

The complaint

Ms M complains about the acts of Mr M2. She says he gave her unsuitable advice to switch her pension to a self-invested personal pension (SIPP) to make a high-risk investment. She says Quilter Financial Services Ltd (Quilter Financial) is responsible because Mr M2 was with a business that was an appointed representative of it at the relevant time.

What happened

I can see from the Financial Conduct Authority (FCA) register that Mr M2 worked for a business called Mortgage Choices (now Choices Financial Ltd). According to the FCA register, that business has been an appointed representative of several different businesses:

- Quilter Mortgage Planning Limited (Quilter Mortgage) between 2 November 2006 and 7 December 2010.
- Quilter Financial between 8 October 2007 and 7 December 2010.
- First Complete between 15 December 2010 and 28 January 2011 and from 11 May 2011 until now.

Quilter's previous name was Intrinsic so references to Intrinsic in this decision should be read as Quilter.

Ms M says her partner had been advised by Mr M2 and he suggested that she contact him for advice too. She says there were several meetings where Mr M2 advised her to switch her pension to a SIPP and invest in a resort. She says he advised her to buy jointly with her partner to be able to afford a better quality apartment.

Ms M says Mr M2 told her the scheme was backed by the government and that he'd invested in it himself. The projections that were provided showed very good income returns and significantly increased capital values and she says she wasn't told about any risks or that the apartment would need to be sold before she could access her pension funds.

A reservation form was signed on 26 January 2010. Ms M invested jointly with her partner with the intention that 45% would be paid initially and the remaining 55% on the completion of the resort.

In March 2010 Ms M's partner emailed Mr M2 to say they'd decided to not go ahead. Mr M2 replied on 24 March 2010 saying:

I would not be talking to my family and clients about this investment opportunity if I did not think it was a massive opportunity to maximise your existing provisions and make retirement look a lot more comfortable than it does at present. I would urge you to give it some more thought and if you would like me to speak to [Ms M] again I would be happy to.

That email was sent from a personal email account, but it had a footer which read:

Mortgage Choices is an appointed representative of Intrinsic Financial Planning Limited which is authorised and regulated by the Financial Services Authority

Ms M and her partner decided to go ahead after reassurances. The SIPP application was done in June 2010. The application form referred to CIB (Life & Pensions) Ltd (CIB) as Ms M's financial adviser. Ms M says this firm was referred to her as part of the package of organising the SIPP and investment, but she says she never met anyone from that business and only received a report from it reiterating the advice Mr M2 had already given her.

The SIPP was set up in August 2010 and Ms M's pension – £33,328.43 – was switched to it. £19,791 was paid to The Resort Group from Ms M's SIPP on 29 November 2010 and Ms M and her partner entered a promissory contract to buy an apartment. Further payments were made from Ms M's SIPP on 21 February 2012; 28 September 2012; and 8 September 2020 – of £5,500, £4,700 and £1,320.97 respectively.

In August 2014, a further promissory contract replaced the first one and Ms M and her partner's interest in all of one apartment was transferred to a half-share of a different apartment.

It hasn't been possible to sell the apartment and Ms M says her investment is therefore worthless.

Ms M made a claim to the Financial Services Compensation Scheme (FSCS) about CIB and received compensation, but this didn't fully compensate her, so she obtained a reassignment of rights from the FSCS to complain about Quilter Financial.

Quilter Mortgage responded to the complaint. It said there was no evidence Mr M2 had given advice as either Quilter Mortgage or Quilter Financial. It said it had no business relationship with The Resort Group and had received no remuneration. And it said Mr M2 had been a mortgage adviser with Quilter Mortgage and was only authorised to give advice on mortgages and protection products.

An investigator was satisfied we couldn't consider Ms M's complaint against either Quilter Mortgage or Quilter Financial because he said there was no evidence Mr M2 had given advice representing either of those businesses. Ms M didn't agree and said it's possible for two firms to carry out regulated activities at the same time. The issue was therefore passed to me for a decision.

I issued a provisional decision saying I was satisfied Mr M2 had advised Ms M and that he'd done so whilst acting for Quilter Financial. I was satisfied Quilter Financial was responsible for the acts complained about and that this service could therefore look at Ms M's complaint about Quilter Financial. I was also satisfied that complaint should be upheld.

