DRN-3841127

The complaint

The estate of the late Mrs K complains about the acts of Mr K. It says the person with power of attorney for Mrs K believed Mrs K was investing money through Mr K (on Mr K's advice) but it's now clear Mr K kept most of the money himself. It says Quilter Financial Limited (Quilter) is responsible because Mr K was with a business that was an appointed representative of Quilter at the relevant time.

What happened

I can see from the Financial Conduct Authority (FCA) register that Mr K worked for a business between 6 January 2010 and 31 December 2012. That business seems to have consistently used the trading name of CFC Financial Services (CFC) when dealing with Mrs K and her estate. This is therefore the name I've used throughout this decision. CFC has been an appointed representative of Quilter since 5 October 2010.

The estate of Mrs K says she became unwell and was going to need to pay care home fees so Mr K – a family member and financial adviser – advised that Sterling investment bonds be set up using a discounted trust (bare) trust deed. Sterling has explained that this type of bond allows a donor to make a gift to a trust that isn't treated for inheritance tax as a settlement to enjoy a tax efficient series of regular withdrawals whilst ensuring that on the donor's death, the funds are available to the named beneficiaries in a tax efficient manner.

Two of these bonds were set up initially – one for £140,00 on 25 May 2010. And one for £280,000 on 18 June 2010. I've been provided with some of the documentation for these two bonds. This shows they were sold by Mr R and Mr K of CFC. These bonds and the withdrawals from them are the subject of separate complaints.

Later that year, Mrs K's house was sold and there was a further £380,000 to invest. The estate of Mrs K says Mr K again advised a Sterling investment bond be set up – in exactly the same way as before.

I've been provided with a Sterling bond illustration for £380,000 dated 14 December 2010. Mrs K and Mr K were named as joint applications and trustees and the application was witnessed by Mr K. Sterling has searched its records and can see an application for this third bond. But it says no money was ever received and the bond was never started. Mr K has since confirmed that he didn't invest this money and instead misappropriated it.

This decision relates to the £380,000 that Mrs K paid to Mr K in December 2010 that wasn't invested in a Sterling bond.

I've set out below an extract from Mr K's sentencing hearing as this is useful background in explaining what happened next:

> *In February 2014* [Mrs K] *passed away, and the probate process caused things to begin to unravel for* [Mr K]. *Because of his expertise, the family tasked him with requesting the funds from the trusts in order to distribute* [Mrs K's] *estate in accordance with her wishes…*

Probate on the [K] *estate was granted in March 2015, and in July 2015 the family solicitor contacted* [the representative of Mrs K's estate] *to advise her that HMRC had some concerns over some of the withdrawals from the bonds and would be investigating them. Again,* [Mr K] *was trusted by the family with liaising with HMRC throughout this process, due to his expertise and previous involvement.*

In July 2016 HMRC allowed the release of bonds 1 and 2, but the family had heard nothing…about the third bond, which they had asked [Mr K] *to create using the money from the proceeds of the sale of* [Mrs K's] *property. The family began to feel that* [Mr K] *was giving them "the run-around". But, ultimately, because he was their son and brother, they trusted him.*

Several members of [Mr K's] *family were relying on receiving their inheritance from their grandmother and mother in order to buy property, or get married…*

In September 2017 [a member of the family] *received documentation for a life insurance policy that had been taken out for him by* [Mr K's] *company, CFC Financial Services.* [He] *became suspicious and went to see* [the managing director] *of CFC Financial Services, who was…also the trustee for bond 1. During this visit* [the managing director] *disclosed…that he had been removed as a trustee from that bond sometime ago. Which meant, effectively, that* [Mr K] *had sole control over both bond 1 and bond 2.*

The family had had their concerns and doubts about [Mr K's] *prevarications and excuses for some time, but they had put their concerns out of their minds on the basis that he was family and that they trusted him. However, after the issues with the life insurance policies…and the information that* [Mr K] *had taken sole charge of the trusts without telling them, the family began to suspect that* [Mr K] *had, in fact, already cashed in the bonds and that was the real reason for the delay in them receiving their money.*

They informed [Mr K's] *mother…who confronted* [Mr K] *over the telephone about it, and his response, according to her statement, was simply as follows "Mum, you're not going to like this, but I've spent the money and I never invested the money from the sale of Granny's house". When she asked how much money remained,* [Mr K] *told* [her] *that there was around £300,000 left.* [She] *flew home from her holiday, and once she returned* [Mr K] *transferred £305,264 into her bank account.*

Mr K was later convicted of fraud and given a prison sentence.

