DRN-4314821

The complaint

Mr S complains that performance data provided by Quilter Cheviot Limited (Quilter) since 2010 has been incorrect. Mr S said he'd suffered a financial loss as his pension value was too low, based on Quilter's performance figures.

What happened

I issued a provisional decision on 11 July 2023. In the main I didn't uphold the complaint. But I did agree there were some shortcomings on Quilter's part, which had caused confusion and a loss of expectation, and some delay. I thought a payment of £750 for distress and inconvenience was appropriate. I've recapped here the background and my provisional findings.

'In 2010, on advice from his independent financial adviser (IFA), Mr S transferred two existing pension arrangements into a SIPP (self invested personal pension). Of the total of £1,045,161.37 paid into the SIPP, £1,035,000 was transferred to Quilter as a Discretionary Fund Manager (DFM).

Statements and investment summaries were sent twice a year. These illustrated fund movements, charges deducted, gave updated values and showed the performance of the pension fund in comparison to various benchmarks. Mr S's complaint centres on the information given as to how his portfolio was doing – the total return – compared to the benchmarks used.

In early 2020 Mr S raised some queries about charges. There were email exchanges between Mr S and his investment manager. In an email sent on 3 March 2020 Mr S said the way his funds were being invested was 'seriously disappointing'. The investment manager replied, saying, amongst other things, no inducements, commissions or other benefits were paid and that Quilter only invested in the funds it felt offered the best performance. The investment manager asked why Mr S was disappointed when the previous year the portfolio had returned 20.7% gross and 19.6% net. In reply, Mr S referred to the charges for some of the funds and asked for details of how his portfolio had performed since inception against the agreed benchmark, the costs he'd paid to Quilter and the total expense ratio.

The investment manager replied saying he didn't think the fund costs Mr S had quoted were correct and he explained why. He also said portfolio performance to the last valuation point was 135.5% versus the benchmark of 121.4%. Over the last ten years Mr S had paid £136,577 to Quilter in fees and the value of his portfolio had increased by approximately £1,100,000. Mr S replied the following day, suggesting maybe meeting next time he was in the UK, probably the following month. Mr S also mentioned that he was looking to transfer his fund to a QROPS (Qualifying Recognised Overseas Pension Scheme). Further emails were exchanged on 4 March 2020 about how the figures the investment manager had quoted were calculated. Mr S also queried if Quilter could offer a reduced fee arrangement and if he should've been charged VAT. The investment manager said fees could be reduced by about £1,100 pa and that VAT had been correctly charged.

I've seen there was further email correspondence later in 2020. In an email sent on 22

October 2020 Mr S queried performance figures that had been given in an email on 4 March 2020 from the investment manager. In reply, the investment manager maintained that Mr S's portfolio had performed very well over the last ten or so years and querying if Mr S's figures took into account other fees paid – to his IFA, the SIPP provider and in connection with the transfer to a QROPS which was by then I think underway. In reply Mr S said, taking other fees into account, he still thought there was a gap between the returns Quilter said he'd had and the actual value of his fund.

Things culminated in Mr S's email on 6 December 2020. He enclosed a spreadsheet showing his portfolio had returned 99.22% against the benchmark return of 116.60%, a difference of £179,967.12. He said the information he'd received from Quilter had indicated his portfolio had outperformed the benchmark which wasn't the case. Mr S asked how he'd be compensated for the £179,967.12 difference which he described as missing from his portfolio. Mr S's investment manager replied the following day, saying he'd forwarded Mr S's email and spreadsheet to Quilter's complaints department.

Quilter issued their first response on 11 December 2020. That didn't resolve Mr S's concerns and he replied to Quilter on 14 December 2020 saying, if the percentage returns Quilter had stated were correct, his pension should be around £170,000 to £190,000 larger than it was. Quilter issued a follow up response on 4 February 2021, repeating that the reporting was accurate and not upholding the complaint. Mr S referred the matter to this service.

One of our investigators looked into the complaint but he didn't uphold it. In summary he said:

