DRN-3471841

The complaint

Mr O complains an appointed representative of Quilter Financial Limited gave him unsuitable advice to move his pension to a self-invested personal pension (SIPP) to invest in a high-risk investment.

What happened

Mr O says he received a cold call from a company who asked him about his pension and whether he was satisfied with it. He's not sure who this company was, but he says he was then passed to an adviser – Mr W at Bridgewater Financial Services Ltd – who he spoke to several times. He says Mr W told him he'd be better off if he transferred out of his current pension into a SIPP to make an investment called Verdant Australian Farmland (now Global Agricultural Services). He says he was told the returns were guaranteed to be better than those from his existing pension and was led to believe it was a low to medium risk investment which fit with the level of risk he was prepared to take.

Bridgewater was an appointed representative of Paradigm Financial Advisers Limited between 26 November 2009 and 27 January 2011. Paradigm later changed its name to Caerus Financial Limited and then to Quilter Financial Limited. For the purposes of this decision, I'll refer to the business as Quilter throughout. And I'll refer to the investment as GAS.

The SIPP application form was signed on 25 March 2010. The transaction history for the SIPP shows:

- The SIPP was opened on 16 April 2010.
- Mr O's Barclays pension (£30,410.25) was transferred on 26 April 2010.
- IFA fees of £1,060.36 were paid to Bridgewater on 4 May 2010.
- £25,000 was invested into GAS on 7 May 2010.
- Returns of £1,599.44; £89.74; and £179.29 were received from the GAS investment on 26 October 2012; 14 October 2013; and 17 September 2014 respectively.

No further returns were received, and it seems the GAS investment was revalued to £1 in 2017. Mr O complained to Quilter on 9 October 2019 about the advice he said Bridgewater had given him and brought his complaint to this service.

Quilter said it isn't responsible. In particular, it said Mr O had made his complaint too late. It said the events complained about were more than six years before he complained and he was sent a letter about the investment on 8 October 2014 that, along with the annual statements for the SIPP, should have caused concern and this was more than three years before he complained. But in any event, it said Mr W hadn't been acting in his capacity as a representative of Quilter. It said it had no business relationship with the investment provider and had received no renumeration. It also said the agreement between it and Bridgewater

means it's only responsible for introductions to, or applications submitted to, "*an approved institution*".

Mr O's representative said he'd never received the 8 October 2014 update. An investigator was satisfied we could consider Mr O's complaint against Quilter and that the complaint should be upheld. In summary, she said:

- Mr O didn't know he had cause for complaint more than three years before he did. And there's nothing to say he ought reasonably to have. There's no evidence the 8 October 2014 update was sent to Mr O; there's nothing to suggest the value of the investment dropped more than three years before Mr O complained; and there's nothing to suggest Mr O was expecting any particular ongoing returns from the investment.

- Bridgewater advised Mr O and Quilter is responsible for that advice. Nothing had been provided to support Quilter's claim that Bridgewater could only make introductions to, or submit applications to, "*an approved institution*" under the agreement with it.

- The advice to move Mr O's pension to a SIPP to invest in the GAS investment wasn't suitable.

- If everything had happened as it should have, Mr O would have left his pension where it was.

Quilter didn't agree. It said Mr O must have been aware of the GAS investment's valuation and the fact the returns from it had dropped in 2013 and said this ought reasonably to have made him aware of cause for complaint. The issue has therefore been passed to me for a decision.

My findings – jurisdiction

I've considered all the evidence that's been provided. Having done so, I'm satisfied this complaint is in the Financial Ombudsman Service's jurisdiction.

Was the complaint made too late?

This service can't look at all complaints. Our ability to consider complaints is set out in Chapter 2 (DISP 2) of the Financial Conduct Authority's (FCA's) Handbook of Rules and Guidance.

DISP 2.8.2R says:

> *The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service…*
>
> *(2) more than:*
>
> *(a) six years after the event complained of; or (if later)*
>
> *(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;*

> *unless the complainant referred the complaint to the respondent or the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;*
>
> *unless:*
>
> *(3) in the view of the Ombudsman, the failure to comply with the time limits…was as a result of exceptional circumstances.*

It's not clear exactly when the advice complained about was given. But as set out above, the SIPP application form was signed on 25 March 2010. So, the advice must have happened on or before 25 March 2010.

Mr O complained to Quilter on 9 October 2019. The complaint is therefore outside the first part of the time limit – i.e. it was made more than six years after the events complained about.

The issue for me to decide is whether the complaint was also made outside the second part of the time limit – i.e. whether it was made more than three years after Mr O knew, or ought reasonably to have known, he had cause for complaint.

