DRN-3589682

## The complaint

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

## What happened

Mr B says he received a cold call from a Mr W at Bridgewater Financial Services Ltd who told him he'd be better off if he transferred out of his current pensions into a SIPP. He says he was initially advised to invest in a hotel resort, but Mr W then changed his mind and said the best option was an investment called Verdant Australian Farmland (now Global Agricultural Services). He says he was told he'd receive 12% returns a year with a bonus at the end of the fixed period along with the return of the investment. And he says he was told 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 14 January 2010. The transaction history for the SIPP shows:

- The SIPP was opened on 9 March 2010.
- IFA fees of £867.39 were paid to Bridgewater on 18 March 2010.
- Mr B's Zurich pension (£21,784.65) was transferred on 19 March 2010.
- Mr B's two Barclays pensions (£50,281.87) were transferred on 22 March 2010.
- IFA fees of £2,007.27 were paid to Bridgewater on 24 March 2010.
- £65,000 was invested into GAS on 30 March 2010.
- Returns of £4,216.16; £233.33; £466.15; and £160.25 were received from the GAS investment on 26 October 2012; 14 October 2013; 17 September 2014; and 3 November 2015 respectively.

No further returns were received, and it seems the GAS investment was revalued to £1 in 2017. Mr B complained to Quilter on 4 March 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 B had made his complaint too late because 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 should have caused concern and this was more than three years before he complained.

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

- Mr B didn't know he had cause to complain 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 B and there's nothing to suggest the value of the investment dropped more than three years before Mr B complained.

- Bridgewater advised Mr B and there's nothing to suggest Quilter isn't responsible for that advice.

- The advice to move his pensions to a SIPP to invest in the GAS investment wasn't suitable.

- If everything had happened as it should have, Mr B would have left his pensions where they were.

Quilter didn't agree. 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 14 January 2010. So, the advice must have happened on or before 14 January 2010.

Mr B complained to Quilter on 4 March 2019. So, the complaint is 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 therefore 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 B knew, or ought reasonably to have known, he had cause for complaint.

Quilter says on 8 October 2014 Mr B 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 B 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 B most likely received the letter. Taking everything into account, I'm not persuaded this is most likely. Mr B has consistently said he didn't receive the letter and only received SIPP statements. Quilter hasn't been able to provide any evidence of the letter being sent. And the SIPP provider has told us it can't evidence the letter being sent to consumers. I therefore haven't put any weight on the letter in deciding what Mr B knew, or ought reasonably to have known.

Mr B did however say he received a few statements over the years. Unfortunately, he hasn't kept these statements and Quilter has only been able to provide the 2012 and 2017 statements as the SIPP provider doesn't have copies of the others.

I've carefully considered the 2012 SIPP statement that's between provided. It included a line "*The value of your fund as at 30th March 2012 is: £68038.27*". Whilst this is slightly lower than Mr B would have been expecting to see based on the returns he'd been told he'd get, I don't think this is sufficient to say he ought reasonably to have known of cause for complaint at that point. And whilst the value of the fund had fallen significantly by the time of the 2017 statement, Mr B did complain within three years of that statement. 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 B.

Mr B says first knew something was wrong when he contacted his SIPP provider before it went into administration because he'd stopped receiving statements. The SIPP provider went into administration in 2018 and it's been confirmed that because of the value of Mr B's SIPP, he didn't receive any statements after 2017. Mr B'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 B 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 B 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 B has complained about?***

Mr B complains he was given unsuitable advice to switch his pensions 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, the pension switches and the GAS investment. I'm satisfied it's also most likely Mr W advised Mr B to switch his pensions 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 B would have taken the decision himself to switch his pensions to a SIPP without receiving advice. He's plausibly and consistently said Mr W advised him and that he'd been happy with the pensions until that point. I'm persuaded by Mr B's recollection of events.

The SIPP and Mr B's previous pensions 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 B 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:

- The SIPP application form Mr B signed on 14 January 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 LTD 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 5 March 2010.

