

PENSION SCHEMES ACT 1993, PART X
DETERMINATION BY THE PENSIONS OMBUDSMAN

Applicant	Mr Gregory Stobie
Scheme	Standard Life Self Invested Personal Pension Scheme (the SIPP)
Respondent	Standard Life Assurance Limited (Standard Life)

Subject

Mr Stobie complains that Standard Life refused to act on his request to transfer his benefits from the SIPP to the Shredded Image Limited Pension Scheme (**the Scheme**).

Summary of the Ombudsman's determination and reasons

Mr Stobie did not have a statutory right to transfer, primarily because the transfer would not have secured "transfer credits" which, as defined in the relevant legislation, required him to be an earner in relation to the Scheme, which he was not. However, under the rules of the SIPP Standard Life had discretion whether to allow a transfer nevertheless, which they have not considered. The complaint is upheld to the extent that they should now do so.

Background

Pension liberation

1. This case is connected to what is known as “pension liberation” or “pension scams”. Currently the issue has a high profile in the UK pensions industry so this and other decisions concerned with the same matter will be of wide interest.
2. To begin with the basics: present tax legislation is designed to prevent access to pension funds before the age of 55 (other than in ill-health or as benefits following death) as part of the policy that encourages pension saving by giving tax advantages, with penalties if the advantages are abused by using funds other than for authorised purposes. There was also, at the material time, a limit on the amount that could be taken as cash at any age.
3. The practice of pension liberation involves a transfer away from a genuine pension scheme intended to allow access to a scheme member’s pension savings before the age of 55, or to more cash than would normally be allowed. It is recognised as being contrary to the broad policy of encouraging pension savings and is of concern to the regulatory and tax authorities and those responsible for national pension policy. The businesses active in persuading people to indulge in such arrangements are likely to be doing so with their own financial gain put before the long term interests of the people with whom they deal. Charges made by businesses for making such arrangements are high and significant tax penalties that a member is likely to suffer may not have been explained. Some transfers have been fraudulently diverted to the advantage of the persons advertising the schemes and there is a suggestion of the involvement of organised crime in some pension liberation schemes.
4. Pension liberation is recognised in statute in sections 18 to 21 of the Pensions Act 2004, under which pension money is defined as having been liberated where a transfer value is paid from a pension scheme on the understanding that it would be secured to be used in an authorised way by the recipient, but it has not been. The Pensions Regulator is given power to make restraining and repatriation orders and the courts are given powers to order restitution. These provisions have no direct relevance to the matter I have to consider, however.

The statutory right to a transfer value

5. Section 94 of the Pension Schemes Act 1993 (**PSA93**) provides that a member of an occupational or personal pension scheme has a right to a “cash equivalent transfer value” of any benefits which have accrued under the transferring arrangement.

6. Section 95(1) of PSA93 says that a cash equivalent transfer value can be taken by making an application in writing to the managers of the transferring arrangement requiring them to use the cash equivalent in one of several ways set out in subsequent paragraphs. In summary, and so far as relevant, they are:

- for acquiring “transfer credits” in an occupational pension scheme; or
- for acquiring rights under a personal pension scheme;

which satisfies prescribed requirements in each case and where the trustees or managers of the scheme are able and willing to accept the transfer.

7. The definition of “occupational pension scheme” for this purpose is in section 1(1) of PSA93:

““occupational pension scheme” means a pension scheme -

(a) that -

- (i) for the purpose of providing benefits to, or in respect of, people with service in employments of a description, or
- (ii) for that purpose and also for the purpose of providing benefits to, or in respect of, other people,

is established by, or by persons who include, a person to whom subsection (2) applies when the scheme is established or (as the case may be) to whom that subsection would have applied when the scheme was established had that subsection then been in force, and

(b) that has its main administration in the United Kingdom or outside the EEA states,

or a pension scheme that is prescribed or is of a prescribed description;”

8. Subsection (2), referred to in the definition above as describing persons who can establish an occupational pension scheme, limits them to, in fairly complex terms that I do not need to reproduce here, employers of people who are in an employment of the description referred to in paragraph (a)(i), or persons who are themselves in an employment of that description, or persons representing the interest of either. Subsection (3) says that where a person in an employment is an office holder, their employer will be taken to be the person responsible for paying them.

9. Transfer credits are defined in section 181(1) as follows:

““transfer credits” means rights allowed to an earner under the rules of an occupational pension scheme by reference to a transfer to that scheme of his accrued rights from another scheme (including any transfer credits allowed by that scheme)”

10. That in turn leads to the definition of “rights” in the same section, being:

““rights”, in relation to ... transfer credits, includes rights to benefit and also options to have benefits paid in a particular form or at a particular time;”

Where “benefit” and “benefits” are undefined.

11. The definition of “earner” cross refers to section 3 of the Social Security Contributions and Benefits Act 1992.

“(1) In this Part of this Act and Parts II to V below—

- (a) “earnings” includes any remuneration or profit derived from an employment; and
- (b) “earner” shall be construed accordingly.”