Mr O has provided a letter he received from the SIPP provider dated 5 September 2014. This enclosed a letter from Global Agricultural Services which read:

> *The Board of Directors wish to apologise for the delay in distributions and reporting which will be completed this week.*
>
> *At present, the Group is undertaking a review of its tax situation in Australia which has proved to be more complicated than anticipated.*
>
> *The Board has also taken into consideration the unusual amount of requests to sell farmland ahead of the eight year contractual period.*
>
> *As a consequence of the tax review and the long term nature of the investment, the Board is proposing a restructure of the overall Fund, dependent upon the agreement of the Australian Tax Office and Australian Securities and Investment Commission to the proposed arrangements and subsequent calculations. It is hoped that the new structure will facilitate the trading and realising of current holdings.*
>
> *The Chairman of the Board…will be hosting a series of meetings in the first week of October to discuss with any Investors the Board's proposals.*

The cover letter from the SIPP provider said a representative would attend one of the meetings and it'd then update clients. I've carefully considered these letters and I note that they hint at the fact there might be some issues with the GAS investment but there's nothing in them that I think ought reasonably to have made Mr O aware of cause for complaint.

Quilter says on 8 October 2014 Mr O was sent "*A REVIEW from the Board of GAS Global Agricultural Services*" which read:

> ***PRESENT REDEMPTION OF INVESTMENTS***
>
> *The Board is of the opinion that the market for wheat producing farmland in Australia is very weak. Discussions with farm managers, banks and lawyers indicate that the market is very parochial. The values of the farms are difficult to determine*

professionally as there are several repossessions available at reduced cost and there is poor demand.

The present set up of the Fund renders sales difficult; the Fund is regarded as a long term investment and the plot holders are locked in by the terms of their investments with realisation dates ranging from 2018 to 2020.

LONG TERM REDEMPTION

The consideration of short term selling also led the Board to reconsider the "exit plan". If, as the previous paragraph implies he weakness of the Western Australian farm Market is its parochialism, then, when the Fund comes to sell the various farms under the terms of the Investor contracts, it is a concern that the knowledge the Fund is having to sell by the due date may determine a lot weaker price.

LIQUIDITY OF INVESTMENT

In short, the Fund is illiquid in trading terms and the requests for redemption are extremely difficult to satisfy. In addition, the previous sources of funding, i.e. UK pensions, financial advisors etc. are neither available or acceptable to the Board.

It says this letter ought reasonably to have made Mr O aware of cause for complaint. However, I haven't commented on the content of this letter because it would only be relevant if I was satisfied Mr O most likely received the letter. Taking everything into account, I'm not persuaded this is most likely. Mr O has consistently said he didn't receive the letter; Quilter hasn't been able to provide any evidence of the letter being sent; and the SIPP provider has confirmed to us it can't evidence the letter being sent to consumers. I also note that Mr O did keep a copy of an earlier letter he received. I therefore haven't put any weight on the 8 October 2014 letter in deciding what Mr O knew, or ought reasonably to have known.

Between them, the SIPP provider and Mr O have only been able to provide one statement that was sent to Mr O before 2017 – the 2012 one. I've carefully considered this and note it included a line "*The value of your fund as at 30th March 2012 is: £28545.93*". Whilst this is slightly lower than Mr O may have been expecting to see, I don't think this is sufficient to say he ought reasonably to have known of cause for complaint at that point. Everything I've seen suggests the value of the fund didn't fall significantly until the 2017 statement and Mr O did complain within three years of that statement. And I haven't seen anything that persuades me the content of any of the statements between 2012 and 2017 ought reasonably to have concerned Mr O. It's not clear how they set out what returns had been received and even if they did this clearly, Mr O has said he wasn't expecting any particular level of returns.

Mr O says first knew something was wrong when he received a letter saying his SIPP provider was going into administration and he started looking into things in detail at that point. The SIPP provider went into administration in 2018. Mr O's explanation of what prompted him to complain seems plausible in the circumstances and I've seen nothing that satisfies me he ought reasonably to have known of cause for complaint before 2017.

I'm therefore satisfied Mr O made his complaint within the time limits.

Responsibility

To carry out regulated activities a business needs to be authorised (Section 19 of the Financial Services and Markets Act 2000 (FSMA)). Bridgewater wasn't directly authorised. Instead it was an appointed representative of Quilter. Quilter is an authorised firm. It's authorised by the FCA to carry out a range of regulated activities including advising on

investments and arranging deals in investments. We can therefore consider complaints about Quilter. And this includes some complaints about its appointed representatives.