- *No funds were missing from Mr S's pension. The funds appeared to have been managed in a way which was in line with the agreed mandate. There were no underlying guarantees. So the value of Mr S's pension was correct.*
- *Mr S had produced and supplied to Quilter a detailed spreadsheet which collated information from his statements and showed where Mr S thought Quilter had made errors in reporting returns. Mr S believed there'd been a mix up between net and gross returns from 2020 to 2017.*
- *Quilter had reiterated that the quoted returns were correct and taken from their main client reporting system, used for all clients. And a 'time weighted return' method of calculating returns to account for money in and out flows was used. Mr S didn't consider that satisfactory as there'd been no such movements between 2020 and 2017.*
- *It wasn't part of the investigator's role to undertake some form of audit on Quilter's IT reporting systems. Quilter was required to provide statements and take reasonable steps to ensure their accuracy.*
- *The investigator accepted there was disagreement about the accuracy of the portfolio return percentages quoted by Quilter. The investigator considered the hypothetical scenario – that is if (and which Quilter hadn't accepted was the case) Quilter's performance percentages were incorrect and the percentages were as per Mr S's spreadsheet, that would've changed things.*
- *Mr S had said, if he'd been aware that the benchmark wasn't being beaten, he'd have made alternative investment decisions to try to seek better performance elsewhere and limit Quilter's fees. But, looking at the statements issued to Mr S from 2010 to 2020 of the 28 updates, 14 highlighted the fact that Quilter's management had underperformed the benchmark. Statements as early as 2011 confirmed the returns were below those of the benchmark.*
- *It might've been that the underperformance would've been more pronounced and a greater gap may have prompted a different reaction from Mr S. The investigator couldn't know exactly would've happened, had Mr S been given different information*

over a ten year period. So he'd need to decide, on the balance of probability in conjunction with the evidence available, what was most likely to have happened.

- *There was documentary evidence showing Mr S had been told numerous times that Quilter's returns were below the benchmark. Mr S hadn't questioned that or chosen to make alternative investments. The investigator didn't think it was reasonable to conclude that Mr S would've made different investment decisions.*
- *Mr S had said that individual statements didn't raise any concerns and it was only the cumulative impact of the perceived errors over a ten year period which had highlighted the issue. The investigator considered that supported the point, if Mr S had been given marginally different percentages over time, he wouldn't have acted differently. He still wouldn't have been able to see the cumulative impact, simply marginally different percentages on each statement. And the actual value of his pension would've remained the same.*

Mr S didn't accept the investigator's view. He said Quilter hadn't seen the detailed analysis produced by Mr S's adviser (who wasn't the IFA who'd recommended Quilter as DFM). Mr S had now forwarded that and raised some specific queries with Quilter. Mr S said he was hopeful that might lead Quilter to come to a different conclusion and that he'd be able to resolve his dispute without this service's further involvement.

Mr S requested Quilter's further comments on 1 August 2022 and he chased several times. Quilter said on 16 August 2022 that it was reviewing the information and on 2 September 2022, following further reminders from Mr S, that the calculations he required had been requested. A similar answer was given on 22 September 2022. Quilter told Mr S on 12 October 2022 that he should get a response by the end of that week. I've seen a letter dated 13 October 2022. Mr S says he didn't get it until 28 October 2022. That seems consistent with the emails I've seen - on 14 October 2022 Quilter said the calculations had been received and were being reviewed. By 21 October 2022 the data hadn't been finalised. So I think Quilter's response, although dated 13 October 2022, wasn't sent until 28 October 2022.

Mr S didn't think Quilter had provided the details requested. He included in his reply on 2 November 2022 a schedule of questions with space for Quilter's responses. After further prompting by Mr S, Quilter emailed him on 9 November 2022. Quilter said it had previously sought to address the requests for further information but as the complaint (a continuation of the complaint which had already been made, not a new complaint) was now being reviewed by an ombudsman, and as Quilter had already provided its final response, Quilter wouldn't be responding to further requests for information. Quilter would continue to cooperate fully with this service if any further information was required in order to reach a final decision.

Mr S asked us to contact Quilter for the information he'd requested and we asked Quilter to provide the information. In January 2023 Quilter told us that they'd explained to Mr S that, as a final response had been issued, Quilter wasn't in a position to add anything. We explained the position to Mr S and that it would be up to the ombudsman who reviewed the complaint to decide if anything further was needed. Mr S said he was getting a solicitor to review his case and he asked for more time to supply information.

Mr S then instructed a representative who has made extensive further comments. I've read and considered everything and the documents referred to carefully. But I'm not going to attempt to summarise all that's been said.

Mr S's representative referred, amongst other things, to COBS (Conduct of Business Sourcebook) rule 4.2 about fair, clear and not misleading communications; the Fraud Act 2006; information on the statements issued to Mr S between 2010 and 2016 and from 2016 onwards; what Quilter had said about the reporting system it had used up to 2016 and changes introduced then; and how Quilter had dealt with Mr S's complaint, including the

request for further information following the investigator's view.

Mr S's representative was also critical of the way we'd handled Mr S's complaint and said that, based on what the investigator had said, Mr S had suffered losses caused by Quilter's breaches of duty over the years. Mr S's representative highlighted some of the key points made by the investigator and which weren't accepted.