The estate of Mrs K complained to Quilter on 16 December 2019. Quilter issued a final response letter saying it wasn't responsible. In summary, it said:

- The police investigation said Mr K was solely responsible for the fraud and didn't mention Quilter at any time.

- It has Mrs K as a client on its system but has no documentation for any of the investment bonds.

- Mr K acted outside its authority and the permissions he held through it. His actions were out of its control.

An investigator was satisfied we could consider the complaint and that it should be upheld. In summary, he said:

- He was satisfied there'd been a regulated activity – advice had been given on a specified investment.

- Quilter's omission from the police report isn't determinative. It was responsible because Mr K was most likely acting as CFC when he gave the advice, and he was authorised by it to give advice on Sterling bonds.

- If everything had happened as it should have, Mrs K would have invested in a Sterling bond identical to the two she'd previously invested in.

Quilter didn't agree. It noted that it seemed Mr K had returned some money to Mrs K's estate, and it raised an issue with the date being used to calculate compensation. It also said the estate of Mrs K had raised the complaint too late.

The investigator therefore issued further views addressing Quilter's comments on compensation and its time bar objection. He was still satisfied we could consider the complaint and that it should be upheld. But he updated the compensation he felt was appropriate to deduct a proportion of the money that had been returned and to reflect the fact it was likely the £380,000 bond would have been surrendered on 6 April 2017 (the date the two genuine ones were) if it'd been genuine.

Quilter hasn't said whether it'd be prepared to pay compensation in line with the investigator's view. But given the length of time since the final view, the issue has been passed to me for a decision. I've read and considered everything Quilter has said. In summary, it's said:

- There should be one complaint for the issues raised.

- A decision should be made on the jurisdiction issues first.

- Jurisdiction is a matter of law that requires legal analysis – it doesn't involve consideration of what's fair and reasonable.

- The events complained about were more than six years ago and Mrs K's estate ought reasonably to have been aware of cause for complaint more than three years before it complained. Probate was granted in March 2015 and Mrs K's estate was told HMRC had concerns about the bonds and had started an investigation in July 2015. The first two bonds were released in July 2016 but not the third bond and this ought reasonably to have caused concern.

- The estate of Mrs K didn't need to know for certain that it had cause for complaint, it just needed to know enough that it ought reasonably to have investigated further.

- The sentencing hearing said things started to unravel for Mr K during the probate process and it referred to the family being concerned when HMRC questioned the bonds and starting to feel as though Mr K was giving them the "*run-around*". Time therefore started to run in July 2015 when HMRC began investigating and probate was delayed. And the estate definitely ought to have realised there was an issue by July 2016 when the first two bonds were released but not the third.

- Checks should be made to find out whether any further money has been returned to Mrs K's estate.

What I've decided – how many complaints have been made

The FCA Handbook defines a complaint as:

> *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, claims management service or a redress determination, which:*
>
> *(a) alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience; and*
>
> *(b) relates to an activity of that respondent, or of any other respondent with whom that respondent has some connection in marketing or providing financial services or products or claims management services, which comes under the jurisdiction of the Financial Ombudsman Service.*

The key question here is whether the complaint is about one or more provisions of a financial service.

The investigator was satisfied three financial services had been provided to Mrs K and so set up three complaints – one for each of the two genuine bonds and one for the fictional bond.

Quilter says these were all one financial service and should therefore be considered in the same complaint. I don't agree. Instead, I agree with the investigator that the fictional bond being considered in this decision involved a separate financial service.

As I've set out above, Mrs K had more money available approximately six months after the genuine bonds had been set up. The estate of Mrs K has been consistent and plausible that when this additional money became available, Mr K's advice was sought. And given there was such a relationship of trust between Mrs K and her family and Mr K, I think it's most likely their recollections are an accurate reflection of how things operated and what actions were taken when more money became available.

I'm therefore satisfied a new financial service was provided by Mr K in relation to the £380,000 he was given in December 2010 and so this should be the subject of a separate complaint.

This decision therefore only considers the £380,000 paid in December 2010 that the estate of Mrs K says was intended to be put into a Sterling bond.

What I've decided – jurisdiction

I agree with Quilter that I can't decide jurisdiction on the basis of what I consider to be fair and reasonable in all the circumstances. That's the basis on which the merits of the complaint will be determined if, but only if, we have jurisdiction to consider it.