- The SIPP provider sent an email to Mr W at Bridgewater on 16 March 2010 saying:

  > *Today we received a cheque from one of the two ceding schemes; Zurich issued a cheque for £21,784.65. I have spoken to…Barclays and the funds look to arrive by the end of this week.*
  >
  > *This case is close to be finalised – good news.*

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

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, Quilter hasn't made any arguments that Bridgewater's actions weren't allowed under the appointed representative agreement. And from a later version of the agreement that has been provided on other cases, I can see that Bridgewater was authorised to give investment and pension advice and there aren't any restrictions that I think would be relevant in the circumstances here.

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 B says Mr W didn't review or discuss his existing pensions and the focus was simply on the returns of the GAS investment. He 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 pensions that it seems Mr B was happy with. It seems Mr W's only reason for recommending the switches was so that Mr B 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 B says he was self-employed at the time of the advice earning approximately £22,000 a year and had no investment experience. He was 50 years old and he says he couldn't afford to lose his pensions as he had no savings, investments, or major assets.

Everything I've seen suggests Mr B 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. There's also nothing that suggests he could afford to take significant risks with his investments. Mr W should have known all of this.

In these circumstances I'm satisfied advice to switch Mr B's pensions 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 B's evidence that he wasn't looking to move his pensions and had been cold called. So, I'm satisfied that if Mr W hadn't given unsuitable advice, Mr B would have left his pensions as they were.

## Putting things right

My aim is that Mr B 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 B wouldn't have moved his pensions 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 B has suffered as a result of making the switches and investment.
2. Take ownership of the GAS investment held in the SIPP if possible.
3. Pay compensation for the loss into Mr B's pension in respect of his pension losses. If that isn't possible, pay compensation for the loss to Mr B direct. In either case, the payment should take into account necessary adjustments set out below.

4. Pay Mr B's SIPP fees for the next five years, in the event he's not now able to close his SIPP.
5. Pay compensation of £500 for the trouble and upset caused to Mr B.
6. Pay interest on the above if fair compensation isn't paid within 28 days of notification of acceptance by Mr B.

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

***1. Calculate the loss Mr B has suffered as a result of making the switches and investment***

To do this, Quilter should work out the likely value of Mr B's pensions as at the date of this decision, had he left them where they were instead of switching to the SIPP.

Quilter should ask Mr B's former pension providers to calculate the current notional transfer values had he not switched his pensions. If there are any difficulties in obtaining notional valuations, 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 values. That is likely to be a reasonable proxy for the type of returns that could have been achieved if the pensions hadn't been switched.

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

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

Any withdrawal, income or other distributions paid out of the SIPP should be deducted proportionately from the fair value calculations at the point it was actually paid so it ceases to accrue any return in the calculations 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 B 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 B is compensated in full, Quilter may ask Mr B 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 B 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 B for the loss he's suffered in (1)***

Since the loss Mr B 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 B'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 B could claim. The notional allowance should be calculated using Mr B's marginal rate of tax.

If it's not possible to pay the compensation into Mr B's pension, the compensation should be paid to Mr B 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 B should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mr B's marginal rate of tax in retirement. For example, if Mr B 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 B 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 B 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 B 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 B £500 for the trouble and upset caused. I'm satisfied Mr B has been caused significant upset by the events this complaint relates to, and the loss of, in effect, all of his pension fund. I think that a payment of £500 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 B 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 B how much has been taken off. Quilter should give Mr B a tax deduction certificate in respect of interest if Mr B asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

**My final decision**

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £160,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £160,000, I may recommend that Quilter Financial Limited pays the balance.

**Determination and award:** I uphold the complaint. I consider that fair compensation should be calculated as set out above. My decision is that Quilter Financial Limited should

pay the amount produced by that calculation up to the maximum of £160,000 (including trouble and upset but excluding costs) plus any interest on that amount as set out above.

**Recommendation:** If the amount produced by the calculation of fair compensation exceeds £160,000, I recommend that Quilter Financial Limited pays Mr B the balance plus any interest on the balance as set out above.

Quilter Financial Limited should provide details of its calculation to Mr B in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 8 August 2022.

Laura Parker
**Ombudsman**