DRN-3762750

The complaint

Mr T complains about the role played by an adviser authorised by Quilter Financial Planning Solutions Limited ("Quilter") to transfer funds from an occupational pension into his Self-Invested Personal Pension ("SIPP") to make an unregulated investment in Sustainable Agro Energy in 2011.

What happened

Mr T complained to Quilter about a number of transactions:

1. The amalgamation of five pensions into a Legal & General pension in January 2009.
2. The switch of a Legal & General pension into D A Phillips ("DP") SIPP in March 2009.
3. An investment using SIPP funds into Oxigen Plantation in June 2009 – this appears to have been for an initial £10,000 and an additional £1,000 per year for five years.
4. An investment using SIPP funds into Sustainable Agroenergy ("SAE") in June 2009 - £15,000.
5. An investment using SIPP funds into Fidelity Funds Network in October 2009 - £50,000.
6. An investment using SIPP funds into Unit 66, Blue Coral Resort in the Philippines (the Blue Coral Resort) in February 2010 - £27,400.
7. An investment using SIPP funds into Plantation Capital Bamboo in September 2010 - £3,995.
8. The transfer of Mr T's Social Housing Pension ("SHP") into the DP SIPP in July 2011 of £15,023 and subsequent further investment into SAE in August 2011 - £12,695.

This decision relates only to transaction 8.

The following is some further background about the events and arguments.

Mr T says he was advised at all times by Mr X – an authorised individual at Quilter. In January 2009, a fact find of Mr T's circumstances was carried out by Mr X. The notes accompanying the fact find were updated as further meetings were held. It appears the initial intention was to open a SIPP to allow Mr T to make an investment in Bulgarian property, but this changed and different investments were made instead.

On 26 March 2009, Mr X wrote to DP Pensions Ltd using Quilter headed paper and contact details. The letter confirmed that Mr T's SIPP application was enclosed and that Mr T's intention was to transfer funds from his Legal & General pension into the SIPP.

On 19 May 2009 £102,025 and £10,479 was switched into the SIPP from Legal & General. Some of this money was used to make the first investment in SAE - £15,000 in June 2009 (see transaction 4 above). Other investments were also made between 2009 and 2010.

In July 2011, Mr T transferred his SHP to the SIPP and a further investment of £12,695 was made into SAE in August 2011. I'll refer to this as the second SAE investment. There is very little paperwork relating to this investment.

Some of the investments – including SAE – have failed. Mr T received documentation relating to the administration of SAE in 2012.

Mr T, via his representatives, complained to Quilter in October 2016. He said he was not made aware of the risks in transferring funds from his pension into the SIPP and that the subsequent investments – including the second SAE investment - have caused him a loss.

Quilter said that the complaint about all of the transactions was made too late under the regulatory rules. The basis of Quilter's argument is that SAE was the subject of an SFO investigation and went into administration in 2012. Mr T was made aware of this at the time. So Quilter says the complaint made by Mr T in 2016 about the advice Mr X gave in relation to the switch to the SIPP in 2009 and all the subsequent investments was made more than six years after the initial SIPP advice and more than three years after Mr T ought reasonably to have realised there was a problem with his pension.

Our service has previously issued a decision in 2009 setting out that the complaint about the first SAE investment made too late under our rules. The ombudsman said the investment was made more than six years before the complaint was made in 2016 and more than three years after 2012, when Mr T knew there were problems with SAE. However, the ombudsman's decision was clear that the complaint about the second SAE investment was not time barred as that transaction took place in 2011 and this was less than six years before Mr T's complaint in 2016.

Quilter continued to dispute that the complaint about the second SAE investment had been made in time. One of our investigator's looked at the facts and reiterated that it did comply with our time limit rules for the same reasons as the previous ombudsman.

The investigator also explained why, in her view, Quilter is responsible for the complaint under agency laws. In summary, she said that Quilter had made representations that Mr X was authorised to give the type of advice given here to Mr T and that Mr T had relied on this representation. As such, Quilter was responsible for the complaint on the basis of apparent authority.