12. The prescribed requirements under section 95(1) in relation to transfers from occupational pension schemes are set out in Regulation 12 of the Occupational Pension Schemes (Transfer Values) Regulations 1996 (**the Occupational Schemes Transfer Regulations**). The requirements for transfers from personal pensions are in the Personal Pension Schemes (Transfer Values) Regulations 1987 (**The Personal Pension Transfer Regulations**). The relevant requirement is the same in each, being that where the transferring scheme is registered under section 153 of the Finance Act 2004 (**FA04**) the receiving scheme should also be registered under that section.
13. Section 99 of PSA93 requires the trustees or managers to carry out the member’s requirements within a specified period – basically within six months of application, or, in the case of salary related occupational pension schemes, six months of the date of guarantee of the amount of the cash equivalent. It also provides:
- that the Pensions Regulator can extend the six month period in specified circumstances;
 - for notification to the Pensions Regulator where payment is not made; and

- in the case of occupational pension schemes, for civil penalties to be imposed by the Pensions Regulator on trustees or managers who have not taken reasonable steps to comply.
14. In relation to transfers from occupational pension schemes, Regulation 13 of the Occupational Schemes Transfer Regulations specifies the circumstances in which the Pensions Regulator may grant an extension to the period for compliance with the member's request. In particular the Pensions Regulator may do so where the member has not taken all the steps that the trustees or managers may reasonably expect in order to satisfy them of any matter needing to be established, or has not provided the information that the trustees or managers reasonably need. There are no equivalent regulations relating to transfers from personal pension schemes, so there are no circumstances in which the Pensions Regulator or any other regulator can extend the six month period.

Tax legislation

15. Section 153 of the Finance Act 2004 (**FA04**) provides for the registration of schemes by the Inland Revenue. One condition of registration is that the instruments or agreements of the scheme do not entitle a person to "unauthorised payments".
16. Section 164 of FA04 lists types of payments that are regarded as "authorised member payments", which include "recognised transfers" under section 169. Section 169 says that a recognised transfer is a transfer of sums or assets to another recognised scheme (or a qualifying recognised overseas scheme).

"A "recognised transfer" is a transfer of sums or assets held for the purposes of, or representing accrued rights under, a registered pension scheme so as to become held for the purposes of, or to represent rights under-

- (a) another registered pension scheme, or
- (b) a qualifying recognised overseas pension scheme,

in connection with a member of that pension scheme."

17. "Member" is defined in section 151 of FA04 as follows:
- "(1) In this Part "member" in relation to a pension scheme, means any active member, pensioner member, deferred member or pension credit member of the pension scheme.
 - (2) For the purposes of this Part a person is an active member of a pension scheme if there are presently arrangements made under the pension scheme for the accrual of benefits to or in respect of the person.

- (3) For the purposes of this Part a person is a pensioner member of a pension scheme if the person is entitled to the present payment of benefits under the pension scheme and is not an active member.
 - (4) A person is a deferred member of a pension scheme if the person has accrued rights under the pension scheme and is neither an active member nor a pensioner member.”
18. Sections 208 and 209 of FA04 provide that, where an unauthorised member payment is made, an unauthorised payment charge, and potentially an unauthorised payment surcharge, will be levied on the member (where living).
 19. Section 239 of FA04 provides for a “scheme sanction charge” to be paid by the person identified as the administrator of the scheme. A scheme sanction charge could (subject to some conditions not relevant) be payable if an unauthorised member payment was made. It would be at 40% of the payment subject to a deduction where an unauthorised payment charge has been paid.
 20. Also relevant are sections 157 and 158 of FA04 which provide that a scheme that makes ‘unauthorised payments’ that exceed a permitted threshold could face de-registration. If registration is withdrawn the trustees or managers become liable to pay a de-registration charge, assessed at a rate of 40% of the assets held by the arrangement immediately before registration was withdrawn.

General obligations

21. Regulation of pension schemes is divided between the Financial Conduct Authority (**FCA**) and the Pensions Regulator under different statutory regimes. Before the FCA came into existence, the Financial Services Authority (**FSA**) had the same responsibilities and there are no material differences between the regulatory regimes of the FSA and the FCA. (For convenience in this document I use “FCA” where I might otherwise have said “the FCA and the FSA before them”.)
22. The FCA’s jurisdiction broadly includes providers of all pension schemes other than occupational pension schemes (activities concerning which are excluded from being a “regulated activity” in the relevant legislation). The FCA expects all firms within its jurisdiction to act in accordance with certain principles, which include acting with integrity, due skill, care and diligence, and treating customers fairly. More specifically, in relation to retail investment business (which includes pensions) the FCA expects firms to “act honestly, fairly and professionally in accordance with the best interests of its client”.

23. Trustees and managers of occupational pension schemes have general obligations in law, which there is no need to rehearse here in depth, to act in the best interests of beneficiaries, with due care, etc. However, since, as stated above, managing an occupational pension scheme is not a regulated activity, businesses and persons managing such schemes are not required to be authorised by the FCA.

Regulation

24. In February 2012 the Pensions Regulator published a press release directed to the public headed “Warning against early release pension offers”. The Pensions Regulator noted that it had published details of investigations in two cases, which had resulted in the appointment of an independent trustee, and including advice to pension scheme members about pension liberation schemes, including comments from HM Revenue and Customs (**HMRC**) and the FSA. At the same time, the Pensions Regulator published a factsheet “Pension Liberation Fraud” giving information for scheme members and the FSA published its own material directed to consumers.
25. A year later, in February 2013, the Pensions Regulator published “Pension liberation fraud. An action pack for pension professionals” in conjunction with a number of bodies including HMRC and the FSA, directed to trustees, administrators and providers. It says:

“Looking out for pension liberation fraud

When processing a transfer request, trustees and administrators may be in a position to identify the warning signs that suggest that pension liberation fraud is occurring.

If you are a trustee or administrator, and 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:

- Receiving scheme not registered, or only newly registered, with HM Revenue & Customs
 - Member is attempting to access their pension before age 55
 - Member has pressured trustees/administrators to carry out transfer quickly
 - Member was approached unsolicited
 - Member informed that there is a legal loophole
 - Receiving scheme was previously unknown to you, but now involved in more than one transfer request”
26. The action pack goes on to set out check lists that could be used if any of the above applied.