But this service can't look at all complaints. Before we can consider a complaint, we need to check, by reference to the DISP rules and the legislation from which those rules are derived, whether it's one we have the power to look at.

DISP 2.3.1R says we can:

> *consider a complaint under the Compulsory Jurisdiction if it relates to an act or omission by a firm in carrying on…regulated activities…or any ancillary activities, including advice, carried on by the firm in connection with them*.

Guidance for this rule at DISP 2.3.3G says that:

> *complaints about acts or omissions include those in respect of activities for which the firm…is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility*.

And Section 39(3) FSMA says:

> *The principal of an appointed representative is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility*.

The responsibility of a principal was considered by the judge in the case of *Anderson v Sense Network* [2018] EWHC 2834 (this case was the subject of an appeal, but the Court of Appeal issued a decision agreeing with the earlier decision). In the High Court, Mr Justice Jacobs said, at paragraph 33:

> *There is no indication in the wording of section 39, or in the case-law, that indicates that the business for which responsibility is accepted is to be determined not by reference to the contract, but by reference to the authorisations granted to the principal which are to be found in the Financial Services register*.

So, a principal isn't automatically responsible for the actions of its appointed representatives and it's necessary to go beyond looking at the activities Quilter was authorised to do. Whether Quilter is responsible for the actions of Mr W here is determined by considering the terms of the contract between Quilter and Bridgewater – the appointed representative agreement.

To decide whether Quilter is responsible here, there are three issues I need to consider:

- What are the specific acts Mr O has complained about?
- Are those acts regulated activities or ancillary to regulated activities?
- Did Quilter accept responsibility for those acts?

What are the specific acts Mr O has complained about?

Mr O complains he was given unsuitable advice to switch his pension to a SIPP to invest in a high-risk investment.

Are those acts regulated activities or ancillary to regulated activities?

Section 22 FSMA defines "*regulated activities*" as follows:

> *(1) An activity is a regulated activity for the purposes of this Act if it is an activity of a specified kind which is carried on by way of business and –*
>
> *(a) relates to an investment of a specified kind;…*
>
> *(4) "Investment" includes any asset, right or interest.*
>
> *(5) "Specified" means specified in an order made by the Treasury*.

The relevant Order is the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO). Advising on investments is a specified activity under Article 53 RAO. And arranging deals in investments is a specified activity under Article 25 RAO.

It's clear that Mr W was involved in making arrangements for setting up the SIPP and the pension switch. I'm satisfied it's also most likely Mr W advised Mr O to switch his pension to the SIPP to invest in the GAS investment.

Although suitability reports are one of the indicators that advice was given, the absence of one doesn't mean advice wasn't given. I think it's highly unlikely Mr O would have taken the decision himself to switch his pension to a SIPP to make the GAS investment without receiving advice. He's plausibly and consistently said Mr W advised him and that he'd been happy with his pension until that point. I'm persuaded by Mr O's recollection of events.

The SIPP and Mr O's previous pension are specified investments, so I'm satisfied that advising on and arranging the switch are regulated activities. And given the timeline of events here, and what Mr O says happened, I'm satisfied the advice to invest in GAS was either part of that advice and arranging, or ancillary to it.

Did Quilter accept responsibility for those acts?

Taking everything into account, I'm satisfied Mr W was most likely holding himself out as acting as Bridgewater – a representative of Quilter – at the time of the events complained about.

I say this because:

- Mr O has provided a copy of the Bridgewater client agreement that he was given. This included the below:

  > ***<u>Our Commitment to You</u>***
  >
  > *Prior to providing you with any advice we will take time to understand your current needs, circumstances and attitude to risk. Any advice provided will be confirmed to you in writing…*
  >
  > ***<u>Investment and Non-Investment Insurance Services</u>***
  >
  > *Bridgewater Financial Services Limited is permitted to advise on and arrange (bring about) deals in investments and non-investment insurance contracts.*

- The SIPP application form Mr O signed on 25 March 2010 said:

> *In return for the services to be provided by TLSC, I agree that TLSC may deduct from my fund the charges set out in the leaflet and such additional charges as I have agreed with BRIDGEWATER FINANCIAL SERVICES LIMITED and may realise any of the investments held for my benefit in order to pay their fees and any third party costs/fees relating to those investments or advice I receive in respect of this arrangement…*
>
> *I hereby appoint BRIDGEWATER FINANCIAL SERVICES LTD as investment managers for the purposes of the Lifetime SIPP and fully understand and agree that in all circumstances I am solely responsible for all decisions relating to the purchase, retention and sale of investments held under the SIPP for my benefit.*

- Mr W wrote to the SIPP provider with the documents for the SIPP on Bridgewater headed paper on 12 April 2010.