The investigator said that the advice to transfer Mr T's SHP to the SIPP to make the SAE investment was unsuitable and that Quilter should therefore compensate Mr T.

I've now been asked to make a final decision as Quilter still thinks the complaint is time barred. Quilter says that the two SAE investments are linked and therefore, like the first SAE investment, the second SAE investment is time barred under our rules.

Why we can look into this complaint

I've considered all the available evidence and arguments provided in relation to this complaint.

Has the complaint been made in time?

The rules about time limits and whether our Service can look into the merits of a complaint are set out in the FCA Handbook under DISP 2.8.2R. It 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 to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;

Mr T's complaint was referred to Quilter in October 2016. It included all of the transactions listed at the outset of this decision – including the transfer of the SHP and second investment in SAE.

'Complaint' is defined in the glossary to the FCA handbook as follows:

> *"Any oral or written expression of dissatisfaction, whether justified or not, from or on behalf of, a person about the provision of, or failure to provide a financial service…which alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience…"*

So a complaint has to be about the provision of, or failure to provide, a financial service. It follows that an important question is whether Mr T's complaint is about one or more 'provision(s) of, or failures(s)to provide, a financial service(s).' 'Financial service' is not a defined term within the FCA handbook, which means I should interpret it as having its natural meaning unless the context otherwise requires (GEN 2.2.9 G).

In this case, Mr T's expression of dissatisfaction was treated as one complaint by Quilter. However, how the complaint is viewed by Quilter (or even by Mr T) is not determinative in the analysis.

Quilter essentially says that this complaint involves one act undertaken by Mr X – the pension switch which led to all subsequent investments; and that the two SAE investments are intrinsically linked.

But there is a clear difference between the acts in 2009 and in 2011. Each transaction comprised distinct activities – in 2009 Mr T's Legal & General pension was switched to a newly created SIPP and the first SAE investment was then made at around the same time together with other investments.

The transfer of Mr T's SHP took place much later in July 2011 and appears to have been undertaken with a new investment in SAE in mind as the proceeds from the transfer were used to make the SAE investment in August 2011. So whilst the SHP transfer and second SAE investment likely formed one financial service, there is nothing to indicate that a single overarching plan, strategy or objective was contemplated in connection with the earlier SIPP advice and SAE investment in 2009.

On balance, it is my view, that the switch to the SIPP in 2009 and first SAE investment arose from a distinct financial service to the transfer of the SHP and second SAE investment in 2011. As such, it is right for me to deal with the provision of those services as separate matters.

The relevance of this is that Mr T's complaint in October 2016 has been made less than six years after the transfer of the SHP to the SIPP and the second investment in SAE in 2011. The issue of the three year time limit and Mr T's knowledge of when he knew there were problems with the SAE investment is therefore irrelevant. As such, Mr T's complaint about the SHP and second investment in SAE is not in breach of our time limit rules.

Is Quilter responsible for the acts of Mr X?

This doesn't seem to be the subject of recent submissions by Quilter, but I will address it nonetheless.

We can consider a complaint under our compulsory jurisdiction if it relates to an act or omission by a firm in the carrying on of one or more listed activities, (including regulated activities), or any ancillary activities carried on by the firm in connection with those activities, (DISP2.3.1R).

Complaints about acts or omissions by a firm include complaints about acts or omissions in respect of activities for which the firm is responsible (including the business of any appointed representatives for which the firm has accepted responsibility) (DISP2.3.3G).

So, I think there are three important points to consider when looking at our jurisdiction to consider this complaint:

- What are the acts about which Mr T has complained?
- Were these acts done in the carrying on of a regulated activity or an ancillary activity carried on in connection with a regulated activity (DISP 2.3.1)?
- Were those acts ones for which Quilter accepted responsibility?

What are the acts about which Mr T has complained?

Mr T says that he wasn't given appropriate advice by Mr X of Quilter when making the investment in SAE in 2011. As I've set out above, this investment appears to be linked to the transfer of the SHP to his SIPP and so this transfer too forms the subject of his complaint.