The nature/status of the scheme	
Is the scheme to which the member wants to transfer:	How to establish
<ul style="list-style-type: none"> newly registered with HMRC? if the scheme is a self-invested personal pension (SIPP), not registered with the Financial Conduct Authority (FCA)? 	<ul style="list-style-type: none"> Ask the pension scheme in question for documentary evidence
<ul style="list-style-type: none"> sponsored by a newly registered employer? sponsored by a dormant employer? sponsored by an employer that is geographically distant from the member? 	<ul style="list-style-type: none"> Obtain employer information from scheme in question Check with Companies House for details of the employer status (www.companieshouse.gov.uk)
<ul style="list-style-type: none"> sponsored by an employer that doesn't employ the member? 	<ul style="list-style-type: none"> Ask the member
<ul style="list-style-type: none"> connected to an unregulated investment company? 	<ul style="list-style-type: none"> Ask the receiving scheme for details of their investment service providers Check these providers with the FCA (www.fca.org.uk/register)

Description/promotion of the scheme	
Do descriptions, promotional materials or adverts:	How to establish
<ul style="list-style-type: none"> include the words 'loan', 'savings advance', 'cash incentive', 'bonus', 'loophole' or 'preference shares'? allude to overseas investments? hint at unusual, creative or new investment techniques? 	<ul style="list-style-type: none"> Ask the member for copies of promotional materials, emails or letters about the scheme Ask the member about the way the receiving scheme has been described to them over email/text/phone

The scheme member	
Has the member:	How to establish
<ul style="list-style-type: none"> • been advised by an 'introducer'? • been advised by a non-regulated adviser? • taken no advice • decided to transfer after receiving cold calls, unsolicited emails or text messages about their pension? 	<ul style="list-style-type: none"> • Ask the member about how he/she became aware of the receiving scheme • Check whether advisers are registered with the FCA at www.fca.org.uk/register
<ul style="list-style-type: none"> • pressured the trustees/administrators to carry out the transfer as quickly as possible? • mentioned that your pension scheme has transferred funds to this arrangement before? 	<ul style="list-style-type: none"> • Check whether member has contacted trustees/administrators to hurry along transfer since first submitting request
<ul style="list-style-type: none"> • not received documentation from the new scheme? 	<ul style="list-style-type: none"> • Check whether member has received documents
<ul style="list-style-type: none"> • been told they can access their pension before age 55? • been misled about the potential tax consequences? 	<ul style="list-style-type: none"> • Review promotional material for receiving scheme

27. The pack continues:

“Answering 'yes' to any of these questions individually does not necessarily indicate a dangerous pension liberation arrangement, but if several features are present there may be cause for concern.

...

Next steps if you have concerns

Contact the member to establish their understanding of, for example, the type of scheme they'll be transferring to. You may also want to direct the member to the Pensions Advisory Service (TPAS), who can help them understand the potential tax consequences of the transfer if any part of the arrangement is deemed as unauthorised. ...

Communicating with the member may also allow you to establish answers to more of the questions above, where you've been unable to answer them with the information you have available. If your concerns remain then you should alert the relevant authority ...

Delaying a transfer when you have concerns over liberation

Should you have concerns regarding a transfer request you may wish to seek your own legal advice. Trustees have a duty to carry out a member's

transfer request where the legislative requirements are met. This includes a member having made a valid application requesting the transfer.

If, for example, a member requests a transfer to obtain transfer credits in an occupational pension scheme, but the trustees of the transferring scheme have reason to believe that the receiving arrangement is not a legitimate occupational pension scheme they should consider carefully whether the application is validly made, and if not whether they have any duty to process the transfer.

For example, in certain circumstances where a scheme describing itself as an occupational pension scheme is sponsored by a dormant company, which has never actually traded, the trustees may conclude that it does not have the necessary characteristics of an occupational pension scheme.

We can't predetermine any future regulatory action we may take on any particular case. However, where the transferring trustees or administrators 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.

For example, where a trustee has obtained evidence that subsequent to a member's transfer then monies would be passed back to the member before their normal minimum pension age, this factor would be given significant weight by the regulator in assessing whether it would be appropriate to pursue any action in relation to a non-payment of a transfer.

The Pensions Regulator would expect trustees/managers to be able to demonstrate that they have taken steps to establish the legitimacy of an arrangement where they have delayed making a transfer for that reason."

28. The Pensions Regulator's guidance was updated in July 2014. It is not significantly different and, of course, any changes significantly postdate the events to which this Determination relates.

The issue

29. The issue that arises in this case can be straightforwardly expressed and is typical of one presenting itself across the pensions industry in relation to pension liberation. Put simply, it concerns where the balance lies for those responsible for the management of a scheme when a transfer request is thought possibly to be for the purpose of pension liberation. On the one hand, the member has statutory transfer rights and, usually, transfer rights under the transferring scheme. On the other, the trustee, manager or provider has regulatory and other general responsibilities to act in the member's interests and with due care – and it must act consistently with the tax legislation or risk financial penalty.

30. I understand that there has been a range of approaches across the industry, with some schemes and providers taking a protective attitude towards their members, building (and sharing) databases to help them to identify transfer requests that are likely to be for pension liberation, and others adopting a more permissive stance. Also, schemes and providers may have modified their respective approaches over time as experience has grown.
31. No doubt in some cases in which a scheme or provider contacts the member offering information and/or asking questions, as advocated by the Pensions Regulator, the member will simply drop the application – whether because they realise from the information that the transfer is not in their interests or they retain their original impulse but give up in the face of an obstacle.
32. In those cases, the scheme or provider will not need to look beyond the *prima facie* evidence that the transfer was for the purpose of pension liberation. But where the member persists, the trustee, manager or provider will need to make a judgment about what evidence is needed and how much further to look for it before concluding whether or not the member has a right to transfer.