I accept that jurisdiction involves considering the rules and law. But I'd add that if there are any disputed issues of fact that I need to resolve to help me decide either jurisdiction or the merits of the complaint, it falls to me to decide them according to the balance of probability.

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 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.*

The advice complained about here was in December 2010. The estate of Mrs K complained to Quilter on 16 December 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 the estate of Mrs K knew, or ought reasonably to have known, it had cause for complaint.

The estate of Mrs K says it didn't know it had cause for complaint until September 2017 – when the family confronted Mr K and he admitted what he'd done – and the complaint was made within three years of that date. It says up to that point there'd been frustration with delays caused by Mr K but nothing more.

Quilter says the estate of Mrs K ought reasonably to have been aware of cause for complaint earlier than this. I agree with Quilter that a complainant doesn't have to know for certain that something has gone wrong, or the full extent of what's gone wrong, for the purpose of the time limit rules. I've therefore considered whether anything ought reasonably to have made the estate of Mrs K aware of cause for complaint more than three years before it complained with this in mind.

Probate being delayed

The sentencing hearing said things started to unravel for Mr K during the probate process. It's likely this was the case as this was the point that things started to be looked into in detail and questions asked of Mr K. However, just because Mr K knew that his story was about to be tested and exposed, doesn't mean that the estate of Mrs K knew that anything was wrong.

If probate was delayed – which it's not clear to me it was – I haven't been provided with anything that suggests this was because of any concerns or issues connected with the Sterling investment bonds.

HMRC concerns in July 2015

I've been provided with a letter from HMRC to the probate solicitor dated 25 March 2015 saying it was considering the values of the arrangements which were returned in the inheritance tax account and reconciling the discounted gift values so it needed information.

A further letter from HMRC to the probate solicitor dated 1 October 2015 read:

> *I note that you have been advised by the Financial Advisor that we should have received all the requested information from Sterling. On reviewing my file, and also after speaking to my colleague at the Board's Actuarial Office, I can advise that we have not received all the information requested. We have only received the certified copy of the death certificate sent in with your letter dated 16 June 2015.*
>
> *Please contact either the Financial Advisor or Sterling to advise that we have not received the information requested and ask that it now be forwarded on to us. I look forward to hearing from you.*

Mr K then emailed the probate solicitor on 21 October 2015 saying:

> *See the docs attached in relation to the 3 investments made. These were sent to* [the probate solicitor's firm] *via email on 27th Jan 2015 so you should have them on file – no worries if not.*
>
> *This information was provided to HMRC in April 2015 shortly after our initial letter from them requesting copies etc. Copy of my covering letter to follow. The items that are not included are the GP reports and age additional details – these were sent as the letter instructed to HMRC at the address quoted at the end of August 2015.*
>
> *I note that the latest letter from HMRC is from a different individual at a different address. However I have spoken to her and she has given me an email address I can send the docs to along with her address via the post. I have sent the attachments in this email to her last week.*
>
> *Sterling have to reissue the GP docs now due to the time taken and the fact that now i have left CFC i cannot access the secure mail server in which they sent the original docs to me. I made a call to them on Thursday 15th October to chase these and they informed me it would take a maximum of 11 days to provide this documentation. They have my telephone and email details to contact me in relation to this query and have confirmed this will be done by 30th October latest after a conversation i have had with them this afternoon.*
>
> *I would re iterate that HMRC have indicated that they will review the investments made and decide if the level of discount was prudent or excessive. When we know the outcome of this we may, depending on the size of any bill, need to take action against Sterling in this regard. If you can therefore wait for HMRC to "reach a verdict" I would be most grateful so we do not incur any further costs your end.*
>
> *I have some further docs on file that I need to scan and send in relation to this and I will get this done tomorrow as these docs merely service to pad out the file for HMRC and may help us in any action we take with Sterling.*

Mr K then emailed HMRC on 22 October 2015 saying:

> *Following on from our conversation the week before last I have attached the trust docs and bond schedules for the 3 investments made.*
>
> *I have also requested that Sterling provide the GP reports and age addition details to you as well. Given the importance of collating this information correctly they had advised this should be ready on 30th October 2015. They will also confirm any rates of withdrawals at this time.*
>
> *I can only apologies* [sic] *for the delays with this as it was our understanding that the docs had already been sent to you. I am in the process of collating copy correspondence for this but in any event we need to get the information to you in order to process a decision.*
>
> *I would be grateful if you can confirm receipt of this email so I know you have the information contained within.*
>
> *If there are any other items outstanding then please do not hesitate to contact me and I will aim to get them over to you as soon as possible.*