Were these acts done in the carrying on of a regulated activity or an ancillary activity carried on in connection with a regulated activity (DISP 2.3.1)?

Regulated activities are specified in Part II of the FSMA 2000 (Regulated Activities) Order 2001("the RAO") and include advising on the merits of buying or selling a particular investment which is a security or a relevant investment (article 53 RAO), and making arrangements for another person to buy or sell or subscribe for a security or relevant investment (article 25 RAO).

The SHP, the SIPP and the investment in SAE are the kind of investments that can give rise to regulated activities. So did Mr X give Mr T advice?

There's not much documentary evidence about what happened in 2011. But I think it unlikely that Mr T would have transferred his SHP and made another investment in SAE without this being recommended to him by someone. And there's no evidence that a third party was involved either.

It's clear that Mr X was Mr T's IFA from around January 2009 onwards. He completed fact finds and provided Mr T with recommendation letters in 2009.

The SHP was transferred into the SIPP on 25 July 2011 and the investment into SAE was made from the SIPP on 1 August 2011. DP SIPP has confirmed the following adviser charges were paid from the SIPP to Quilter:

- 08.06.2009 - £3,431.40

- 03.06.2010 - £554.61
- 09.08.2011 - £584.64

DP SIPP has also confirmed that their records show that Mr X of Quilter was the adviser for the SAE investment.

Earlier, in March 2011, Mr X had written to Mr T enclosing the most up to date valuation of the SIPP, saying:

> *"As you will see, the value of the Unit Trust has gone up almost 16% in the past twelve months, to a total of £56.697.69, which is a good return on your original investment of £50,000. Perhaps you could let me know if you want me to take any further action with regard to your SIPP, or indeed anything else? Alternatively, if you would like to arrange a meeting, please do not hesitate to contact me."*

This, along with the regular fees Mr T was paying to Quilter for Mr X's services indicate that it's more likely than not that Mr X of Quilter was the person who advised him about his SHP and the second SAE investment.

Giving advice about the pension and SAE investment are regulated activities. As such, I'll now go on to consider whether the acts complained about are ones for which Quilter accepted responsibility.

Were those acts ones for which Quilter accepted responsibility?

Quilter has said the following in relation to SAE:

- It has no record of providing advice to make this investment.
- Mr T "self-invested".
- Even if Mr X did give advice to make this investment, which it maintains he did not, he was not authorised by Quilter to provide advice on SAE – it was not on its approved product/provider list as it was an unregulated investment.
- Mr X was authorised to provide advice on pension transfers subject to its process and procedures in place at the time.

There is limited evidence relating to the SHP transfer into the SIPP and investment into SAE in 2011. However, as set out above, I think it's likely that Mr X advised Mr T to carry out these acts and did so as an agent of Quilter.

Quilter isn't responsible for everything Mr T did. The rules allowed Quilter to appoint an agent to act on its behalf and limit what it authorised the agent to do.

The law recognises more than one type of agency. Agency is where one party (the principal - here Quilter) allows another party (the agent - here Mr X) to act on its behalf in such a way that affects its legal relationship with third parties. An agent may have actual authority, where the principal has expressly or impliedly given its assent to the agent that it may act on its behalf. Or the agent may have apparent authority, where the principal has made a representation to a third party that the agent has authority to act on its behalf and the third party has relied on this representation.

Actual authority

There's an express agreement between Quilter and Mr X. The agreement sets out that Mr X must account to Quilter for all business and only advise on investments that it had pre-

approved. There's also a general point in agency of this type that the agent is required to act in the principal's best interests.

Quilter hasn't commented on whether the DP SIPP was an approved investment. But SAE was not. So, Mr X wasn't acting in accordance with the actual authority he had been given when conducting these acts. As such, I can't conclude Quilter accepted responsibility for the act complained about by Mr T by way of actual authority.

That is not however the end of the matter, because there's also agency based on apparent authority, which I'll go on to now.

Apparent authority

Although Mr X actions may not have been authorised in his agreement with Quilter, it could also have given apparent authority. This arises when the principal represents to third parties through words or conduct that the agent has authority to act on its behalf and the third party reasonably relies upon that representation.