Basis of my decision

33. I have jurisdiction to decide complaints of injustice due to maladministration and disputes of fact or law. The two often overlap. There will not have been maladministration by a body that makes a reasonable decision in an honest belief that it is acting correctly. However, where I am determining legal rights, I must do so in accordance with legal principles – in substance reaching a decision equivalent to the decision that a court could have reached, and I must provide the same legal remedy as a court would in the same circumstances. The position is helpfully summarised in *Arjo Wiggins Limited v Henry Thomas Ralph* [2009] EWHC 3198(Ch), paragraphs 13 to 15.

Mr Stobie’s case - Material Facts

The Standard Life Self-Invested Personal Pension Scheme

34. The SIPP was established by a Trust Deed executed on 5 July 2004. Standard Life Trustee Company Limited is the trustee and the “Scheme Administrator” is Standard Life. Standard Life’s relevant activities are regulated by the FCA (and previously the FSA).

35. The material rules of the SIPP are set out below.

“11.1 A Member has a right to a ‘cash equivalent’ under the provisions of Part IV or Part IVA of Chapter IV of the Pension Schemes Act.

If a Member elects to apply for a ‘cash equivalent’, which by definition relates to the whole of the Member’s interest in the Scheme then all the Member’s accrued rights under the Scheme must be transferred.

Transfer Payments

11.2 In the absence of an election to apply for a statutory right to transfer a ‘cash equivalent’ under Rule 11.1, the Scheme Administrator may agree at the written request of a Member to transfer all or part of the Member’s Fund to another scheme of which he or she has become a Member.

Receiving Scheme

11.3 The Member’s Fund may be transferred to:

- (1) a Registered Pension Scheme; or
- (2) a Qualifying Recognised Overseas Pension Scheme...

11.4 Before making a transfer in accordance with Part 11 of the Rules the Scheme Administrator will:

- (i) check that the receiving scheme is one of the types of scheme listed in Rule 11.3.”

The receiving scheme

36. The arrangement to which Mr Stobie wished to transfer is known as the Shredded Image Limited Pension Scheme (**the Scheme**). The Scheme was established by a trust deed dated 5 March 2013 between Shredded Image Limited defined as “the Employer” (**Shredded Image**) and Redkite Fiduciary Services Limited, defined as “the Original Trustee” (**Redkite**). The preamble (headed “Background”) to the Trust Deed says “The Employer wishes to establish an occupational pension scheme to provide benefits for such of its employees or office-holders as may be admitted to membership of the Scheme.” The trust is stated to be governed by the laws of England and Wales.

37. Clause 1 of the Trust Deed contains the following definitions:

“Employee” means any employee or office holder of the employer

“Member” means any Employee admitted to membership of the Scheme...”

38. By Clause 4 the administration of the Scheme is vested in “the Trustees” (being Redkite).

39. Clause 5 of the Trust Deed says “any Employee may be admitted to the Scheme on such terms as the Employer and the Trustee agree”.
40. The clauses relevant to benefits provide (in summary) that a member can elect to have the “Member’s Account” (being the amount of contributions by or in respect of them, transfer payments, any other sums credited by the Trustees, less expenses, insurance premiums etc) applied in providing a lifetime annuity, a lump sum, a dependants’ lifetime annuity or a lump sum death benefit. In each case the application of the account is said to be subject to the relevant rule in sections 165 to 168 of FA04.
41. According to the records held at Companies House, Shredded Image is an active UK based company incorporated on 22 January 2013. Shredded Image’s registered address is the same as Mr Stobie’s residential address. Shredded Image’s nature of business is described as “Combined office administrative service activities.”
42. Mr Stobie describes his business as being in software development and IT consultancy. He says he currently engages in software development under a different company but wishes to move operations to Shredded Image once he has completed the sale of his current business and one of its software products. Mr Stobie has confirmed that he has not received any remuneration from Shredded Image.
43. Companies House records show Redkite as an active UK based company incorporated on 9 January 2013. The registered address is an address in Brighton, East Sussex.
44. The Scheme was registered by HMRC on 5 March 2013.

The transfer application

45. Mr Stobie was born on 10 September 1967 and was 45 when these events were set in motion.
46. On 24 May 2013 a recorded delivery letter was sent to Standard Life requesting that the proceeds of the SIPP be transferred to the Scheme. It had a letterhead which read “The Shredded Image Limited Pension Scheme” and was signed off “Yours Faithfully [initials illegible, but not Mr Stobie’s signature] The Shredded Image Pension Scheme”. Shredded Image’s registered address, which as mentioned was Mr Stobie’s home address, was printed at the base of the letter. The writer asked to be told the timescale for the transfer if it was going to be more than five days. They said that for any queries contact should be with “us” at an address in Worthing, West Sussex. The

letter provided details of a bank account with Santander Bank in the name of the Scheme, and asked for the reference to be "G STOBIE". HMRC's registration certificate was enclosed.

47. On 7 June 2013 Standard Life wrote to Mr Stobie and said that they were not going to proceed with the transfer. The letter referred to "warning signs" that schemes were being used for pension liberation. It said that Standard Life did not know if the Scheme was being used in that way, but because there were warning signs they were not making the transfer. It went on to contain a warning against early release pension offers and included a link to the Pensions Regulator's website and a leaflet (presumably one produced by the Pensions Regulator).
48. Standard Life also sent a copy of the letter to the Pensions Regulator who responded on 17 June 2013 saying that the contents of the letter had been noted and that they were taking no further action at that time.
49. Following Standard Life's refusal Mr Stobie apparently wrote and complained. (I say "apparently" as the letter is undated and has been signed "pp" Mr Stobie in an illegible hand). Standard Life responded to his complaint on 5 July 2013 and said:

"Standard Life has identified a number of firms we believe are operating outwith, and against, current pension legislation by allowing customers to take money from pensions before age 55, or to access more than the normal amount of tax free cash allowable. The company who administer The Shredded Image Limited Pension Scheme is one of these firms which is why we will not complete the transfer.