HMRC replied the same day saying:

> *Thank you for this. Once the GP reports and age addition have been received, I will forward all the information to our Board's Actuarial Office to be considered.*
>
> *That's no problem, you had thought we already had the information requested, so the delays could not be helped.*
>
> *I will check my file and if there is anything else outstanding, I will let you know.*

The probate solicitor then emailed Mr K on 31 October 2015 saying:

> *I know we are all keen to finalise the Estate as soon as we can and since there has been a considerable delay I thought it was worthwhile contacting HMRC again just to clarify what they had received and hence what they were still waiting for.*
> *I therefore telephoned…the relevant caseworker at HMRC on Friday who said that so far they had received nothing from either Sterling or you. They* [sic] *only thing they have received is the certified copy death certificate which I sent to them. She acknowledges that she was not the same person who started the case but she has checked with the person/office who started the matter and they had* [not] *received anything from you either.*
> *You said in your email of 21 October that copy documents were sent to* [the probate solicitor's firm] *on 27th January but we have no record of having received an email on that day (the only email activity on that day was an email which I sent to your Mother responding to an email I received from her of 26th January saying that I still had not received any information in relation to the three discounted gift trusts). In the same email of 21st October you said you would send to me a copy of your covering letter to HMRC of April 2015. I look forward to receiving a copy of that letter as it might be useful.*
> *I should be grateful if you would send to HMRC copies of all documents which they originally requested in their letter of 25th Match* [sic] *2015 and send me a copy of that letter.*

Mr K then emailed the probate solicitor on 2 November 2015 saying:

> *I enclose a copy of an email to…HMRC dated 22 October 2015 which shows she has received the trust docs and schedules for the 3 investments.*
>
> *As per her letter the only items that are outstanding are the age addition calculation and any GP records. As per my conversation on Friday 30th October 2015 with Sterling they are sending me this information today so in the interests of thoroughness I will re email everything to HMRC and will of course do hard copy in the post.*
>
> *I can send over the letter to HMRC from earlier in the year at some stage tomorrow when I am in the office.*
>
> *I enclose two email copies from Jan 2015 which show the trusts were also send* [sic] *to* [the probate solicitor's firm] *on 27/01/2015 – I do not propose we get carried away with this as at this stage we had no idea the trusts were going to be challenged by HMRC. However, the emails should be placed on file.*
>
> *I will confirm receipt with* [HMRC] *later on today that she has everything she needs.*
>
> *Can I ask you to send a copy of the grant of probate? This is so I can prepare the trusts to be dispersed pending HMRC's decision.*

The next letter from HMRC I've been provided with is dated 3 December 2015 (again to the probate solicitor). This said it was accepting first two bonds, but in relation to the third "*it looks as if there has been some kind of mistake*" and it talks about there being some inconsistencies. HMRC therefore asked for:

- *A copy of the remainder of the trust deed (only pages one to six have been provided)*
- *Confirmation of the value, frequency and start date of the regular withdrawals*
- *Confirmation from Sterling that a "Basic" basis of mortality is applicable to this arrangement.*

I've carefully considered all of these emails and letters. I accept it seems as though the probate solicitor was getting frustrated with Mr K not doing what he'd been asked and what he'd said he'd done. And I accept the letter from HMRC talks about a "*mistake*" and inconsistencies. But taking everything into account, I'm satisfied these would have simply seemed like administrative issues to Mrs K's estate. There's nothing in the letters from HMRC that suggests it had any real concerns or that one of the bonds might not exist. And I'm satisfied it would have simply seemed as though HMRC was following its processes and making sure it had everything it needed, and Mr K wasn't quite as on top of complying with the requests as he should have been.

Whilst this would have been frustrating for Mrs K's estate, I'm not persuaded there's anything that ought reasonably to have made them aware of cause for complaint. The emails seemed to be genuine and to contain genuine documents. I also note that the probate solicitor didn't raise any concerns with Mrs K's estate about the legitimacy of the third bond.