Quilter Financial replied to say it has nothing further to add. Ms M's representative replied saying she and it agree with my provisional decision on jurisdiction and merits. But in terms of the compensation I'd proposed, it said if the compensation is paid into Ms M's pension as set out in my provisional decision, Ms M would immediately need to withdraw a significant portion of it to repay the FSCS which would cause unintended issues. So, it asked me to direct that the money be paid to Ms M instead, or that Ms M be given the choice so she can seek advice.

Having reconsidered my provisional findings, I'm satisfied my decision on jurisdiction and merits hasn't changed. I've therefore repeated my provisional findings below with Ms M's additional point on compensation addressed in that section.

What I've decided – jurisdiction

I've considered all the evidence that's been provided. Having done so, I'm satisfied this complaint is one that the Financial Ombudsman Service has jurisdiction to consider.

Which business the complaint should be against

Quilter Financial and Quilter Mortgage both say that the complaint should be set up against Quilter Mortgage.

Quilter Mortgage says Mortgage Choices was appointed by both it and Quilter Financial, but the offer letter of 26 October 2006 (signed 4 November 2006) makes it clear that it will be representing Quilter Mortgage. It provided a copy of this offer letter which reads:

We are delighted to offer you a Membership Agreement representing Intrinsic Mortgage Planning Limited. This letter (the "Offer") sets out the terms on which we can offer you a Membership Agreement and supersedes any previous offers you may have received...

The Membership Agreement incorporates the Individual Rates Document, the Compliance Manual (available through Intrinsic's Website) and the Sales Process all as expressly modified or augmented by this Offer. The Membership Agreement incorporating these documents therefore sets out the terms of the agreement between you and Intrinsic...

You will be required to use business stationery approved by Intrinsic, including letterheads and business cards, so that you can correctly represent your status as an appointed representative of Intrinsic Mortgage Planning...

We would like to welcome you to Intrinsic Mortgage Planning Limited and we look forward to working with you over the coming years as you build your business.

It also says Mr M2's Quilter number was an "MPA" number rather than a "FPA" number which shows he was a mortgage planner rather than a financial planner. And it's referred to various documents where Mr M2 was referred to as a mortgage planner and where Mr M2 had filled in "N/A" on documentation when a FCA number was requested. As well as the proposition letter sent to Mortgage Choices on 27 September 2006 which only talked about protection, mortgage and general insurance business.

I've considered these points carefully, but I don't agree that Quilter Mortgage is the correct business. As Quilter Financial acknowledges and as the FCA register shows, Mortgage Choices was appointed by both Quilter Financial and Quilter Mortgage. The appointed representative agreement Mortgage Choices had stated "*The Member is an Appointed Representative of Intrinsic*" with "*Intrinsic*" defined as "*Intrinsic Financial Planning Limited and Intrinsic Mortgage Planning Limited*".

I note what Quilter Financial says about the offer and proposition letters and the other documentation and sources that refer to Mr M2 as a mortgage planner. But the agreement that was in place didn't restrict Mortgage Choices to representing Quilter Mortgage. And the reality of the situation is that Mr M2 held himself out as representing Quilter Financial when he sent an email with a footer which read:

Mortgage Choices is an appointed representative of Intrinsic Financial Planning Limited which is authorised and regulated by the Financial Services Authority

I haven't seen anywhere that Mr M2 held himself out as representing Quilter Mortgage to Ms M and it was Quilter Financial Ms M complained to. Taking everything into account, I'm satisfied the complaint was correctly set up against Quilter Financial.

Responsibility

To carry out regulated activities a business needs to be authorised (Section 19 of the Financial Services and Markets Act 2000 (FSMA)). Mortgage Choices (and therefore Mr M2) wasn't directly authorised. Instead, it was an appointed representative of Quilter Financial. Quilter Financial 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.

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

- What are the specific acts Ms M has complained about?

- Are those acts regulated activities or ancillary to regulated activities?
- Did Quilter Financial accept responsibility for those acts?

What are the specific acts Ms M has complained about?

Ms M complains Mr M2 gave her unsuitable advice to switch her pension to a SIPP to make a high-risk property investment.