Mr S's representative said a fair award would be in respect of charges levied by Quilter from 2010 to the date Mr S had transferred away from Quilter. Fees paid to Quilter from 1 April 2010 to 30 September 2020 totalled £176,096.17. Fees charged from 1 October 2020 to 31 December 2020 were a further £5,902.34 which made £181,998.51 in all. Interest of £152,978.47 was also claimed the total was £334,976.98.

Mr S's representative suggested that Mr S's complaint be split into three with the award for each capped at £160,000. Mr S had mitigated his losses – he'd incurred other costs for which he wasn't seeking an award and he was claiming interest only up to December 2020 (and not May 2023). And he'd narrowed the complaints to three rather than up to ten possible complaints (on the basis that each statement given to Mr S that was fraudulent and/or unfair, unclear and misleading could be treated as an individual source of complaint).

We'll share what was said with Quilter. A large number of appendices were attached. But I think Quilter has seen those already so we won't forward them again. If there's anything which is mentioned and which Quilter hasn't seen, Quilter should let us know in response to this provisional decision so we can provide copies.

What I've provisionally 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.

I've concentrated on the submission from Mr S's representative. I'm not going to deal with each and every point, just what I see as key.

Unfortunately I'm unable to agree with most of the arguments put forward on Mr S's behalf. In particular I'm not persuaded by the central allegation of fraud. That's a very serious matter that would usually be dealt with by a court and typically would involve detailed pleadings and a large amount of evidence. That's especially the case when the allegations span a ten year period. I recognise that the burden of proof in civil fraud is the balance of probabilities and not beyond reasonable doubt as for criminal fraud cases. But fraud by false representation involves proving dishonesty. I don't think what's been said shows how the two limb test for dishonesty has been met. I think it would require very significant further evidence, probably including multiple individual testimonies as to actual knowledge and belief at various points over a ten year period to establish what is essentially a mental state, albeit a corporate one.

But, in any event, I don't see that the allegation of fraud adds much, aside from perhaps to underline the seriousness of the complaint. I think I can consider the complaint fairly and fully on the central basis of COBS 4.2 and the duty to ensure communications are fair, clear and not misleading and taking into account legal principles such as contractual duties and mis representation and which are generally easier to establish than fraud.

I'd also point out that we deal with individual complaints. Mr S's representative suggests the issues Mr S has raised will affect all of Quilter's clients and points to what Quilter said on 4 February 2021 – that the performance data being quoted was from its main client reporting system and consistent with the performance reported on for all Quilter's clients. I accept that the matters Mr S has raised may affect Quilter's other clients. But I've just considered the

issues raised in the context of Mr S's case. And, in the main I'm not upholding the complaint or at least not on the basis put forward on behalf of Mr S. It's a matter for Mr S if he wishes to raise any concerns with the regulator, the Financial Conduct Authority.

I accept that Mr S was a retail client and I've considered the complaint, including Mr S's reliance on information from Quilter and what he'd have understood from what was provided, from that perspective. And that under COBS 4.2.2R Quilter needed, in communicating with Mr S, to take into account his status as a retail client. I further accept what's been said about the basis on which Quilter was selected as the DFM and which included competitive charges (1.25% pa) and Quilter's monitoring and reporting services.

I note what's been said about the first statement that was issued being misleading as a loss of £53,000 during the six month period wasn't shown prominently. But I don't think that's representative of Mr S's concerns and why he's brought this complaint which centre on the total return figure for the portfolio shown on the statements and what's been said about how that's been calculated. So I've concentrated on that aspect.

Quilter's reporting to Mr S took the form of bi annual statements. Mr S's representative has drawn a distinction between statements issued between 30 June 2010 and 30 June 2016 and those issued after that date when Quilter had merged with Cheviot Asset Management.

From what Quilter said in its letter of 13 October 2022, prior to the merger, Quilter had been using the Fiscal/Quarrier system where performance reporting was calculated on a gross of management fee basis. After the merger Quilter moved to a new system, Figaro, where performance reporting was on a net of management fees basis. But in that letter Quilter also said, although Mr S's account migrated in July 2016 which meant performance figures after then were reported on a net of fees basis, where migrated clients only had historic gross of fee performance figures, Quilter ran a client report that covered a period including migrated data and the new system would automatically produce a gross of fee return on the client report.

And the letter also referred to the investment report for the period in question (31 March 2010 to 30 September 2020) and which confirmed that, saying, at the end:

'Performance: Calculations are made on a daily basis adjusted for cash and asset flows, then compounded as necessary to provide returns for longer periods. Figures are presented on a capital and total return basis, net of Quilter Cheviot management fees and other expenses or taxes (including underlying fund charges) subtracted from the portfolio subject to the necessary data being available. ***For longer request periods (or where the requested time frame includes dates prior to May 2017) the relevant historic detail may not be held, in which case returns are quoted on a Total Return basis only, and gross of Quilter Cheviot management fees. Further information can be provided by your investment manager on request.****'*

Mr S's representative's point is that Quilter has confirmed (after the event) that the total return performance figures for Mr S's portfolio were calculated gross of management fees. But Mr S's representative says the statements Mr S got over the years indicated otherwise – that the total return shown was net of management fees. That would mean the portfolio performance figures against the benchmark were over inflated. So, from the only information Mr S had about performance, he'd have thought his portfolio was doing better than was actually the case.