The fact the third bond wasn't released in July 2016

The probate solicitor emailed Mr K on 8 August 2016 saying:

There were three Discounted Gift Trusts referred to in the Probate papers and the Revenue have allowed the smaller two but all the queries they are raising are in relation to the Sterling Investment Bond when £380,000 was invested in January 2011. The discount was £41,800 and if that discount was not allowed by HMRC (which is currently the case) that would mean that the taxable Estate would be increased by £41,800 which would mean there would be further inheritance tax payable of about £17,000.

Could you please therefore ask Sterling for the information requested by HMRC and also let either us or HMRC have a full copy of the Trust deed.

Once again if you would prefer me to contact Sterling direct I shall be happy to do so.

Mr K replied the same day saying:

I will continue to ask for the information provided and I have already asked for copies of the trust deed which will be stamped by Sterling as "file copy" – this should show HMRC that the copy provided is the correct trust deed as I cannot find another trust on my electronic client database or indeed the paper file.

I will sort out asking for the medical evidence as this needs a letter from mum which I will collect on Wednesday.

There's then a gap in the correspondence I've been given. But on 13 June 2017 Mr K emailed the executor of Mrs K's estate saying:

see the statements from inception to date – these show the withdrawals and values etc across the years which is part of the calc for HMRC and surrender

the HMRC doc does not show all the information needed

sterling have told me today they will re issue these docs by email to we [sic] *in 3 working days to complete this side of things*

And on 18 July 2017 Mr K emailed the probate solicitor saying:

Just a quick one – I have been in contact with Sterling who are preparing me some documents to send into HMRC.

I have on file the trust deed, the mortality rating and documentation and the withdrawals summary – the only docs to go from Sterling to HMRC was the confidential medical evidence.

I also have an email from [HMRC] *stating they had all the relevant paperwork twelve months ago but I want to be absolutely certain that when I speak to* [HMRC] *that I know what paperwork they have had historically and also if there is anything still missing.*

The trust deed does seem to have some odd page numbers on it that appear out of sequence but this is the same document that is available to download via their IfA site today so I want to see the file copy that Sterling have rather than my photocopy of the original one. The same applies for the withdrawals made as well as I provided an illustration from the time of application and not the summary they can prepare for me. This will need to be done manually by sterling as well.

Sterling have advised that it can take up to 15 working days to send this info to me via secure email so il wait for this and then see if there are any missing areas.

Mr K then emailed HMRC on 26 July 2017 saying:

Thank you for the letter of 28 June 2017.

I am somewhat surprised that the letter indicates that you do not have the contract rate of withdrawals and the signed trust deed as these have previously been supplied to HMRC, albeit not to your office, and have been confirmed as received.

I have attached the discount confirmation which shows the amount invested, the income taken, the amount outside of the estate by Sterling's assessment and a copy of the trust deed. I have no other documents on file, so I have been discussing this matter with Sterling as there was some mention of missing pages on the trust document. This is not the case as the trust attached matches the one Sterling have, but I have asked them to send me a copy which will be stamped "file copy" as well. This will take up to 15 working days as they have to retrieve the file from their archives.

I have asked for copies of the medical evidence to be sent to your office as indicated on the letter. I have no file copies of the GPR report or the medical questionnaire but again I will be obtaining file copies of these.

I have also enclosed the guide for Sterling's mortality assessment.

I am happy for you to contact me on the mobile number below should you have any queries on the documentation attached.

Again, there's nothing included in these letters and emails that satisfies me Mrs K's estate ought reasonably to have known of cause for complaint at this time. The executor of Mrs K's estate says they were told tax enquiries were normal. The probate solicitor and Mr K were dealing with HMRC and seemed to be providing what was asked for – albeit with delays – and I think it's important to note that again the probate solicitor never raised any concerns (other than about the delays).

Being given the "run-around" by Mr K

The estate of Mrs K accepts being frustrated by the delays Mr K was causing. The term "*run-around*" seems to have been one that was used in the sentencing hearing with the benefit of hindsight. The representatives of Mrs K's estate have been consistent and plausible in explaining that they simply thought there were delays. Mr K was a family member and it's clear his family trusted him.

Whilst the estate of Mrs K now knows Mr K's delays were a warning flag, I'm satisfied based on everything I've seen that none of the beneficiaries of the estate knew this at the time. And I'm also satisfied it was reasonable to not know this at the time and to rely on the explanation they were given by their trusted registered financial adviser and the involvement of a probate solicitor. It's also clear that Mr K was very plausible and persuasive in how he carried out the fraud.