...

The Standard Life view is that, due to the potential penalties, charges and impact on retiral benefits, taking money from pensions in ways not allowed by legislation, is not a good idea. That is why we will not comply with your request.

I appreciate pension liberation may not be what you are looking to do - we are not suggesting this is the case. I'm sorry but that is not enough for Standard Life to transfer your pension benefits to The Shredded Image Limited Pension Scheme. If there are grounds to suspect there is a possibility of a firm being involved in pension liberation, the Pensions Regulator expect us not to make a transfer. The information we have about the scheme administration means it is on a list of firms we will not transfer to."

50. On 10 July 2013 another letter was sent to Standard Life, written on Shredded Image Limited Pension Scheme letterhead and which appears to have been signed by Mr Stobie. The letter said:

“We are the administrator of our own pension scheme and you have inferred that we are a firm which allows unauthorised withdrawals from pension schemes to take place. We can inform you that this is the only scheme we administer and therefore cannot possibly be accused of this.”

51. Standard Life responded on 23 July 2013 and said that the letter did not alter their view. Further correspondence followed, but the position remained unchanged. Standard Life wrote on 6 August saying:

“Our decision not to transfer is based on the fact the Pensions Regulator expects us not to if we believe scheme administrators may be operating outwith current pension legislation.

We will not transfer to The Shredded Image Limited Pension Scheme unless we are instructed to do so by the Pensions Regulator.”

52. In submissions to the Pensions Ombudsman’s office, Standard Life gave further reasons for refusing the transfer. They said that they had taken into account that:
- Shredded Image was incorporated on 22 January 2013 and so was a newly registered company.
 - Mr Stobie became a director on 8 February 2013. He is the sole director of the company.
 - The Scheme was set up on 5 March 2013 and so is a newly registered scheme.
 - The previous directors of Shredded Image Limited were an unconnected limited company and an individual who are located in the Isle of Man. The individual is a director of an Isle of Man business which appears to specialise in company incorporation and administration. The website does not mention the company being involved in pensions. Standard Life is unable to ascertain whether the company had provided any advice to Mr Stobie or whether there was an overseas element to his arrangement.
 - The current registered address of Shredded Image Limited is Mr Stobie’s home address.
 - The transfer request received from the Scheme noted an address in West Sussex as the contact address. This appeared to be a residential address at which various companies were registered. Standard Life suspect it is a mail forwarding address.

- Further correspondence from the Scheme did not refer to the West Sussex address.
- The HMRC registration certificate provided by the Scheme did not provide details of the trustee or the scheme administrator.
- No evidence had been provided of registration in the Pensions Regulator's register of occupational and personal pension schemes, though Standard Life noted that as the Scheme was likely to be a one man scheme it was not required to register.
- The transfer request asked for the monies to be paid to a bank account belonging to the Scheme. There was no plan number noted for the member (the reference used was "G Stobie").
- There was no indication of where the money was to be invested.
- The style of the transfer request document received from the Scheme was identical to requests received for other schemes. Further investigation revealed that those requests had the same characteristics as Shredded Image and the Scheme. Companies had been set up and then pension schemes registered shortly after.
- The transfer values of these cases ranged from approximately £150,000 to £7000. The lower values would be too low to be viable on their own taking into account the costs incurred in investing monies and administering the pension scheme.
- There is no evidence that Shredded Image Limited was a trading company. There was a website but that was under construction. So Standard Life could not obtain any information about Shredded Image.

53. Mr Stobie responded to those points, as follows.

- Shredded Image was newly registered because beforehand he jointly owned a company with his then business partner. He had been working for himself for ten years.
- He said it is not unusual for directors to use a pension scheme for self-investment in a company to help both retirement planning and the business.

- Shredded Image Limited had nominee directors appointed before he took control of the company. He did not want his former business partner to know what he was planning before he had finalised his new venture.
 - The Isle of Man company is not involved in pensions. They are specialists in company administration and incorporation.
 - It is not unusual that his company is registered at his home address. It is because he works from home.
 - The address in Worthing, West Sussex is the trustees' address and the Brighton address is that of the trustees' accountants, which has more companies listed at that address.
 - It is common business practice to have the administration address of the pension scheme as the same address as the limited company.
 - A one member scheme does not need to be on the Pensions Regulator's register.
 - It is of no concern to Standard Life where he intends to invest his funds.
 - He would appoint an investment adviser when he was in a position to make scheme investments.
 - It is a one man scheme and therefore he does not need to have a Plan number.
 - The value of other customer's pensions has nothing to do with his statutory right to transfer.
 - Shredded Image Limited would soon have the website up and running. The investment from the pension scheme is key to his business plans going forward. Additional information about the employer is of no concern to Standard Life.
54. During the course of my investigation Standard Life said that they had not seen the Trust Deed and Rules of the Scheme when the decision was made to decline the transfer. At the time of the transfer request their due diligence process did not include requesting the governing documentation of the receiving scheme, though it now does. They say the decision to decline was for the reasons set out above, which constituted significant warning signs of potential pension liberation fraud. Having now reviewed the Trust Deed and Rules Standard Life say that if the documentation had

been reviewed at the time of the request the decision would have remained the same; on the basis of all the other warning signs, the transfer request would have been refused. That is so notwithstanding that following *Pi Consulting v The Pensions Regulator* [2013] EWHC 3181 (Ch) the Scheme does appear to fall within the definition of an occupational pension scheme under Section 1 of PSA93.