The essence of apparent authority isn't concerned with what was actually agreed between the parties (for example by way of the agency agreement), but rather, how the relationship between those parties appeared to third parties. In this complaint, I'm concerned with how the relationship appeared to Mr T.

The case law indicates that I must look to see whether:

- Quilter made a representation to Mr T that Mr X had Quilter's authority to act on its behalf in carrying out the activities he now complains about; and

- Mr T relied on that representation in entering into the transactions he now complains about.

Did Quilter represent to Mr T that Mr X had the relevant authority?

I'm satisfied that, in the circumstances of this complaint, Quilter did represent to Mr T that Mr X had the necessary authority. I say this because:

- Quilter placed Mr X in a position which would, in the outside world, generally be regarded as having authority to carry out the act Mr X complains about.

- Quilter authorised Mr X to give investment advice on its behalf. Quilter arranged for Mr X to appear on the FCA register in respect of Quilter. And Mr X was approved to carry on the controlled function CF30 at the time of the disputed advice.

- Quilter held itself out as an independent financial adviser firm that gave advice and offered products from the whole of the market after assessing a client's needs. No information was provided to clients or potential clients about the agent being authorised in relation to approved products only.

- Quilter provided Mr X with Quilter's business stationery and an email address which Mr X had used to make arrangements and to give Mr T advice from 2009. This allowed Mr X to build up and establish the professional relationship that lead to the 2011 investment.

- It was in Quilter's interest for the general public, including Mr T to understand that it was taking responsibility for the advice given by its financial advisers. I am satisfied that Quilter intended Mr T to act on its representation that Mr X was its financial adviser.

Did Mr T rely on Quilter's representations?

Mr T has said he *"received correspondence on the [Quilter] letterhead regarding his pension transfer and investments from [Mr X] and they were noted as his adviser on his SIPP application form. As far as [Mr T] was concerned [Mr X] worked for [Quilter] and they were his financial adviser."*

Mr T was paying his regular annual fees to Quilter for Mr X services, at the time. I haven't seen any evidence to show that Mr T knew or should have known that Mr X was acting in any capacity other than a Quilter adviser.

In my view, on balance, the evidence does indicate that Mr T proceeded on the basis that Mr X was acting in every respect as the agent of Quilter with authority from Quilter so to act.

Conclusion on jurisdiction

The complaint about the transfer of the SHP to the SIPP and the second investment in SAE in 2011 was made in time. Quilter are also responsible for the acts being complained about.

What I've decided – and why

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

As set out above, I'm satisfied that Mr X advised Mr T to transfer his SHP into the SIPP and invest into SAE in 2011 using funds held in the SIPP. So was this advice suitable?

As a starting point, Mr X should have undertaken a fact find and provided a letter outlining his advice and reasons for any recommendations. He failed to do this.

SAE was an unregulated, high risk overseas investment. It would only have been suitable for a very small proportion of investors who had the willingness and capacity to potentially lose their investment.

I note that some of the documentation from the 2009 transactions set out that Mr T was prepared to take high risks with his pension. But, my view is that Mr X should have looked at Mr T's circumstances again in 2011 and given him suitable advice taking this into account.

I think it likely that Mr T's circumstances in 2011 were broadly similar to those recorded in the documents from 2009. At that time, Mr T was around 55 years of age and earning around £35,000 a year. He was divorced with two sons who were dependant on him. He was repaying the mortgage against the property he was living in and had £2,000 in savings. Mr T intended to retire at the age of 65. So clearly, Mr T wasn't someone who had a significant capacity for loss, regardless of whether he had said to Mr X that he was prepared to take high risks.

By 2011, Mr T had also already made other unregulated investments in the SIPP amounting to around just under half of the value of his pension. So his pension was already exposed to significant risk – well beyond what was appropriate for him.

Given the circumstances, Mr X should not have advised Mr T to transfer his SHP to the SIPP and invest in SAE. Suitable advice would have been for him to remain invested in his existing scheme.