As I understand it, Mr S's representative's point rests on the inclusion in the pre 2016 statements (see, for example, the investment summary for the period 1 July 2013 to 31 December 2013) of the following explanation: 'Total Return is calculated on a daily basis and

equals capital movement plus income receivable in the portfolio's based currency. All transactions plus cash/stock additions and withdrawals are taken into account.' And from that Mr S would've understood that the total return was calculated net of Quilter's fees, which Quilter is now saying wasn't the case.

But I don't think the statement quoted must mean the total return is calculated after deduction of management fees. I think it's somewhat unclear. On the one hand, saying that all transactions and withdrawals are taken into account, could be construed as meaning that fees had been deducted so the total return shown is on a net of charges basis. But, on the other hand, I'm not sure that charges would necessarily be termed a transaction or a withdrawal as such. I think charges might be considered as something separate and outside what would normally be termed a transaction (such as the sale and purchase of stock although that might include units cancelled to meet charges) or a withdrawal (such as the payment of funds to the investor). In my view, what was said isn't entirely clear.

I know that's Mr S's point – that the information he was given had to be fair, clear and not misleading. But much of what's been argued is on the basis that the statements Mr S got said that the total return was calculated net of charges and which Quilter is now saying wasn't the case and so Mr S was misled. But as I've explained, I don't agree the statements definitely said that. I also note that Quilter's fees were shown on the statements in money terms. And, if Mr S had been in any doubt as to the precise basis on which the total return for his portfolio had been calculated, he could've queried it and specifically if it was net or gross of management fees. On balance, although I think clearer information could've been given as to exactly how the total return had been calculated and if fees had been taken into account, I don't think the allegation that the statements said something which is necessarily inconsistent with what Quilter is now saying has been made out.

Turning now to the statements issued after the new reporting system had been introduced, Mr S's representative says there was no mention of how growth is calculated. And, as Mr S had been told during the previous six years that the total return was net of management fees, he had no reason, especially as a retail client, to continue construing the information other than as he'd done previously. But, and as I've explained, I don't think the position up until then had been as obvious as has been suggested. So I'm not persuaded that going forwards Mr S's belief that the total return was after deduction of Quilter's management fees was necessarily justified. But, if as has been claimed, the statements didn't indicate how the total return had actually been calculated, then again I think Quilter could've given clearer information.

Mr S's representative has suggested that the reason for the change to the reporting system in 2016 was because following the amalgamation it was recognised that the previous reporting had been flawed. And that, going forwards and commencing with the statement for the period 1 July 2016 to 31 December 2016, a new disclaimer was included:

'We shall not be liable to you, whether in contract, tort (including negligence), for breach of statutory duty, or otherwise, in provision of our tax information and valuations for (a) loss of profits (b) loss of sales or business (c) loss of agreements and contracts (d) loss of anticipated savings (e) loss of or damage to goodwill; or (f) any indirect or consequential loss. Notwithstanding the foregoing, nothing in this paragraph shall limit or exclude: (1) any liability for fraud or fraudulent misrepresentation; or (2) any duties or liabilities imposed on us under the FSMA 2000 or any other applicable regulatory system.'

I haven't investigated what may have been behind the change to the reporting system and/or the inclusion of the disclaimer. I don't think anything turns on it. The issue remains whether if the statements provided to Mr S, whether when the original reporting system was being used or the new system introduced following the merger, were fair, clear and not misleading. If

they weren't I don't think Quilter can escape liability by pointing to a disclaimer. And one which doesn't seek to limit or exclude liability for Quilter's regulatory responsibilities (which Quilter would be unable to do in any event). I've already explained why I think the statements both before and after the merger could've been clearer. I've dealt below with what I think the consequences of that was for Mr S.

Mr S's representative has also referred to alleged failings by Quilter in dealing with Mr S's complaint. Including that Mr S had made a written expression of dissatisfaction in March 2020 but he didn't receive a final response until December 2020.

The Handbook glossary definition of a complaint is:

'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.'

In his email sent on 3 March 2020 Mr S said the way his funds were being invested was 'seriously disappointing'. I agree that's an expression of dissatisfaction. But, although the fact that Mr S had suffered (and was continuing to suffer) a financial loss may have been implicit, that allegation wasn't expressly made. So I don't think the email amounted to a complaint as defined. On that basis I don't think Quilter was obliged to treat is as such, including issuing a final response within the eight week period specified by the regulations.

