions Ombudsman
26 June 2020