

## **The complaint**

Mr J complains that he was given unsuitable advice by Mr O to switch his personal pensions into a Self-Invested Personal Pension ("SIPP") to make unregulated, high risk investments. At the time of advice, Mr O was a Registered Individual ("RI") agent of Positive Solutions (Financial Services) Limited, now known as Quilter Financial Planning Solutions Limited. The investments have since failed and Mr J says that Quilter should pay him compensation for his losses.

## **What happened**

In 2010, Mr J was contacted via a cold call. An advisor then met him at his house to discuss his pensions and possible investments. Mr J believes this adviser was Mr O, an RI of Quilter. He was told that his pensions with JIB and the Co-Operative were not performing well and was advised to switch his funds into a SIPP with a company called Lifetime. He also says that two investments were discussed.

A SIPP application was submitted by Mr O and in total, £23,533 was switched into the Lifetime SIPP in September 2010. Of these funds, £3,125 was invested into Sustainable AgroEnergy PLC ("SAE") and £16,172 was invested into Cascade Mosaic Portfolio ("Mosaic").

On 8 September 2010, £1,000 IFA fees paid to Mr O/Positive Solutions out of the SIPP.

On 26 April 2011, £106 IFA fees were paid from the SIPP to a separate firm, I'll call it Firm B in this decision, which had no connection with Quilter. Further fees were paid to Firm B in subsequent years

The investments failed and in 2019, Mr J, complained to Quilter about the unsuitable advice allegedly given by its RI, Mr O. Mr J said that he was not aware that the investments were high risk. He had no previous investment experience and trusted that the advice given was professional and suited his personal and financial needs.

Quilter's response was that the complaint was made too late, and therefore not one it would consider. It also said that it did not authorise Mr O to give investment advice and was therefore not responsible for the advice being complained about.

The matter was looked at by our investigators. The first investigator said, based on the evidence produced by the parties, Mr J's complaint had been made in time under our rules. A subsequent investigator concluded that Quilter had accepted responsibility for the pension advice and was therefore responsible for Mr O's advice – including the investment advice. So the investigator concluded that we did have jurisdiction to consider the complaint against Quilter. She also concluded that Mr O had given Mr J unsuitable advice and therefore Quilter was responsible for his losses.

Quilter disagreed and asked for an ombudsman's decision on the matter.

Following a review of the evidence by me, and in subsequent correspondence with our service, Quilter has accepted responsibility for the pension and investment advice. But it says that Firm B's involvement means that I should conclude that it is not responsible for any losses after 2011.

I've now reviewed matters again and set out my decision below.

### **Our jurisdiction**

We can't consider all complaints brought to this service. Before we can consider something, we need to check, by reference to the FCA's DISP Rules and the legislation from which those rules are derived, whether the complaint is one we have the power to look at.

Quilter's recent correspondence suggests that it is no longer disputing our jurisdiction in this matter. Nevertheless I still set out my views on this below.

In summary, we can only consider complaints that are made within six years of the act being complained about or, if this gives more time, within three years of when the complainant knew or ought reasonably to have known they had cause for complaint.

This complaint was made more than six years after the advice in 2010. However, there is no evidence (for example by way of annual statements and investment updates) from either the SIPP operator or the parties to the complaint clearly demonstrating that Mr J knew or ought to have known that the investments made in the SIPP were high risk and/or unsuitable more than three years before he made his complaint in 2019. So, like the investigators before me, I conclude that the complaint is not time barred.

Quilter also said during this complaint that its RI– Mr O – did not submit the pension switching advice to Quilter for approval and that it did not receive commission for the switch. It also said that none of the SIPP operator or investments were approved product providers. Quilter said this meant it wasn't responsible for the advice that Mr J complains about under our rules as it had not authorised the advice.

But it is clear from the advice letter and SIPP application and other documents that Mr O did give Mr J pension switching advice and purported to do so as an agent of Quilter. It is possible that Mr O was paid the commission from the SIPP operator directly. But the evidence shows that Mr O *did* submit the pension switching advice to Quilter for approval. I say this because Quilter itself has provided us with a copy of the advice letter and fact find which includes submission notes.

Therefore, I conclude that Quilter did likely authorise the pension switching advice given by its agent – Mr O – to Mr J in August 2010. So it is responsible for that advice and the investments connected with the pension switch.

### **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.

Again, Quilter no longer appears to dispute that the advice was unsuitable. But I deal with the merits very briefly below in any event.

When giving the pension switching advice, I think it is likely that Mr O either gave Mr J (undocumented) advice to make the unregulated investments that would be held in the SIPP

after the switch or alternatively knew that this is what was intended. Indeed, “unregulated investments” are mentioned in the advice letter that Mr O prepared for Mr J.

Mr O purported to give “restricted” advice on the switch to the SIPP without reference to the underlying investments to be held in the SIPP. But this wasn’t what Mr O should have done. The advice to switch to a SIPP cannot reasonably be considered by an adviser in isolation. The suitability of the proposed investment should also be considered. So, Mr O should have established that the SIPP he was recommending would be used for high risk unregulated investments and included advice about whether those investments were suitable.