55. Standard Life say that they do not regard the existence of a statutory right to be pivotal to the decision whether to allow or refuse a transfer. Many pension liberation vehicles ostensibly meet the legislative requirements; that is they appear to meet the definition of an occupational pension scheme and they are registered with HMRC.
56. Standard Life say that if they were to take the passive approach of allowing all transfers to schemes that meet the legislative requirements without carrying out further diligence they would be exposing many more customers to fraudulent pension liberation and/or adverse tax consequences. They would also not be acting in accordance with the wishes of the Pensions Regulator (whose guidance is relevant to personal pension schemes), HMRC and the FCA.
57. Finally Standard Life observe that they cannot tell me whether their decision was based on confidential information from other sources (industry, regulatory, government and the police) which they cannot in turn disclose to me or to Mr Scobie.

Conclusions

58. As I note in paragraph 33, I must determine the matter in accordance with the law. So the primary question is whether Mr Stobie had a legal right to transfer. My approach is first to look at his rights under the SIPP and under statute. Also relevant are the tax and regulatory questions, but, in particular, he could not be deprived of a statutory right by regulatory or other guidance. (There is no suggestion otherwise from the Pensions Regulator, whose guidance I discuss later in this determination).
59. I obviously cannot take into account information that I do not have, still less hints that such information might exist. However, I have the same powers as a court in taking evidence. So it may be that any information that Standard Life feel they cannot give me (if it exists) could in fact be given. But I have not pressed Standard Life on this because I am primarily concerned with determining Mr Stobie's rights, including what he was told about them at the time. Whilst recognising the difficulty of Standard Life's position, it would be a matter of some concern if Standard Life had withheld his

rights for reasons undisclosed to Mr Stobie because Standard Life decided, in the absence of legal authority, that they should not be disclosed. If some overriding law (for example concerning “tipping off”) required non-disclosure, that might be different – but it is not the case that has been put to me.

The SIPP’s rules

60. The SIPP does not give Mr Stobie an absolute freestanding right to a transfer. Rule 11.2 (set out in paragraph 34) makes a transfer subject to Standard Life’s agreement, unless there is a statutory right. The only requirements are, whether in exercise of the statutory right or not, that the receiving scheme should be a Registered Pension Scheme or a Qualifying Recognised Overseas Pension Scheme (**QROPS**). The Scheme was registered by HMRC on 5 March 2013.
61. So looking narrowly at the rules, Standard Life:
- (a) had to pay the transfer if there was a statutory right
 - (b) had to withhold the transfer if the receiving scheme was not a registered pension scheme or a QROPS;
 - (c) in other circumstances had discretion to consent to the transfer.
62. The rules could not of course deal with the possibility of a conflict between (a) and (b), which would be technically possible if the two sets of legislation were not a perfect fit for each other. (See also paragraph 74).

The statutory right to a transfer value

63. I now consider whether Mr Stobie’s application met the statutory requirements for a request for a cash equivalent transfer value.
64. First, the receiving scheme needed to be an occupational or personal pension scheme. The Scheme superficially has the characteristics of an occupational pension scheme with its references to the inclusion of employers, employees and so on. The tests for an occupational pension scheme were considered in some detail by Morgan J in *Pi Consulting v The Pensions Regulator* [2013] EWHC 3181 (Ch). That case related to nine schemes to which the Pensions Regulator had appointed a trustee on the grounds that the schemes were devised for the purpose of pension liberation. The judge considered two tests to arise under the definition in PSA93 (see paragraph 7), the “purpose” test corresponding to (a)(i) and (ii) of the definition and the “founder”

test corresponding to the rest of paragraph (a). (I do not need to set out Morgan J's judgment in any detail here.)

65. In that case, the judge assumed that the schemes were not mere shams. I take the same starting position here.
66. The Scheme met the minimum requirement of the purpose test, as it was “for the purpose of providing benefits to, or in respect of, people with service in employments of a description” in this case, employees and office-holders of Shredded Image. Mr Stobie is the sole director of Shredded Image Limited and so an office-holder.
67. The Scheme also met the founder test. It was established by Shredded Image, being the employer of “people with service in employments of a description”.
68. So the Scheme was, as it appeared to be, an occupational pension scheme.
69. The next test is whether Mr Stobie's application required Standard Life to use the cash equivalent transfer value for securing transfer credits, being rights allowed to him as an earner (a person with remuneration or profit from an employment) under the rules of the Scheme.
70. Mr Stobie says that he is currently operating his business through a different company which is currently for sale. He says that when the sale of that company is completed that he intends to trade under Shredded Image Limited and he has said that he has not yet received any earnings from Shredded Image Limited. So he has not received remuneration from an employer that is connected to the Scheme.
71. Although there is nothing in the legislation that expressly states that Mr Stobie's status as an earner had to be in relation to a scheme employer, I find that it did. It would be a very strange result if people not in “employments of a description” who were earners in some other context (with earnings, however small or irregular, from some completely unconnected enterprise) could require a transfer value to be paid to the scheme, when other people not in “employments of a description” could not. It would give the reference to “earner” arbitrary consequences if it just means a person with any earnings from any source.
72. As he had no relevant earnings he was not an earner and so his request for a cash equivalent transfer value was not for securing transfer credits. He had no statutory right to take a cash equivalent transfer value.

73. However, the lack of earnings could, perhaps, have been easily altered (though not by payment of a nominal sum and/or a payment not in exchange for work). So I continue to consider other aspects of the intended transfer below.

