DRN-3944390

The complaint

Mr K complains about the acts of Mr K2. He says he believed he was investing money through him (on his advice) but it's now clear Mr K2 kept the money himself and didn't invest it. He says Quilter Financial Limited (Quilter) is responsible because Mr K2 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 K2 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 Mr K. This is therefore the name I've used throughout this decision. CFC has been an appointed representative of Quilter since 5 October 2010. Quilter's previous name was Caerus Financial Limited so references to Caerus in this decision should be read as Quilter.

Mr K and Mr K2 are related. Mr K says Mr K2 had previously set up bonds for another family member and had given him mortgage advice in 2009. So, he decided to get formal advice from him in 2012 when he had money to invest. He says they had a meeting at CFC's office where they went through an attitude to risk questionnaire and calculator. And he says Mr K2 then recommended that he invest £10,000 in a stocks and shares ISA.

Mr K transferred £10,000 to Mr K2 on 29 February 2012.

A contract note dated 9 March 2012 was addressed to DNK Wealth Management (Mr K2's personal business) and said £10,000 had been invested across two portfolios in a "*Caerus*" stocks and shares ISA. Statements for the "*Caerus*" stocks and shares ISA were given to Mr K on provider branded paper addressed to DNK Wealth Management with valuation dates of 29 January 2013, 27 July 2013, 27 January 2014, 28 July 2014, 25 February 2015 and 25 April 2016.

It now seems that Mr K's £10,000 was never invested by Mr K2 and was in fact misappropriated by him and this documentation was fabricated.

Mr K complained to Quilter. Quilter issued a final response letter saying it wasn't responsible. In summary, it said:

- The police investigation said Mr K2 was solely responsible for the fraud and didn't mention Quilter at any time.
- Mr K2 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 the complaint had been made within the time limits.

- 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 K2 was most likely acting as CFC when he gave the advice, and he was authorised by it to give advice on stocks and shares ISAs.

- If everything had happened as it should have, Mr K would have invested and so compensation should be paid in line with the most suitable benchmark.

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 view, the issue has been passed to me for a decision.

What I've decided – 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 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 whether Quilter has objected to us considering the complaint on the basis it was made outside the time limits, but I've addressed this for completeness. The advice complained about here seems to have been in or before February 2012. Mr 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 Mr K knew, or ought reasonably to have known, he had cause for complaint.

Mr K says he didn't know he had cause for complaint until September 2017 when issues with a life insurance policy and the trusteeship for a bond held by other family members became apparent and so the family confronted Mr K2 and he admitted what he'd done. The complaint was made within three years of that date.

Taking everything into account, I've not seen anything that satisfies me Mr 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 K2'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 K2) 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 K2 here is to consider the terms of the contract between Quilter and CFC.

But the case law also indicates that there's a difference between acts and omissions in breach of the principal's requirements as to "*what*" activity the appointed representative can carry on and acts and omissions which breach "*how*" the appointed representative may carry on permitted activities. The former kind of breach takes the appointed representative's conduct out of the principal's ambit of responsibility, but the latter doesn't, being regarded instead as a matter "*inter se*" the principal and the appointed representative.

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

- What are the specific acts Mr 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 Mr K has complained about?

Mr K complains Mr K2 advised him to invest money through him into a Caerus stocks and shares ISA 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 K2 advised Mr K to invest £10,000 into a stocks and shares ISA in February 2012. Mr K has been consistent and plausible on this point throughout and although we don't have any documentation from the time, we have evidence of later communications that suggest Mr K2 gave ongoing advice on this. For example, in an email dated 29 January 2013, Mr K2 said to Mr K:

> *Next steps to consider…….*
>
> *The money has done well thus far and I would be tempted to consolidate some of the gains you have made and maybe move some of the money from the second pot which is riskier, but has done better, and put it into the first pot which will be more steady.*

In an email dated 4 March 2015, Mr K2 said to Mr K:

> *I would suggest that you only surrender the ISA when you have found a property to purchase for a buy to let and you have had both an offer accepted and a mortgage offer made – otherwise you cannot put the money back into the ISA funds. This saves you losing the tax free status of the money invested.*

And in an email dated 28 April 2016, Mr K2 said to Mr K:

> *I would look at the possibility of moving into a more cautious approach across the board given the BREXIT anxiety – so this may involve moving your balanced holdings so that you have 100% in cautious. Will keep you updated on this one.*

I've additionally been provided with evidence of Mr K2 advising other family members in relation to their investments and I think this pattern of behaviour is a relevant consideration.

It's also my view that Mr K2 agreed to arrange the stocks and shares ISA investment in February 2012.

I'm satisfied the stocks and shares in the ISA were specified investments. 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. So, one can happen without the other.

Did Quilter accept responsibility for those acts?

Which business was Mr K2 acting for?

To answer whether Quilter accepted responsibility for the acts complained of, the first issue I need to satisfy myself about is whether Mr K2 was acting for Quilter when carrying out any of the acts.

Taking everything into account, I'm satisfied he was. I say this because an email from Mr K2 to Mr K on 29 January 2013 read:

Please see the report which shows your holdings in your ISA.

The report is one of a few we would use when looking at a clients overall position. The report is branded as a Skandia Report, but please note that your ISA is NOT held with them. We simply use their reporting software as it is the best on the market. We will be working closer to Skandia in the future but I can keep you updated on that as things develop.