In saying that I've considered the email not just in isolation but as part of the overall exchanges that followed on 4 March 2020 and later that month. It appears that Mr S may have been, for the time being at least, satisfied by the investment manager's responses. The possibility of a meeting to discuss things further was mentioned but it seems that didn't go ahead. The discussions seem to have finished with Mr S's email thanking the investment manager for the clarification and moving on to a query about which QROPS Quilter had dealings with and how Mr S's fees could be reduced. I think the discussions fall in to the area where a customer raises a query or concern without it amounting to a complaint as such.

From what I've seen Mr S raised performance again in October 2020 when he revisited what the investment manager had said in March 2020. I don't think it's the case that Quilter failed to treat Mr S's earlier expressed concerns as a complaint. Once Quilter knew Mr S's dissatisfaction had resurfaced and that he was alleging a financial loss and so making a complaint as defined, Quilter treated it as such.

When Mr S's complaint was rejected by the investigator Mr S then sought further information from Quilter. That included sharing with Quilter the report Mr S's adviser had prepared about Quilter reporting a gross return as a net return from 2020 to 2017. I think our investigator wrongly thought that report had already been shared. I note the number of reminders (according to Mr S's representative there were eight) which Mr S sent to Quilter. And that it took three months for Quilter to reply – its letter of 13 October 2022 (which Mr S didn't receive until 28 October 2022). And that Quilter didn't respond to the questions Mr S had raised. Quilter then replied again on 9 November 2022 requesting that any specific questions be directed to this service.

I think the situation was relatively unusual. A complainant won't usually contact a business direct once a complaint is with this service to request further information, particularly after the investigator's view has been issued. I'm not saying Mr S shouldn't have done that. It seems at that stage he was hoping that by sharing his adviser's report he might be able to get Quilter to change its stance and be prepared to settle the matter with him without this service's further involvement. But I can understand if there was perhaps some uncertainty on Quilter's part as how to deal with the request. But, that said, I think Quilter did delay in dealing with Mr S's request – I'm not sure why it took some three months to respond and despite Mr S's frequent prompts. And, if Quilter didn't want to provide the information because it concerned Mr S's existing complaint and the request hadn't come from this service, Quilter could've said that straight away.

As things were, the complaint was awaiting an ombudsman's decision, so we didn't evaluate whether the further information was required or not. We said when the complaint was considered by the ombudsman they'd request any further information needed. That meant that we didn't say that Quilter should provide the details Mr S had requested. So I don't agree the situation is similar to a court case where the judge has ordered further information to be produced and that a failure to do so would be contempt of court.

Turning now to the view issued by our investigator, Mr S's representative has said that there was a failure to take into account a number of factors. I've come to my conclusions bearing in mind those matters, including that Quilter was the only source of reporting for Mr S; Quilter's reputation for monitoring was a key prerequisite for selecting Quilter as the DFM; that Mr S had to instruct an expert to identify that there were issues in how Quilter was reporting to Mr S, on the statements issued to him, performance of his portfolio against the benchmarks indicated.

Mr S's representative takes issue with a number of key points made by the investigator. I don't propose to comment on everything but I agree that the fact that Quilter used a computerised reporting system for performance data isn't particularly relevant – the complaint turns on what information was given to Mr S and if – regardless of how it was generated – it was accurate, fair, clear and not misleading. But, on the other hand, a large number of performance statistics have been quoted, both by Quilter and Mr S. It isn't possible for us to assess or attempt to reconcile those figures. But I've looked into what I consider is the key aspect – that is the basis on which performance was reported to Mr S.

I think the point made by the investigator about the 28 updates given and that 14 of them highlighted that Mr S's portfolio under Quilter's management had underperformed the benchmark is relevant. Even if there was some deficiency in the information provided by Quilter which meant it wasn't easy for Mr S to ascertain by exactly how much the portfolio's returns may have been below the benchmark, that still suggests that for Mr S exceeding or even matching the benchmark wasn't conclusive in terms of how he viewed how his portfolio was performing. So it seems that data wasn't instrumental in Mr S's decisions about whether he made any changes to his portfolio. He had the actual values for his portfolio and that seems to me to have been what he'd have considered and relied on in deciding whether to instruct any changes to his investments.

That brings me to Mr S's representative's point about the investigator having said he needed to know exactly what Mr S would've done had he been given different information. I don't agree that's the approach the investigator took. He acknowledged he couldn't say exactly what Mr S would've done. But he went on to say he'd need to decide, on the balance of probability and in conjunction with the evidence available, what was most likely to have happened. I think that's correct. I've said that the performance data was unclear as to whether the total return was net or gross of charges. But, even if that impacted on how Mr S viewed how his portfolio was doing, I don't think, if things had been made clearer, it would

likely have prompted him to make changes to his portfolio and the underlying investments.