SAE and Mosaic were both high risk, unregulated investments. They were clearly unsuitable for a retail consumer like Mr J. He can’t reasonably have been said to be a high risk investor and certainly had little capacity for loss to his pension funds.

So, I conclude that suitable advice to Mr J should have been for him to remain invested in his previous schemes and not transfer to a SIPP to make the high risk investments that have caused him to suffer losses. If he had received such advice, I’m satisfied that he would have followed it and remained invested in his previous schemes. As such, Quilter should pay Mr J compensation for its agents unsuitable advice.

The only area of current dispute is whether the compensation paid by Quilter should be limited because of the involvement of another firm – Firm B. Firm B appears to have been involved in obtaining information from Mr J’s previous pension schemes in 2010. It also received a trail commission from the SIPP from 2011. So, Quilter says that Firm B should have told Mr J that he was invested in unsuitable products and so Firm B – and not Quilter – should be responsible for losses from 2011 onwards.

I’ve considered this but I’m not persuaded that Quilter should be absolved of all or indeed any responsibility for Mr J’s loss. It looks like Mr O’s role was crucial – he advised on and submitted the SIPP application. Furthermore, I’ve seen nothing to suggest that there was a secondary market for either the SAE or Mosaic investments. So, I think it’s more likely than not that Mr J could not have sold the investments even if he later received advice that they were unsuitable. So, in the circumstances, I think it’s fair and reasonable for Quilter to pay Mr J compensation for all his losses.

### **Putting things right**

My aim is that Mr J should be put as closely as possible into the position he would probably now be in if he had been given suitable advice.

I take the view that Mr J would have remained with his previous providers, however I cannot be certain that a value will be obtainable for what the previous policies would have been worth. I am satisfied what I have set out below is fair and reasonable, taking this into account and given Mr J’s circumstances and objectives when he invested.

### **What must Quilter do?**

To compensate Mr J fairly, Quilter must:

- Compare the performance of Mr J’s investment with the notional value if it had remained with the previous providers. If the actual value is greater than the notional value, no compensation is payable. If the notional 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 J'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 J'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 J won't be able to reclaim any of the reduction after compensation is paid.
- The *notional* allowance should be calculated using Mr J's actual or expected marginal rate of tax at his selected retirement age.
- It's reasonable to assume that Mr J is likely to be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, if Mr J 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 J £250 for the distress caused by the total loss of his personal pension provision. This will undoubtedly been the cause of much worry to him for some time.

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

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
The Lifetime SIPP (now known as Hartley SIPP).	Still exists but illiquid	Notional value from previous providers	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 portfolio if there are assets that are illiquid (meaning they can't be readily sold on the open market). Quilter should take ownership of any illiquid assets 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 illiquid assets, their value should be assumed to be nil for the purpose of calculating the *actual value*. Quilter may require that Mr J provides an undertaking to pay Quilter any amount he may receive from the illiquid assets 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.

As I've said to Quilter before, bearing in mind Firm B's involvement, Quilter should have the option of payment of this redress being contingent upon Mr J assigning any claim he may have against Firm B. If Quilter wishes to do this, it should bear the cost of drawing up any assignment agreement.

### ***Notional Value***

This is the value of Mr J's investment had it remained with the previous providers until the end date. Quilter should request that the previous providers calculate this value.

Any contributions or withdrawals Mr J has made will need to be taken into account whether the notional value is established by the ceding provider or calculated as set out below.

Any additional sums Mr J paid into the SIPP from outset through until the end date should be added to the *notional value* calculation from the point in time when they were actually paid in.

Any withdrawals from the SIPP from outset through until the end date should be deducted from the notional value calculation at the point they were actually paid, so that they cease to accrue any return in the calculation from that point on. To be clear this doesn't include SIPP charges or fees.

If there's 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 to determine the notional value instead of deducting periodically.

If the previous providers are unable to calculate a notional value, Quilter will need to determine a fair value for Mr J's investment instead, using this benchmark: FTSE UK Private Investors Income Total Return Index. The adjustments above also apply to the calculation of a fair value using the benchmark, which is then used instead of the notional value in the calculation of compensation.

The Lifetime SIPP likely only exists because of illiquid assets. If that is the case, in order for the Lifetime SIPP to be closed and further fees that are charged to be prevented, those assets need to be removed. I've set out above how this might be achieved by Quilter taking over the illiquid assets, or this is something that Mr J can discuss with the provider directly. But I don't know how long that will take.

Third parties are involved and we don't have the power to tell them what to do. If Quilter is unable to purchase the illiquid assets and the SIPP can't be closed, to provide certainty to all parties I think it's fair that it pays Mr J an upfront lump sum equivalent to five years' worth of wrapper fees (calculated using the fee in the previous year to date). This should

provide a reasonable period for the parties to arrange for the Lifetime SIPP to be closed.

### **Why is this remedy suitable?**

I've decided on this method of compensation because:

- Mr J wanted Capital growth and was willing to accept some investment risk.
- If the previous provider is unable to calculate a notional value, then I consider the measure below is appropriate.
- 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 J'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 J in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 13 March 2023.

Abdul Hafez  
**Ombudsman**