Your ISA is administered by Caerus – our company – and it would be myself that arranges any transfers or withdrawals etc. Any new business now goes through a company called Parmenion which now administers all our new investment business. It would be my intention to look at potentially moving your existing ISA over to them before the end of the tax year, and any new contribution or withdrawals would be dealt with through me. Again, we can discuss this on your return…

The Caerus funds aim to achieve a higher level of return than its competitors, but without taking the extra risk that so many fund managers do to chase their returns. Our investment mandate is to make sure that the client never takes more risk than they are happy with. We have done this and outperformed the sector average by the 1.79% as highlighted in the report. There will be some funds that will have performed at a similar level to yours, but they will have had to have taken more risk in order to achieve this.

And a further email from Mr K2 to Mr K dated 17 February 2015 read:

These are the figures we get from FE Analytics which is a fund research comparison tool. They are NOT meant to be given to clients at this stage as they do not take into account adviser charges etc – having said that you don't pay these charges so the figures are correct.

These emails were both sent from a personal email address and the fictional documentation attached referred to DNK Wealth Management. But taking everything into account, I'm satisfied they were clearly presenting Mr K2 as acting as an appointed representative of Quilter. He refers to Caerus as "*our company*" in one and throughout uses "*we*" and "*our*" language in relation to Caerus. This also matches up with Mr K's recollections that he was invited to CFC's office to go through an attitude to risk questionnaire and calculator.

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

In response to questions from the investigator, Quilter said:

To confirm, as a CF30 [Mr K2] *was permitted to provide advice in respect of Stocks and Shares ISAs.*

Like the investigator, I accept that it does seem Mr K2 breached some terms of the agreement, for example, holding client money. However, also like the investigator, I'm satisfied these breaches were of the type that, according to the case law, are breaches of *how* CFC undertook authorised activities, not a breach of a provision of *what* activities it could undertake at all.

So, I'm satisfied that Quilter did accept responsibility for Mr K2 advising Mr K to invest £10,000 in a stocks and shares ISA and agreeing to make arrangements for that investment. Which means it's responsible under Section 39 FSMA for the acts being complained about and it's a complaint we have jurisdiction to consider.

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.

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 Mr K's complaint also. 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 K2 advised Mr K to invest £10,000 into a stocks and shares ISA but then failed to arrange that. He failed to do so because he was acting dishonestly. Instead, he paid Mr K's money into his account and used it for his own purposes.

Mr K2's conduct in not arranging the recommended investment as he'd agreed to do but instead stealing the money caused Mr K to lose money. He also lost the investment return he could have earned on the money.

Is it fair and reasonable that Quilter compensate Mr K?

Clearly Quilter didn't actually authorise Mr K2 to steal Mr K's money. And it didn't receive it. So, the question is whether it's fair to require Quilter to compensate Mr K for the losses?

I've found that Quilter is responsible for Mr K2'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 K2'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 Mr K for the effect of Mr K2's actions unless there's a good reason why it shouldn't do so.

Taking everything into account, I don't think Mr K acted unreasonably in his belief that Mr K2 was conducting genuine Quilter business and was acting in his interests. He wasn't careless. He was the innocent victim of a dishonest financial adviser.

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

Putting things right

In assessing what would be fair compensation, I consider that my aim should be to put Mr K as close to the position he would probably now be in if he had not been given unsuitable advice.

I take the view that Mr K would have invested the £10,000 that was misappropriated. It's not possible to say *precisely* what he would have invested in. But I'm satisfied that what I have set out below is fair and reasonable given Mr K's circumstances and objectives at the time.

Like the investigator I'm satisfied it doesn't seem as though Mr K has lost out on any of the tax benefits of an ISA, so I haven't made an allowance for this in the compensation.

What must Quilter do?

To compensate Mr K fairly, Quilter must:

- Compare Mr K's fictional investment with the performance of the benchmark shown below and pay the difference between the *fair value* and the *actual value* of the investments.

- Add any interest set out below to the compensation payable.

- Pay to Mr K £300 for the distress and worry caused to him by the total loss of the £10,000 he thought he was investing.

Income tax may be payable on any interest awarded.

I'm satisfied none of Mr K's money has been returned to him. However, Quilter may require that he provides an undertaking to pay it any repayments he may receive in the future. Quilter will need to meet any cost in drawing up any such undertaking.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Stocks and shares ISA	Fraudulent	For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	Date the money was paid – 29 February 2012	Date of my final decision	8% simple per year on the loss from the date of my final decision to the date of settlement if not settled within 28 days of the business receiving Mr K's acceptance

Actual value

This means the actual amount paid from the investment at the end date. In this case this will be £0.

Fair value

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

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, Quilter should use the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

Why is this remedy suitable?

I've decided on this method of compensation because:

- Mr K wanted capital growth with a small risk to his capital.
- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to his capital.
- The FTSE UK Private Investors Income ***Total Return*** index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is a mix of diversified indices representing 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.
- I consider that Mr K's risk profile was in between, in the sense that he was prepared to take a small level of risk to attain his investment objectives. So, the 50/50 combination would reasonably put Mr K into that position. It does not mean that Mr K would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker fund. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mr K could have obtained from investments suited to his objective and risk attitude.

My final decision

I uphold Mr K's complaint and require Quilter Financial Limited to pay Mr K fair compensation as set out above.

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 11 April 2023.

Laura Parker
Ombudsman