- The "*DUE DILIGENCE – VERIFICATION OF IDENTITY*" document has a section "*DETAILS OF INTRODUCING FIRM (OR SOLE TRADER)*" section which is filled in as Bridgewater.

- The SIPP provider confirmed the IFA was listed as Bridgewater.

- Bridgewater was paid a fee from the SIPP.

I've therefore gone on to consider the agreement that was in place between Quilter and Bridgewater. Unfortunately, I haven't been provided with a copy of the appointed representative agreement that would have been in place at the time of the advice here. However, a later version of the agreement has been provided on other cases. And Quilter has said that the terms here would have been similar to the terms in that agreement. I've therefore carefully considered that agreement and note that it says:

> ***Appointment***
>
> *The Firm hereby appoints the Representative as its appointed representative, subject to the terms of this Agreement. The Firm authorises the Representative to conduct the Relevant Activities.*

"*Relevant Activities*" are defined as "*the activities regulated under FSMA set out in Schedule 1 which the Representative will be carrying out under this Agreement*". And Schedule 1 sets out that this includes arranging deals in investments and advising on investments.

Based on the terms of this appointed representative agreement, it seems Bridgewater was authorised to give investment and pension advice and I can't see any restrictions that I think would be relevant in the circumstances here.

Quilter says it didn't have a relationship with the investment provider and received no renumeration. And it's said Bridgewater was only authorised to make introductions to, or submit applications to, "*an approved institution*". But the version of the appointed representative agreement it's provided doesn't include such a restriction. The investigator explained this to Quilter and gave it the opportunity to provide a different version of the appointed representative agreement or explain why her reading of the agreement is wrong. It did neither of those things.

So, I think Quilter did accept responsibility for the acts conducted by Bridgewater.

My decision on jurisdiction

For the reasons discussed above, my decision is that the Financial Ombudsman Service can consider this complaint.

My findings – merits

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

Taking everything into account, I'm satisfied the complaint should be upheld.

Mr O says his attitude to risk was low-medium and he now knows the GAS investment involved more risk than he was prepared to take. As previously mentioned, a fact find from the time unfortunately isn't available. I haven't seen any justification for switching a pension that it seems Mr O was happy with. It seems Mr W's only reason for recommending the switch was so that Mr O could make the GAS investment. And I haven't seen any documentary record of why this recommendation was made.

The GAS investment was an unregulated, esoteric, high-risk investment. It took the form of a "land purchase contract" which involved a company based in Cyprus leasing plots of agricultural land in Australia to investors. Crops were to be planted on the plots, and the objective was to provide an income to investors through the sale of those crops and capital growth through the sale of the plot of land.

Investments such as this carry significant risks and a lack of protections. Mr O says he was self-employed at the time of the advice earning approximately £20,000 a year and had no investment experience. He was 54 years old and he says he couldn't afford to lose this pension as he only had a small amount of savings, little equity in the two properties he owned and one other pension that wasn't large.

Everything I've seen suggests Mr O was an ordinary retail investor and there's nothing that suggests to me he was the sophisticated type of investor for which unregulated high-risk investments would be suitable. He's said he wasn't in a position to replace any losses within his pension and there's nothing that suggests he could afford to take significant risks with this pension. Mr W should have known all of this.

In these circumstances I'm satisfied advice to switch Mr O's pension to a SIPP to invest in the GAS investment wasn't suitable and should never have been made as a recommendation.

I'm persuaded by Mr O's evidence that he wasn't looking to move his pension and had been cold called. So, I'm satisfied that if Mr W hadn't given unsuitable advice, Mr O would have left his pension as it was.

Putting things right

My aim is that Mr O should be put as closely as possible into the position he would probably now be in if he hadn't been given unsuitable advice. I take the view that Mr O wouldn't have moved his pension if everything had happened as it should have. I'm satisfied that what I've set out below is fair and reasonable.

In summary, Quilter should:

1. Calculate the loss Mr O has suffered as a result of making the switch and investment.
2. Take ownership of the GAS investment held in the SIPP if possible.
3. Pay compensation for the loss into Mr O's pension in respect of his pension loss. If that isn't possible, pay compensation for the loss to Mr O direct. In either case, the payment should take into account necessary adjustments set out below.
4. Pay Mr O's SIPP fees for the next five years, in the event he's not now able to close his SIPP.
5. Pay compensation of £300 for the trouble and upset caused to Mr O.
6. Pay interest on the above if fair compensation isn't paid within 28 days of notification of acceptance by Mr O.