The Tax legislation

74. It is a condition of registration under section 153 of FA04 that scheme rules do not entitle a person to unauthorised payments. It follows that, in relation to transfers, authorised payments must have been defined at least sufficiently broadly to cover transfers to which there is a right under PSA93. Otherwise a PSA93 right that amounted to an unauthorised payment would be in conflict with the requirement (though it could not be withheld).
75. The relevant requirements for Mr Stobie's intended transfer to be a "recognised transfer" were that it was to be held for the purposes of another registered pension scheme or to represent rights under it, in connection with Mr Stobie as a member of that scheme.
76. The Scheme was at the time a registered pension scheme, so the only remaining reasons for doubting the transfer's status as an authorised payment would have been if the payment was not to be held for the purposes of the Scheme or to represent rights under it – or that Mr Stobie's membership of the Scheme was in doubt.
77. As to the first matter, as I have said, the transfer was apparently to be paid to an appropriate bank account and invested for Mr Stobie's benefit.
78. Turning to the second, as set out in paragraph 17, "member" is defined in FA04 as being one of an active member, a deferred member, a pensioner member (and a pension credit member, which is not relevant). The only possible category of membership would be an active member, for which there would have had to have been "presently arrangements made under the pension scheme for the accrual of benefits to or in respect of" Mr Stobie. He was not presently accruing benefits, but to the extent that the Scheme would have been able to accept a transfer in respect of him, there were presently arrangements made for the accrual of benefits – even if actual accrual was contingent on a transfer¹.

¹ Transfers to arrangements such as "section 32" policies and deferred annuities are presently permitted by HMRC and this reading of the definition is consistent with that. If the definition was read so as to only include as members those who were actually accruing benefits, then such transfers would not be authorised payments. (An alternative reading would be that on acceptance of the transfer value they become a deferred member – but it is not necessary for me to decide that point.)

79. But anyway, it would have required very little effort for Mr Stobie to accrue benefits quite independently of the transfer. A modest contribution to the Scheme was all that was required.
80. There was no reason to object to the transfer as being itself an unauthorised payment, therefore.

Regulatory matters

81. As I observed earlier, had a regulator's guidance or rules been inconsistent with statutory rights, then clearly those rights would have taken precedence.
82. The application to transfer was made after the action pack of February 2013 was issued as referred to in paragraph 25. The guidance in the action pack which makes references to the Pensions Regulator not taking action where transfers were delayed is not directly relevant; there are no penalties that the Pensions Regulator can levy in relation to a personal pension scheme. (And it is my understanding that the FSA/FCA would be unlikely to penalise a firm in relation to a single delayed transfer). Strictly the Pensions Regulator's statements about trustees are not relevant to Standard Life as an FSA/FCA regulated provider. But the guidance was endorsed by the FSA, so it is right that Standard Life had regard to it – as well as to the earlier guidance for members issued by both the Pensions Regulator and the FSA.
83. The guidance aside, the relevant regulatory obligations were those described in outline in paragraphs 21 and 22. They are consistent with the general legal obligations that Standard Life would have owed Mr Stobie which can be summarised simply as being to act “honestly fairly and professionally in accordance with the best interests” of Mr Stobie.

The approach that Standard Life took

84. In the foregoing paragraphs I have subjected the Scheme and Mr Stobie's position in relation to it to detailed analysis in order to establish whether it was a proper destination for a transfer to which Mr Stobie had a statutory right. It has failed the test because Mr Stobie was not an earner.
85. That was not the approach that Standard Life took. Mr Stobie applied on 24 May and on 12 June Standard Life told him that they would not make the transfer. They originally explained their decision as being because they were suspicious of Redkite. They have subsequently listed a number of other grounds for concern. And one can have some sympathy for them, because those grounds were in some cases consistent

with the warning signs that the Pensions Regulator mentioned in its guidance issued a few months before they rejected Mr Stobie's application.

86. But, though I have no doubt that Standard Life were acting with the best of motives, they went beyond the Pensions Regulator's guidance, whilst referring to it as supporting their stance.

87. For example, the guidance check lists include a "how to establish" column with suggestions that the member and others should be asked relevant questions. Standard Life did not ask any. And "Next steps if you have concerns" suggested contacting the member to establish what they understood about the receiving scheme, directing them to the Pensions Advisory Service and so on. Finally, it said:

"Trustees have a duty to carry out a member's transfer request where the legislative requirements are met. This includes a member having made a valid application requesting the transfer.

If, for example, a member requests a transfer to obtain transfer credits in an occupational pension scheme, but the trustees of the transferring scheme have reason to believe that the receiving arrangement is not a legitimate occupational pension scheme they should consider carefully whether the application is validly made, and if not whether they have any duty to process the transfer.

For example, in certain circumstances where a scheme describing itself as an occupational pension scheme is sponsored by a dormant company, which has never actually traded, the trustees may conclude that it does not have the necessary characteristics of an occupational pension scheme."

88. It is surprising that Standard Life took from the guidance that the Pensions Regulator expected them not to make a transfer where there were "grounds to suspect there was a possibility" of pension liberation being a motive and that they could withhold the transfer until instructed by the Pensions Regulator to pay it. (See paragraphs 49 and 51.) I read the guidance as expecting somewhat more of the transferring scheme. Indeed the Pensions Regulator says that it "would expect trustees/managers to be able to demonstrate that they have taken steps to establish the legitimacy of an arrangement where they have delayed making a transfer ..." (Also, although not a matter for me, I am not aware that the Pensions Regulator would "instruct" payment of a transfer.)

89. Standard Life suggest that it is wrong to focus solely on whether or not an individual has a statutory right to a transfer. They say that if they were to take a passive approach and allow transfers to schemes that meet the legislative requirements without carrying out further diligence they would be exposing customers to

fraudulent pension liberation and/or adverse tax consequences. They are right – and I have not adopted such a narrow focus, nor do I suggest they should have. The Pensions Regulator’s guidance proposes a range of steps to be taken where there are concerns. It says that it will take into account concerns that can be evidenced in deciding whether to take action and it adds that it would expect trustees and managers to be able to demonstrate that they have taken steps to establish legitimacy of the receiving scheme before delaying the transfer. Significantly the guidance begins “The Trustees have a duty to carry out a transfer value where a legislative requirement is met.”