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). The rights under a personal pension scheme (which includes Ms M’s previous pension and the SIPP she moved to) are specified as investments by a provision in Article 82 RAO and it’s likely the investment she made was also such an investment. Advising on investments is a specified activity under Article 53 RAO.

Ms M says Mr M2 advised her to move her pension to make the investment and although another business later became involved, she never met anyone from that business, and it simply repeated the advice Mr M2 had already given her. Quilter Financial says Mr M2 didn’t give advice and it was CIB that did.

I’ve thought carefully about all the evidence. Taking everything into account, I’m satisfied it’s most likely Mr M2 advised Ms M to switch her pension and make the investment she did.

I accept Quilter Financial has no record of Ms M and there’s no evidence of Mr M2 having done a suitability report. But although suitability reports are one of the indicators that advice was given, the absence of one doesn’t mean advice wasn’t given.

In the circumstances here, there are several things that satisfy me it’s most likely Mr M2 advised Ms M:

- Ms M’s recollections of the conversations she and her partner had with Mr M2 suggest Mr M2 gave advice. Ms M has clearly and consistently said Mr M2 suggested she move her pension as this would benefit her. I’ve found her recollections from the time to be detailed and plausible and it’s clear she was only aware of the investment because of Mr M2.
- On 24 March 2010, Mr M2 referred to the switch and investment as a “*massive opportunity to maximise your existing provisions and make retirement look a lot more comfortable than it does at present*”. It’s clear to me that irrespective of the later involvement of another adviser, Mr M2 gave advice.

PERG 8.28 sets out guidance from the FCA on the difference between advice and information. At the time, PERG 8.28.1G said:

In the [FCA's] view, advice requires an element of opinion on the part of the adviser. In effect, it is a recommendation as to a course of action. Information, on the other hand, involves statements of facts or figures.

What Mr M2 said clearly goes beyond statements of facts and figures. By saying he thought the switch was a “massive opportunity” that would make Ms M’s retirement look “a lot more comfortable” he gave his opinion.

Quilter Financial says it was CIB – which Ms M says she was later introduced to – that advised her. I’ve thought about this carefully. But even if Ms M did later receive advice from another business, that doesn’t mean Mr M2 didn’t also give advice.

So, my conclusion is that Mr M2 did give advice to Ms M about the SIPP and investment and so a regulated activity took place.

Did Quilter Financial accept responsibility for those acts?

Which business was Mr M2 acting for?

For the reasons set out above, I’m satisfied Mr M2 was acting for Quilter Financial when he advised Ms M. I’ve therefore gone on to consider whether Quilter Financial accepted responsibility under the agreement it had with Mortgage Choices.

The agreement with Mortgage Choices

The appointed representative agreement between Quilter Financial and Mortgage Choices says:

APPOINTMENT AND STATUS

The Member is an Appointed Representative of Intrinsic for the purpose only of carrying on the Business.

The Member is not permitted to represent other counterparties or to carry on any other Regulated Activity or to promote, sell or advise on any financial services or plans other than the Plans without the express written consent of Intrinsic, except that the Member may make introductions to Independent Financial Advisers as permitted by Intrinsic from time to time.

“Business” was defined as:

the business of acting as an Appointed Representative of Intrinsic on the terms set out in this Agreement.

And “Plan” was defined as

any policy, investment agreement, mortgage or other agreement or service specified from time to time in this Agreement.

I've also been given a contract headed "**APPOINTMENT UNDER SECTION 39 FINANCIAL SERVICES AND MARKETS ACT 2000 REGISTERED INDIVIDUAL**". This was signed by Mr M2 and Intrinsic on 10 November 2006 and says:

You are appointed to undertake such Selling Activities as Intrinsic has trained you to undertake".

With "*Selling Activities*" defined as:

Activities constituting Regulated Activity carried out under the Registered Individual's contract with the Member or otherwise.

The agreement therefore seems to envisage advice being given on policies and investment agreements and when the investigator asked Quilter Financial to point to where Mr M2's permissions had been restricted to mortgages, it didn't do so.

So, I'm satisfied that Quilter Financial did accept responsibility for Mr M2 advising Ms M to switch her pension and invest in the resort she invested in.