Putting things right

I take the view that Mr T would have remained with his previous provider, however I cannot be certain that a fair calculation can be easily carried for what the previous policy would have been worth against what actually happened with the monies transferred in. I say this because some of the funds were used to meet SIPP fees and another investment that Mr T had already committed to (Oxigen/Plantation Capital). Funds were transferred in and out of the SIPP regularly in subsequent years too. I am also aware that it is the second SAE investment that has ultimately caused Mr T the loss that is the subject of this complaint.

Mr T also accepts that he would have paid the fees/charges and Oxigen/Plantation Capital payment in any event – so he has benefitted from not having to use money from his personal accounts.

It should also be noted that these monies paid from the SHP residual sum in the SIPP would always have been "withdrawals" that would need to have been taken into account in the redress calculations.

Furthermore, the SHP confirmed to Mr T's representatives that the value of his SHP would have remained almost exactly the same in 2018 had it not been transferred in 2011. This suggests that any growth in the funds would have been minimal.

So, I don't agree that it would be fair and reasonable to include the residual SHP amount transferred to the SIPP in the compensation for the reasons set out above. I think there is a risk that the difficulties in calculating the values could lead to undue delays and Mr T being indirectly overcompensated for matters that Quilter is not responsible for (i.e. the fees and Oxigen/Plantation Capital investment).

As such, I'm satisfied that what I have set out below is fair and reasonable, taking this into account and given Mr T's circumstances and objectives when he invested. Mr T should be compensated by comparing the value of his second SAE investment (likely nil) to what it would have been worth had he made an alternative investment.

What must Quilter do?

To compensate Mr T fairly, Quilter must:

- Compare the performance of Mr T's investment with that of the benchmark shown below. If the actual value is greater than the fair value, no compensation is payable.

  If the fair value is greater than the actual value there is a loss and compensation is payable.

- Quilter should also add any interest set out below to the compensation payable.

- Quilter should pay into Mr T's pension plan to increase its value by the total amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension

plan if it would conflict with any existing protection or allowance.

- If Quilter is unable to pay the total amount into Mr T's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the total amount should be reduced to *notionally* allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Mr T won't be able to reclaim any of the reduction after compensation is paid.

- The *notional* allowance should be calculated using Mr T's actual or expected marginal rate of tax at his selected retirement age.

- It's reasonable to assume that Mr T is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr T would have been able to take a tax free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

- Pay to Mr T £250 for the distress caused to him by the loss of a significant amount of his pension provision.

Income tax may be payable on any interest paid. If Quilter deducts income tax from the interest it should tell Mr T how much has been taken off. Quilter should give Mr T a tax deduction certificate in respect of interest if Mr T asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

Investment name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
The sum of money used to make the second investment in SAE (£12,695)	Still exists but illiquid	FTSE UK Private Investors Income Total Return Index	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)

Actual value

This means the actual amount payable from the investment at the end date.

It may be difficult to find the *actual value* of the investment. This is complicated where an investment is illiquid (meaning it could not be readily sold on the open market) as in this case. Quilter should take ownership of the illiquid investment by paying a commercial value acceptable to the pension provider. The amount Quilter pays should be included in the actual value before compensation is calculated.

If Quilter is unable to purchase the investment, the *actual value* should be assumed to be nil for the purpose of calculation. Quilter may require that Mr T provides an undertaking to pay Quilter any amount he may receive from the investment in the future. That undertaking must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Quilter will need to meet any costs in drawing up the undertaking.

Fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

Any additional sum paid into the investment should be added to the *fair value* calculation from the point in time when it was actually paid in.

Any withdrawal, income or other distributions paid out of the investment 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.

Why is this remedy suitable?

I've decided on this method of compensation because:

- Mr T wanted Capital growth and was willing to accept some investment risk.

- The FTSE UK Private Investors Income ***Total Return*** index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It would be a fair measure for someone who was prepared to take some risk to get a higher return.

- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr T's circumstances and risk attitude.

My final decision

I uphold the complaint. My decision is that Quilter Financial Planning Solutions Limited should pay the amount calculated as set out above.

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 7 June 2023.

Abdul Hafez
Ombudsman