I'll explain how Quilter should carry out the calculation set out above in further detail below:

1. Calculate the loss Mr O has suffered as a result of making the switch and investment

To do this, Quilter should work out the likely value of Mr O's pension as at the date of this decision, had he left it where it was instead of switching to the SIPP.

Quilter should ask Mr O's former pension provider to calculate the current notional transfer value had he not switched his pension. If there are any difficulties in obtaining a notional valuation, then a benchmark of 50% of the FTSE UK Private Investors Income Total Return Index and 50% of the monthly average rate for one-year fixed-rate bonds as published by the Bank of England should be used to calculate the value. That is likely to be a reasonable proxy for the type of return that could have been achieved if the pension hadn't been switched.

The notional transfer value should be compared to the transfer value of the SIPP at the date of this decision and this will show the loss Mr O has suffered.

Any additional sum that Mr O paid into the SIPP should be added to the notional transfer value calculation at the point it was actually paid in.

Any withdrawal, income or other distributions paid out of the SIPP should be deducted from the fair value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if Quilter totals all those payments and deducts that figure at the end.

2. Take ownership of the investment

Ideally, the asset in the SIPP – the GAS investment – could be removed from the SIPP. Mr O would then be able to close the SIPP, if he wishes, and avoid paying further fees for the SIPP. For calculating compensation, Quilter should agree an amount with the SIPP provider as a commercial value for the investment. It should then pay the sum agreed plus any costs and take ownership of it.

If Quilter is able to purchase the GAS investment, then the price paid should be allowed for in the current transfer value (because it'll have been paid into the SIPP to secure the investment).

If Quilter is unable, or if there are any difficulties in buying the investment, it should give it a nil value for the purposes of calculating compensation. Provided Mr O is compensated in full,

Quilter may ask Mr O to provide an undertaking to account to it for the net amount of any payment the SIPP might receive from the investment. That undertaking should allow for the effect of any tax and charges on the amount Mr O may receive from the investment and any eventual sums he'd be able to access from the SIPP. Quilter will need to meet any costs in drawing up the undertaking.

3. Pay compensation to Mr O for the loss he's suffered in (1)

Since the loss Mr O has suffered is within his pension, it's right that I try to restore the value of his pension provision if that's possible. So, if possible, the compensation for the loss should be paid into Mr O's pension plan. The compensation shouldn't be paid into the pension if it would conflict with any existing protection or allowance. Payment into the pension should allow for the effect of charges and any available tax relief. This may mean the compensation should be increased to cover the charges and reduced to notionally allow for the income tax relief Mr O could claim. The notional allowance should be calculated using Mr O's marginal rate of tax.

If it's not possible to pay the compensation into Mr O's pension, the compensation should be paid to Mr O direct. But had it been possible to pay the compensation into the pension, it would have provided a taxable income. Therefore, the compensation for the loss paid to Mr O should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mr O's marginal rate of tax in retirement. For example, if Mr O is likely to be a basic rate taxpayer in retirement, the notional allowance would equate to a reduction in the total amount equivalent to the current basic rate of tax. However, if Mr O would have been able to take a tax-free lump sum, the notional allowance should be applied to 75% of the total amount.

4. SIPP fees

If Mr O is unable to close his SIPP once compensation has been paid, Quilter should pay an amount into the SIPP equivalent to five years' worth of the fees (based on the most recent year's fees) that will be payable on the SIPP. I say this because Mr O would not be in the SIPP but for the unsuitable advice. So it wouldn't be fair for him to have to pay the fees to keep it open. And I'm satisfied five years will allow sufficient time for things to be sorted out with the GAS investment and the SIPP to be closed.

5. Trouble and upset

Pay Mr O £300 for the trouble and upset caused. I'm satisfied Mr O has been caused significant upset by the events this complaint relates to, and the loss of, in effect, a large portion of his pension fund. I think that a payment of £300 is fair to compensate for that upset.

6. Pay interest

Quilter should pay fair compensation as set out above within 28 days of being notified that Mr O has accepted this decision. If it doesn't, interest on the compensation due is to be paid from the date of this decision to the date of payment at the rate of 8% simple interest per year. Income tax may be payable on any interest paid. If Quilter deducts income tax from the interest, it should tell Mr O how much has been taken off. Quilter should give Mr O a tax deduction certificate in respect of interest if Mr O asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

My final decision

My final decision is that Mr O's complaint should be upheld. I require Quilter Financial Limited to pay Mr O fair compensation as set out above. Quilter Financial Limited should provide details of its calculation to Mr O in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O to accept or reject my decision before 6 July 2022.

Laura Parker
Ombudsman