My decision – jurisdiction

For the reasons set out above, I'm satisfied Quilter Financial is responsible under Section 39 FSMA for the acts being complained about and this is a complaint that we can look at.

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.

It's my view that I have jurisdiction and that I have all the information I need to look into Ms M's complaint. 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 Ms M's complaint also.

Ms M has told us that she's generally cautious financially and that the pension complained about was her only pension provision. She says she had a small amount of savings in a cash ISA but had no experience of investments and no knowledge of investment risk or pension structures. She says she now knows the investment she made involved more risk than she was prepared to take.

As previously mentioned, a fact find from the time unfortunately isn't available. I haven't seen any justification for switching a pension that it seems Ms M was broadly happy with. It seems Mr M2's only reason for recommending the switch was so that Ms M could make the investment she did. And I haven't seen any documentary record of why this recommendation was made.

The investment Ms M made was unregulated and high-risk. Everything I've seen suggests Ms M was an ordinary retail investor and there's nothing that suggests to me she was the sophisticated type of investor for which unregulated high-risk investments would be suitable. There's also nothing that suggests she could afford to take significant risks with her investments. Mr M2 should have known all of this.

In these circumstances I'm satisfied advice to switch Ms M's pension to a SIPP to invest in an apartment through The Resort Group wasn't suitable and should never have been made

as a recommendation. I'm satisfied that if Mr M2 hadn't given unsuitable advice, Ms M would have left her pension as it was.

Quilter Financial has commented on the fact CIB gave advice. But this decision is about Quilter Financial's responsibility. And because I'm satisfied Ms M wouldn't have moved her pension to a SIPP to make the investment she did if Mr M2 hadn't given the unsuitable advice he did, I think it's fair to ask Quilter Financial to compensate Ms M for the full measure of the loss she suffered from moving her pension and making the investment she did.

The DISP rules set out that when an ombudsman's determination includes a money award, then that money award may be such amount as the ombudsman considers to be fair compensation for financial loss, whether or not a court would award compensation (DISP 3.7.2R). Another business may also have given Ms M advice, but Quilter Financial had its own distinct regulatory obligations which, if met, I'm satisfied would have resulted in the pension move to the SIPP not taking place.

In making these findings, I take account of the potential contribution made by other parties to the losses suffered by Ms M. In my view, in considering what fair compensation looks like in this case, it's reasonable to make an award against Quilter Financial that requires it to compensate Ms M for the full measure of her loss. But for Quilter Financial's failings, Ms M's pension move wouldn't have occurred.

I'm not asking Quilter Financial to account for loss that goes beyond the consequences of its failings. I'm satisfied those failings have caused the full extent of the loss in question. That another party might also be responsible for that same loss is a distinct matter and that fact shouldn't impact on Ms M's right to compensation from Quilter Financial for the full amount of her loss.

Putting things right

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

I acknowledge that Ms M was able to receive compensation from the FSCS in relation to CIB. However, the terms of the reassignment of rights require her to return any compensation paid by the FSCS in the event this complaint is successful. So, I'll make no allowance for what has been paid by the FSCS. It'll be for Ms M to make the arrangements to make any repayments she needs to make to the FSCS. However, I note the comments Ms M's representative made about the issues she might incur as a result of repaying the money if the compensation is paid into her pension. For that reason, I've amended my decision to require the compensation to be paid direct to Ms M.

I take the view that Ms M wouldn't have moved her pension if everything had happened as it should have. I'm satisfied that what I've set out below is fair and reasonable given Ms M's circumstances and objectives at the time.

In summary, Quilter Financial should:

1. Calculate the loss Ms M has suffered as a result of making the switch and investment.
2. Take ownership of the investment held in the SIPP if possible.
3. Pay compensation for the loss to Ms M direct, taking into account the necessary adjustments set out below.

4. Pay Ms M's SIPP fees for the next five years, in the event she's not now able to close her SIPP.
5. Pay compensation of £500 for the trouble and upset caused to Ms M.
6. Pay interest on the above if fair compensation isn't paid within 28 days of notification of acceptance by Ms M.

