DRN-3944398

The complaint

Mrs K complains about the acts of Mr K. She says she believed she was investing money through him (on his advice) but it's now clear Mr K kept the money himself and didn't invest it. She 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

The Financial Conduct Authority (FCA) register suggests 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. This is therefore the name I've used throughout this decision. The FCA register shows 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.

The investigator queried the dates on the FCA register as Mr K seemed to still be holding himself out as CFC after 31 December 2012. Quilter confirmed that the dates on the FCA register are incorrect and said:

> *To confirm,* [Mr K] *was an appointed representative of Quilter Financial Limited between 20 September 2010 and 6 July 2015.*

The dates Quilter has provided – rather than the incorrect dates on the FCA register – are therefore the dates I've used for the purpose of this decision.

Mr K is related to Mrs K. She says he'd previously set up bonds for another family member and had invested money for her in 2009 for a five-year term that had performed well. So, she decided to get further formal advice from him in 2014 when money from her previous investment was available to reinvest. She says they had a meeting at her home where they went through an attitude to risk questionnaire and calculator. And she says Mr K then recommended that she invest £20,000 in shares in a property company.

Mr K sent a letter to Mrs K on CFC headed paper on 26 June 2014. This read:

> *I can confirm receipt of the £20,000 invested into my client account.*
>
> *This is a pooled investment so your funds will be invested along with other clients pension funds by the end of the month.*
>
> *Statements relating to the performance of this investment will be sent to me and I will then be updating the scheme members on an annual basis.*
>
> *I enclose a copy of the investment prospectus and the signed application form for your records.*

An application form for £20,000 of shares was also dated 26 June 2014. And bank statements for Mr K show £20,000 being received on 27 June 2014 and then paid out the next day – on 28 June 2014.

I've also been provided with a letter from "*Project Capital Maximiser SPV LTD*" dated 2 July 2014 which read:

> *We confirm receipt of £20,000.00 (Twenty Thousand Pounds) from DNK Wealth Management* [Mr K's business] *for the investment into the Custodian Capital REIT UK Property Investment Company for his client* [Mrs K].
>
> *We have arranged for this sum to be placed for investment along with the other pension scheme members who are entering the same investment product.*

It now seems that Mrs K's £20,000 was never invested by Mr K and was in fact misappropriated by him.

Mrs K complained to Quilter. 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.
- 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 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 K was most likely acting as CFC when he gave the advice, and he was authorised by it to give advice on investments in shares.
- If everything had happened as it should have, Mrs 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. After considering Mrs K's circumstances and attitude to risk in 2014, I felt a different benchmark was more appropriate to calculate compensation. The investigator therefore shared this with both parties and invited comments, but none were received.

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, so I've addressed this for completeness. However, the complaint was referred to Quilter on 16 December 2019. And it seems the advice complained about was given in or shortly before June 2014 when Mrs K transferred the money. This means the complaint was made within six years of the events complained about so doesn't fall outside 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.

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.

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

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

Mrs K complains Mr K advised her to invest money through him into shares in a property company 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 £20,000 into shares in a property company in June 2014. Mrs K has been consistent and plausible on this point throughout, and it seems unlikely that she'd have made the investment without receiving any advice. I also note that documentation from the time, in particular the application form for the shares, referred to Mr K as her adviser. It's also clear to me from the documentation that Mr K agreed to arrange that investment. I'm satisfied the shares were 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 issue I need to satisfy myself about 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:

- An "*Agreement for the Provision of Investment Services to Retail Clients*" document was on Caerus (now Quilter) headed paper and Mr K of CFC was filled in as the adviser.

- The application form for the shares said that Mr K was the adviser and gave CFC's details, including its address and FCA number.

- The 26 June 2014 letter from Mr K confirming receipt of the £20,000 was on CFC headed paper.

- When Mr K emailed Mrs K from his personal account on 2 June 2015 with documentation for the fictional investment, he added a CFC footer to the bottom of the email.

- I haven't seen any evidence that Mr K held himself out as acting in his personal capacity or representing any other businesses for these events.

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, Quilter did not allow* [Mr K] *to provide advice and/or arrange investments in shares.*
>
> *Please find attached a copy of the Provider and Product Panel in place at the time which shows what he was able to provide advice on.*

This provider and product panel list was headed:

> *CAERUS Capital Group – Provider and Product Panel*
> *This document should be read in conjunction with your Client Agreement*

And shares weren't included on the list. However, the appointed representative agreement between CFC and Quilter that Quilter provided didn't refer to this provider and product panel list. Instead, it said:

> *The Firm hereby appoints the Representative as its appointed representative, subject to the terms of this Agreement. The Firm authorises the Representative to conduct the Relevant Activities.*

"Relevant Activities" was defined as:

> *the activities regulated under FSMA set out in Schedule 1 which the Representative will be carrying out under this Agreement.*

And Schedule 1 set out that relevant activities included, in relation to life policies, units and shares:

> *Making arrangements with a view to transactions in investments (article 25(2) RAO)…*
>
> *Advising on investments (article 53 RAO)…*
>
> *Agreeing to carry out the regulated activities set out…above*

The investigator therefore concluded that advising on shares and agreeing to make arrangements for transactions in shares were allowed under the agreement. Quilter hasn't provided any further comments or evidence on that point in response to that view and I agree with the investigator's interpretation of the agreement.

Like the investigator, I accept that it does seem Mr K 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 K advising Mrs K to invest £20,000 in shares in a property company and agreeing to make arrangements for that investment. It's therefore responsible under Section 39 FSMA for the acts being complained about.

My decision – jurisdiction

My decision is that the Financial Ombudsman Service is able to consider Mrs K's complaint about Mr K.

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 Mrs 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 K advised Mrs K to invest £20,000 into shares in a property company 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 Mrs K to lose money. She also lost the investment return she could have earned on the money.

Is it fair and reasonable that Quilter compensate 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 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 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 acted unreasonably in her belief that Mr K was conducting genuine Quilter business and was acting in her interests. She wasn't careless. She 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 Mrs K.

Putting things right

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

I take the view that Mrs K would have invested the £20,000 that was misappropriated. It's not possible to say *precisely* what she would have invested in. But 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 must Quilter do?

To compensate Mrs K fairly, Quilter must:

- Compare Mrs 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 investment.

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

- Pay to Mrs K £300 for the distress and worry caused to her by the total loss of the £20,000 she thought she was investing.

Income tax may be payable on any interest awarded.

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

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Custodian Capital REIT UK Property Investment	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 – 26 June 2014	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 Mrs 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:

- Mrs K wanted capital growth with a small risk to her 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 her 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 Mrs K's risk profile was in between, in the sense that she was prepared to take a small level of risk to attain her investment objectives. So, the 50/50 combination would reasonably put Mrs K into that position. It does not mean that Mrs K would have invested 50% of her 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 Mrs K could have obtained from investments suited to her objective and risk attitude.

My final decision

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

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs K to accept or reject my decision before 17 April 2023.

Laura Parker
Ombudsman