Nor is redress now being claimed on that basis. As Mr S's representative has said, Mr S isn't asserting that the portfolio was unsuitable. And there's no 'glaringly obvious' point when, if Mr S had been given correct information over the ten year period, a change in the portfolio would've been triggered. Mr S is instead seeking redress based on the fees he's paid. His position is that throughout and from the outset he didn't get the service he was paying for. He couldn't mitigate his position as to fees as it wasn't until 2022 when Quilter admitted that the reporting information he'd been given had been inaccurate. So Mr S couldn't move away to a DFM which was delivering the service for which Mr S's IFA had recommended Quilter in 2010. Nor could Mr S move to a QROPS earlier, which is exactly what he did when he discovered the true position.

I've borne all that in mind but I don't agree that Mr S's claim for a return of all the fees he's paid Quilter over the ten year period is justified. Particularly as I wasn't able to agree with the key point and on which much of Mr S's claim is based. And Quilter was managing Mr S's portfolio and undertaking other services as DFM. Although reporting to Mr S was an important part of the service Quilter was providing, it wasn't the only aspect.

I also bear in mind that the returns for Mr S's portfolio appear to have been relatively healthy even if Mr S now thinks it should've been more based on what he considers would've been a proper comparison with the benchmark. But I don't see that as a financial loss as such. I think it's more disappointment or a loss of expectation. Throughout the period Mr S has known exactly how his portfolio has been performing and what costs he's paid to Quilter in money terms. As I've indicated, I agree with the investigator that, given the instances of underperformance, it's difficult to see that Mr S would've acted differently if he'd thought the position was worse in that there was more of a gap between the portfolio and the benchmark.

I note what Mr S's representative has said about the complaint being split into three (a reduction from the ten or so that was also suggested) but I don't agree. Mr S complains that Quilter failed to report accurately the performance of his portfolio over a ten year period. That's one complaint and we've treated it as such. I don't think it would be fair and reasonable and other than an attempt to circumvent our awards limit to split the complaint at this stage. But, in any event, much of that falls away given the view I've taken of the complaint and the award for compensation I consider is appropriate.

To sum up, I agree there were some shortcomings on Quilter's part. Specifically I think how the total return figures for the portfolio had been calculated could've been made clearer throughout. I think that's caused confusion and some loss of expectation. And there was some delay on Quilter's part in dealing with Mr S's further enquiries after the investigator had issued his view. I recognise the position was somewhat unusual but I think Quilter could've got back to Mr S quicker and saved him the inconvenience of having to chase for responses, especially if Quilter's eventual view was that any further information requests should be made via this service.

I think a payment in respect of distress and inconvenience is warranted. I've taken into account the overall time period – some ten years or so – over which the position as to how the total return figure had been calculated wasn't as clear as it could've been and the confusion that's resulted. I think a payment of £750 would be fair and reasonable in the circumstances of this complaint.

I know that's way short of what Mr S has claimed. I can see that he's expended much time, effort and incurred expense in trying to get Quilter to accept that his portfolio hasn't performed as he was led to expect and that he should be paid very substantial

compensation. But I hope I've been able to explain why I don't consider I can uphold his complaint to the extent and on the basis that's been suggested.

My provisional decision

I uphold the complaint in part only. Quilter Cheviot Limited must pay Mr S £750 for the distress and inconvenience caused by the service failings I've identified above.'

Responses to my provisional decision

Quilter agreed with what I'd said about the serious allegations (of fraud and misleading clients) not being substantiated but was disappointed I'd partially upheld the complaint and proposed an award. But Quilter was prepared to accept my provisional decision in the interests of bringing matters to a close for both parties.

Mr S's representative's response to my provisional decision focused on what I'd said about the pre and post 2016 reporting – essentially that it could've been clearer – and what conclusions should flow from that, taking into account the legal and regulatory position and in particular COBS 4.2.1R. In summary:

- The regulator's Principles for Businesses (Principles 7 (Communications with clients) and 9 (Customer relationship of trust) are particularly relevant) are enshrined in rules in the FCA Handbook and create binding obligations on firms, the contravention of which may lead to enforcement action and a claim for damages. Under COBS Sch 5 (Rights of action for damages) a breach of a rule against a private person (such as Mr S) is actionable under section 138D of FSMA 2000. GEN (General Provisions) 2.2.1R says that every provision in the Handbook must be interpreted in the light of its purpose.
- COBS 4.2.1R says a firm must ensure that a communication or financial promotion is fair, clear and not misleading. COBS 4.5.2R (4) says a firm must ensure that information does not disguise, diminish or obscure important items, statements or warnings. I'd agreed there'd been several breaches of COBS 4.2.1R. And that the lack of clarity had caused confusion. I'd been unable to say a specific loss flowed from the breaches so the only remedy was a payment for distress and inconvenience. But I'd said Mr S had suffered some loss, albeit of expectation. It was because he wasn't complaining about the performance of his portfolio or its suitability that the remedy he was seeking was appropriate.
- I'd referred to two core strands of duties that Quilter were supposed to deliver from 2010 to 2021 – investment management of Mr S's entire and only pension portfolio and reporting to him about the investment of that portfolio. There'd been a lack of reporting clarity for over a decade. During that time 32 investment reports had been issued, none of which included cumulative performance. Once that information was issued, Mr S was able to see that the reporting was at best confusing and therefore, as I'd agreed, misleading. He shouldn't have had to instruct two experts to analyse the information and make a complaint.
- Mr S had paid to have his pension portfolio managed in one place and for accurate and timely reporting on that portfolio. He received one service but not the other. Following my own reasoning, his losses can fairly and reasonably be identified as an appropriate percentage of the fees that were paid for the services Quilter was supposed to provide and didn't. It was fair to deprive Quilter of 50% of the charges that Mr S had paid, for failing to provide that service properly or at all.
- Quilter's shortcomings extended to the absence of cumulative reporting over the period, without which Mr S was essentially blind to the scale of the issue and it wasn't possible for his case to have been pleaded with sufficient clarity for any of his claims

to be upheld. That information wasn't given until 2022 by which time Mr S had already instructed his IFA and thereafter his current representative. It was fair and reasonable for Mr S to recover those fees. His total claim was £175,000 made up of fees paid to Quilter, interest and his IFA's and representative's fees.

Mr S also provided a statement setting out his key allegations of misstatement by reference to what Quilter had said in various communications: the final response dated 11 December 2020; the subsequent response dated 4 February 2021; Quilter's letter of 13 October 2022; and the investment report for the period 1 April 2010 to 30 September 2020. Mr S said there were further instances where the information given wasn't fair, clear and not misleading.

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.

I've thought carefully about what Mr S and his representative have said in response to my provisional decision. But I haven't been persuaded to depart from the views I reached earlier. I've set those out in full above and they form part of this decision. I've made some additional comments on the main points raised.

Mr S is seeking confirmation that we'll raise an issue under the Wider Implications Framework on the basis that I've recognised the statements issued by Quilter (both pre and post 2016) could've been, in some respects, clearer. So there's a possibility that other clients may have found that too.

But I don't think that of itself brings the issue within the scope of the Wider Implications Framework. We often deal with complaints which raise issues which might potentially affect other clients of the respondent business. That might be where, as here, there's a dispute as to whether information provided has been accurate. Or we might have to interpret contractual terms and conditions which apply to other customers too. If we received several similar complaints we'd consider if there was a Wider Implications issue. And, in some cases, a single complaint might be sufficient to trigger that. But I don't think that's the situation here and so I don't propose raising the matter under the Wider Implications Framework.

Mr S's representative agrees that the complaint can fairly and reasonably be dealt with on the basis of COBS and legal principles, including contractual duties and misrepresentation. I agree that Mr S was a retail client and that under COBS 4.2R Quilter owed him a duty to ensure that all communications issued to him about the funds Quilter managed on his behalf (and which were Mr S's only pension provision) were fair, clear and not misleading. At the time, Mr S had no IFA in place to assist him in analysing the information which Quilter provided direct to him. I also acknowledge that Quilter had been selected, not only for its competitive charges, but for its monitoring and reporting services.

Mr S's representative says that certain conclusions must flow from my findings about breaches of COBS 4.2.1R. Under COBS Sch 5, there's a right of action for damages for breaches of certain COBS rules including the fair, clear and not misleading rule (but subject to the proviso in COBS 4.2.6R that if, in relation to a particular communication or financial promotion, a firm takes reasonable steps to ensure it complies with the fair, clear and not misleading rule, a contravention of that rule does not give rise to a cause of action under section 138D of FSMA). Although I can see the analogy, I don't think it's directly relevant here. We're an alternative to the courts. We don't award damages as such. I can make a money award for such amount as I consider to be fair compensation for, amongst other things, financial loss and whether or not a court would award compensation.

Further, the basis on which we decide complaints isn't the same as the courts. I determine a complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. In considering that I'm required to take into account relevant law and regulations; regulators' rules, guidance and standards; codes of practice, and (where appropriate) what I consider to have been good industry practice at the relevant time.