I'll explain how Quilter Financial should carry out the calculation set out above in further detail below:

1. Calculate the loss Ms M has suffered as a result of making the switch and investment

To do this, Quilter Financial should work out the likely value of Ms M's pension as at the date of my decision, had she left it where it was instead of switching to the SIPP.

Quilter Financial should ask Ms M's former pension provider to calculate the current notional transfer value had she not switched her pension. If there are any difficulties in obtaining a notional valuation, then a benchmark of 50% of the FTSE UK Private Investors Income Total Return Index and 50% of the monthly average rate for one-year fixed-rate bonds as published by the Bank of England should be used to calculate the value. That is likely to be a reasonable proxy for the type of returns that could have been achieved if the pension hadn't been switched.

The notional transfer value should be compared to the transfer value of the SIPP at the date of my decision and this will show the loss Ms M has suffered.

Any additional sum that Ms M paid into the SIPP should be added to the notional transfer value calculation proportionately at the point it was actually paid in.

Any withdrawal, income or other distributions paid out of the SIPP should be deducted proportionately from the fair value calculations at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if Quilter Financial totals all those payments and deducts that figure at the end.

2. Take ownership of the investment

Ideally, the asset in the SIPP – the investment – could be removed from the SIPP. Ms M would then be able to close the SIPP, if she wishes, and avoid paying further fees for the SIPP. For calculating compensation, Quilter Financial should agree an amount with the SIPP provider as a commercial value for the investment. It should then pay the sum agreed plus any costs and take ownership of it.

If Quilter Financial is able to purchase the investment, then the price paid should be allowed for in the current transfer value (because it'll have been paid into the SIPP to secure the investment).

If Quilter Financial is unable, or if there are any difficulties in buying the investment, it should give it a nil value for the purposes of calculating compensation. Quilter Financial may then ask Ms M to provide an undertaking to account to it for the net amount of any payment the SIPP might receive from the investment. That undertaking should allow for the effect of any tax and charges on the amount Ms M may receive from the investment and any eventual sums she'd be able to access from the SIPP. Quilter Financial will need to meet any costs in drawing up the undertaking.

3. Pay compensation to Ms M for the loss she's suffered in (1)

The compensation should be paid to Ms M direct for the reasons set out above. But had the compensation been paid into Ms M's pension, it would have provided a taxable income. Therefore, the compensation for the loss paid to Ms M should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Ms M's marginal rate of tax in retirement. For example, if Ms M is likely to be a basic rate taxpayer in retirement, the notional allowance would equate to a reduction in the total amount equivalent to the current basic rate of tax. However, if Ms M would have been able to take a tax-free lump sum, the notional allowance should be applied to 75% of the total amount.

4. SIPP fees

If Ms M is unable to close her SIPP once compensation has been paid, Quilter Financial should pay an amount into the SIPP equivalent to five years' worth of the fees (based on the most recent year's fees) that will be payable on the SIPP. I say this because Ms M would not be in the SIPP but for the unsuitable advice. So, it wouldn't be fair for her to have to pay the fees to keep it open. And I'm satisfied five years will allow sufficient time for things to be sorted out with the investment and the SIPP to be closed.

5. Trouble and upset

Pay Ms M £500 for the trouble and upset caused. I'm satisfied Ms M has been caused significant upset by the events this complaint relates to, and the loss of, in effect, all of her pension fund. I think that a payment of £500 is fair to compensate for that upset.

6. Pay interest

Quilter Financial should pay fair compensation as set out above within 28 days of being notified that Ms M has accepted my decision. If it doesn't, interest on the compensation due is to be paid from the date of the decision to the date of payment at the rate of 8% simple interest per year. Income tax may be payable on any interest paid. If Quilter Financial deducts income tax from the interest, it should tell Ms M how much has been taken off. Quilter Financial should give Ms M a tax deduction certificate in respect of interest if Ms M asks for one, so she can reclaim the tax on interest from HM Revenue & Customs if appropriate.

My final decision

My decision is that I uphold Ms M's complaint and require Quilter Financial Services Ltd to pay Ms M fair compensation as set out above.

Quilter Financial Services Ltd should provide details of its calculation to Ms M in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms M to accept or reject my decision before 1 June 2023.

Laura Parker
Ombudsman