Taking everything into account, I've not seen anything that satisfies me the estate of Mrs K ought reasonably to have known of cause for complaint more than three years before the complaint. I'm therefore satisfied the complaint was made within the time limits.

Responsibility

I agree with the investigator that the fact Quilter wasn't named in the police reports and isn't criminally liable isn't determinative and that it may still be responsible for Mr K's actions.

To carry out regulated activities a business needs to be authorised (Section 19 of the Financial Services and Markets Act 2000 (FSMA)). CFC (and therefore Mr K) 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. The starting point for deciding whether Quilter is responsible for the actions of Mr K here is to consider the terms of the contract between Quilter and CFC.

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

- What are the specific acts the estate of Mrs K 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 the estate of Mrs K has complained about?

The estate of Mrs K complains Mr K advised Mrs K to invest money through him in a genuine investment but it's now clear he kept the money himself.

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 agreeing to advise on investments and agreeing to arrange deals in investments is a regulated activity under Article 64 RAO.

To satisfy the definition of the activity under Article 53 RAO there must be advice and, as the investigator explained, the advice must:

- Be to a person in their capacity as an investor or potential investor.
- Relate to an investment that's a security or relevant investment.
- Relate to the merits of buying, selling etc the investment.
- Relate to a particular investment.

Taking everything into account, I'm satisfied it's most likely Mr K advised Mrs K to invest £380,000 into a Sterling bond in December 2010. It's also my view that Mr K agreed to arrange that investment. I'm satisfied the Sterling bond was a specified investment. So, these acts therefore amounted to regulated activities.

I'm satisfied that if an adviser advises a client to invest in a specified investment, there's regulated investment advice even if the adviser then intercepts the payment and steals the money. This is because, as the investigator explained, although buying an investment naturally follows investment advice, the actual purchase isn't part of the definition of the regulated activity of advising on investments. The subsequent arranging of the deal is a separate regulated activity under Article 25 RAO – even if the two activities normally run one into the other without much thought being given to that process.

Did Quilter accept responsibility for those acts?

Which business was Mr K acting for?

To answer whether Quilter accepted responsibility for the acts complained of, the first question I need to satisfy myself of is whether Mr K was acting for Quilter when carrying out any of the acts.

Taking everything into account, I'm satisfied he was. I say this because he was named as an adviser on the two genuine bonds that were set up in May 2010 and June 2010 and it's clear he advised on these two bonds in his role at CFC. He also asked a follow up question to Sterling on 7 June 2010 in his role at CFC. There isn't as much documentation for the fictional bond and the page where the adviser would be inserted isn't included. But Mr K was clearly involved – he was stated to be an applicant and a trustee and he witnessed the application. I haven't seen any evidence that he held himself out as acting in his personal capacity or representing any other businesses for these events and I think it's most likely he continued holding himself out as acting in the same capacity.

I've therefore gone on to consider whether Quilter accepted responsibility for the acts complained about under the agreement it had with CFC.

The agreement with CFC

Quilter has accepted that Mr K was allowed to give advice on Sterling bonds under the appointed representative agreement. So, I'm satisfied that Quilter did accept responsibility for Mr K advising Mrs K to invest £380,000 in a Sterling bond.

What I've decided – merits

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

Quilter has argued that the merits of the complaint shouldn't be considered until the issue of jurisdiction is resolved. I've set out above my view on jurisdiction. I've made it clear how I've approached the issue and that I haven't based any part of my view on a consideration of what's fair and reasonable in all the circumstances.

As it's my view that I have jurisdiction and as both parties have been given the opportunity to comment on both jurisdiction and merits and, given the nature of our role to resolve complaints which are within our jurisdiction speedily and with minimal formality, I now set out my conclusions on the merits of the complaint of Mrs K's estate also. I don't agree that the DISP rules or the caselaw Quilter has quoted mean this has to be done in separate decisions. And I note that the investigator told Quilter on several occasions that this might be the next step and to make sure it made any arguments it had in relation to merits and compensation.

As I've set out above, I'm satisfied Mr K advised Mrs K to invest £380,000 in a Sterling bond but then failed to arrange that investment. He failed to do so because he was acting dishonestly. Instead, he paid Mrs K's money into his account and used it for his own purposes.

Mr K's conduct in not arranging the recommended investment as he'd agreed to do but instead stealing the money caused the estate of Mrs K to lose money. It also lost the investment return it could have earned on the money.

Is it fair and reasonable that Quilter compensate the estate of Mrs K?