90. Standard Life did not ever tell Mr Stobie that they did not think he had a statutory right. I do not think they ever considered it. It may be that they thought that went hand in hand with the transfer not being a recognised transfer. But I cannot see why the burden lay with Mr Stobie to prove that the transfer was an authorised payment and/or that he did have a statutory right. In my view, reflecting the different balance of power between the parties, Standard Life needed to satisfy themselves that he did not have a right to the transfer. Notwithstanding that, there was no such right.
91. In the absence of a right Standard Life, acting as the administrator of the SIPP, had discretion under Rule 11.2 of the SIPP whether to make the transfer.
92. That discretion had to be exercised reasonably by Standard Life. As will be clear from my observations above, I do not think that Standard Life actually assessed what their legal and regulatory obligations were, before deciding not to agree to the transfer and they did not take the steps that the Pensions Regulator had suggested.
93. I therefore uphold the complaint to the extent that Standard Life had discretion whether to agree to the transfer which they did not exercise properly.
94. They might have come to the same conclusion, being that the transfer should not be paid, if they had taken a more deliberate approach, but that is beside the point. And if they had agreed to the transfer it need not have been paid within five days, as Mr Stobie seemed to hope it would be. Standard Life were right to identify that there were grounds for suspicion. The arrangements that Mr Stobie was making fitted perfectly the model of unorthodox arrangements that the Pensions Regulator was worried about. Whether there was a statutory right or they were exercising discretion, the decision whether to pay the transfer value would have taken time.

95. I should be clear that I have no evidence that either was the case, but Standard Life's concerns might legitimately have been that:
- Mr Stobie was on the point of being defrauded by Redkite;
- or
- he was going to use the money in a way that would have constituted an unauthorised payment.
96. It seems to me that there is a significant difference between the two, although the approach that Standard Life took did not take account of that difference. And of course there was a third possibility which was that he did, as he said, intend to use the Scheme as a vehicle to put money into a new business venture, which might have been high risk, but would not have been illegal.
97. I have to assume that if Standard Life had asked more questions, as the Pensions Regulator's guidance suggested, they would have decided that Mr Stobie had no statutory right, but there was a discretion to be exercised. Then they might have thought that he was about to be defrauded or use the money in an unauthorised way. They might reasonably have put more effort into making him aware of the facts if they suspected the former than if they suspected the latter. But, having offered the support of the Pensions Advisory Service and given him whatever warnings they thought appropriate, Standard Life would then have had to decide whether to allow the transfer or not. I consider that would reasonably have taken at least three months.

Conclusion on the withholding of the transfer

98. In summary, the position in law was:
- Mr Stobie had no statutory right as a member to a transfer value.
 - Mr Stobie was, under rule 11.2 of the SIPP, able to request a transfer which Standard Life had discretion whether to agree to.

The potential harm to Mr Stobie

99. Mr Stobie says that he wanted to use the money to support his new business. The indication from its website is that Shredded Image is not trading even now. So, even though Standard Life have yet to exercise their discretion, I do not consider it would be appropriate to calculate compensation to Mr Stobie based on what might have happened to an investment in Shredded Image.

100. I shall therefore direct that Standard Life consider agreeing to a future request to a transfer, but if they agree, then they are to pay the higher of a backdated transfer value with interest and the current transfer value.
101. I add, for Mr Stobie's benefit, a serious note of caution. He intended to take an unorthodox step which was, at the least, high risk. At worst he was on the point of being financially disadvantaged. He may wish to consider taking professional advice from a recognised adviser properly authorised to deal with pension matters before he takes that step now.

Direction

102. I direct that at Mr Stobie's request, if received within 56 days of this Determination, Standard Life are to consider agreeing to pay a transfer value to the Scheme. If they agree, it shall be the higher of:
- the transfer value as at 24 August 2013, plus simple interest at the average rate for the time being payable by the reference banks from that date to the date of payment: and
 - the transfer value at the date of payment.

General closing observations

103. Pension providers, trustees, managers and administrators find themselves in a highly unenviable position. They must decide between complying with what might have initially seemed a legitimate transfer request, and delaying the transfer, making further investigations and, potentially refusing it. If they comply with the transfer request, they are at risk of having made an unauthorised payment, with potential tax consequences. If they delay or refuse they are at risk of the member seeking to enforce the statutory right and succeeding, possibly claiming a financial loss. The strength of their reputation as an effective guardian of their customer's money is also at risk.
104. That a regulator, or other source of intelligence, indicates that a transfer may be for pension liberation purposes (perhaps because the receiving scheme and/or those connected with it have a history) may be good reason for delaying the transfer and asking relevant questions during the statutory period allowed for the transfer. As I noted in paragraph 31, those questions may result in the application being withdrawn – and where they do, that may be the “right” outcome, as long as the scheme member has not been misled or unfairly pressurised.

105. But there is no direct link between a transfer being for pension liberation purposes and (a) its not being a recognised transfer or (b) there being no statutory right to the transfer. It may be probable in any individual case that all three go together. But providers, trustees, managers and administrators will want to keep in mind that strictly they can only refuse to make the transfer beyond the end of the statutory period if there is no statutory right to it. They should satisfy themselves of the position, on the balance of probabilities and a correct interpretation of the law, based on such evidence as they can obtain from the member or receiving scheme or other sources - and reaching a decision may include drawing inferences from a failure to provide evidence. Where they find that there is no right to transfer they should be expected to be able to justify that to the person asserting the right.

Tony King
Pensions Ombudsman

8 January 2015