Clearly Quilter didn't actually authorise Mr K to steal Mrs K's money. And it didn't receive it. So, the question is whether it's fair to require Quilter to compensate the estate of Mrs K for the losses?

I've found that Quilter is responsible for Mr K's conduct because I consider the law would impose liability on Quilter for his actions. So, it isn't necessarily unfair to require Quilter to pay compensation for the losses caused by Mr K's dishonesty. I don't have to follow the law but, bearing in mind the legal position, I do think it fair and reasonable to take as my starting point that I should ask Quilter to compensate the estate of Mrs K for the effect of Mr K's actions unless there's a good reason why it shouldn't do so.

Taking everything into account, I don't think Mrs K or her estate acted unreasonably in their belief that Mr K was conducting genuine Quilter business and was acting in their interests. They weren't careless. They were the innocent victims of a dishonest financial adviser.

In my view it's fair and reasonable in all the circumstances to require Quilter to compensate the estate of Mrs K.

Putting things right

In assessing what would be fair compensation, I consider that my aim should be to put the estate of Mrs K as close to the position it would probably now be in if Mrs K had not entrusted Mr K with advising her on her investments.

In the particular circumstances of this case, it seems most likely that Mrs K would have invested the £380,000 that was misappropriated into the same type of Sterling bond that she actually did invest £420,000 in in May/June 2010. She seems to have been happy with this recommendation and it appears to have been in line with the risk profile.

I'm satisfied that what I have set out below is fair and reasonable given Mrs K's circumstances and objectives at the time.

What should Quilter do?

To compensate the estate of Mrs K fairly, Quilter must:

- Contact Sterling to obtain a notional value, as at 6 April 2017, of the £380,000 Mrs K thought she'd invested. The £380,000 should be treated as though it'd been invested on 14 December 2010 into a Sterling bond the same as the ones she did in fact invest in in. The two genuine Sterling bonds were surrendered on 6 April 2017 and whilst I've considered whether all three would have been surrendered on an earlier date if the third bond had been genuine, this involves too many assumptions and I'm satisfied it's simpler and reasonable to assume they all would have been surrendered on 6 April 2017.

  From 6 April 2017 to the date of settlement, interest of 8% simple a year should be added to the notional value to reflect the fact the estate has been without the money since then. Income tax may be payable on this interest. If Quilter considers it's required by HMRC to take off income tax from the interest, it should tell the estate of Mrs K how much it's taken off. It should also give an appropriate certificate showing this if it asks for one, so it can reclaim the tax from HMRC if appropriate.

- Pay this notional value – less money returned (explained below) – to Mrs K's estate.

- Provide the details of the calculation in a clear, simple format.

Money returned to Mrs K's estate

I understand that Mr K returned £305,241.66 which was then distributed amongst Mrs K's estate. Quilter should deduct a proportion of this from the notional value at the point it was actually paid so it ceases to accrue any return in the calculation from that point on.

The proportion to be deducted here will be £380,000 as a proportion of the total amount Mr K misappropriated from Mrs K's estate.

Quilter has asked us to confirm whether any other money has been returned. The investigator asked questions about this and was satisfied no other money has been returned. I'm satisfied with the investigation that's been carried out on this and so I make no further deductions.

Quilter may require that the estate of Mrs K provides an undertaking to pay it any repayments it may receive in the future. Although if Quilter chooses to limit compensation to our award limit, the undertaking should only apply to any amounts received once the estate of Mrs K has been fully compensated in line with this decision. Quilter will need to meet any cost in drawing up the undertaking.

My final decision

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £160,000, plus any interest and/or costs/interest on costs that I think are appropriate. If I think that fair compensation is more than £160,000, I may recommend that the business pays the balance.

Decision and award: I uphold the complaint. I think that fair compensation should be calculated as set out above. My decision is that Quilter Financial Limited should pay the estate of Mrs K the amount produced by that calculation – up to a maximum of £160,000 plus any interest.

Recommendation: If the amount produced by the calculation of fair compensation is more than £160,000, I recommend that Quilter Financial Limited pays the estate of Mrs K the balance.

This recommendation is not part of my determination or award. Quilter Financial Limited doesn't have to do what I recommend. It's unlikely that the estate of Mrs K can accept my decision and go to court to ask for the balance. The estate of Mrs K may want to get independent legal advice before deciding whether to accept this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mrs K to accept or reject my decision before 21 March 2023.

Laura Parker
Ombudsman