Mr S's representative says I've agreed there were several breaches of COBS 4.2.1R which caused Mr S confusion and loss of expectation. Generally, in my provisional decision, I referred to the information (both pre and post 2016) as not being entirely clear and I said that clearer information could've been given. But I also said, in connection with the pre 2016 statements, that although I thought clearer information could've been given as to exactly how the total return had been calculated and if fees had been taken into account, I didn't think the allegation that the statements said something which was necessarily inconsistent with what Quilter was now saying had been made out. And, in view of that I said, about the later statements, that I wasn't persuaded, going forwards, that Mr S's belief that the total return was after deduction of Quilter's management fees was necessarily justified.

But if there were breaches of COBS 4.2.1R and Principle 7, which reiterates the requirement to communicate information to clients in a way which is clear, fair and not misleading, there are three criteria. What I said equates to a finding that there were breaches in terms of the requirement to provide clear information. Although Mr S's representative suggests I said the information given was misleading, I don't think I went that far. It isn't a matter of semantics. More that it's important to put any breaches in context.

COBS 4.5.2R (4) has also been cited. I'm not sure I'd agree there was any breach of that more specific provision. But in any event I don't think it adds much as COBS 4.2.1R is the central obligation. And I agree that it was, to some extent at least, breached. But I think the important question, whether the situation is approached on the basis that there's been a breach of the rules and/or Principles or otherwise (such as from a contractual or service failing perspective) is whether Mr S has suffered any financial loss.

Mr S's representative has been clear that Mr S isn't now seeking compensation on the basis that his portfolio was unsuitable or based on its performance. Instead he's seeking a refund of 50% of the charges he's paid to Quilter, plus interest, and other fees. I can of course see the argument that there's been a service failing on Quilter's part and, as Mr S was paying for that service, a refund of fees would be appropriate. It's a basic tenet of consumer law that a service must be carried out with reasonable care and skill and any service failing might mean a refund is due. But it will all depend on the circumstances.

Mr S is seeking a refund because there was an issue with how Quilter reported performance of his fund. I say an issue because, although Mr S points to statements received over a ten year period, the concern has been the same throughout – how performance compared to the benchmark has been reported and if it's on a net or gross of management fees basis. As I've said, Mr S could see in money terms how his portfolio was performing even if how it was doing against the benchmark could've been clearer. And he could see that often the benchmark wasn't beaten. I think that's an important point in considering if any refund is due – the extent and effect of the service failing is a factor to take into account.

Mr S's representative says a 50% refund is due on the basis that Quilter's responsibilities were managing the fund and reporting on it. But there may be arguments that each element doesn't carry the same weight or involve the same level of work and so a 50/50 split isn't appropriate. And that apportionment would ignore other activities that Quilter undertook as DFM and which might include, for example, research, due diligence and analysis.

And, even if it was fair to attribute 50% of the fees Mr S paid to reporting, a refund of the full amount allocated to that aspect of Quilter's service would, in my view, imply a total failure to deliver that service. That might sometimes be the case. For example, if a firm undertakes to carry out annual reviews which don't, through no fault of the client's, take place and where the firm hasn't done anything else to justify an ongoing service fee, we might say that fee should be refunded.

But where there's not been a total service failing the position isn't so clear. Especially if the issue relates to the adequacy or otherwise of just one aspect of that part of the service the client is unhappy with. Here, even if the statements could've been clearer in terms of comparison with the benchmark, Quilter still produced detailed half yearly investment summaries (which ran to about twenty pages or so) and which included, as well as the performance summary, a market commentary, asset allocation breakdown, transaction and capital and income statements and valuations for each holding.

I also think Mr S would've been willing to pay for his portfolio to be managed. I don't see that he'd have been happy to undertake that himself. The charges of any other firm he employed might have been lower or higher or around the same as Quilter's. And the actual performance might have been better or worse.

All in all I'm not persuaded that a refund of 50% (or any other percentage) of the fees Mr S paid Quilter is proportionate or fair and reasonable. I think in the main Quilter delivered the service Mr S was paying for, even if Mr S is unhappy with an aspect of the way in which Quilter reported on the performance of the portfolio.

Mr S has incurred fees in researching what's happened and in bringing his complaint. But I don't think an award in respect of those fees is justified. Our service is free and it's generally only in exceptional circumstances that we'll make an award for fees incurred in connection with bringing the complaint. Although Mr S says that it wasn't until he sought professional assistance that his complaint was to some extent at least upheld, I'd point out that ours is a two stage process. In many cases the investigator's and the ombudsman's views will be aligned. But, if an investigator doesn't uphold the complaint that doesn't mean, even if no further evidence is provided, that an ombudsman will also reject the complaint. And, although I did in part uphold the complaint, I was unable to agree with many of the arguments made.

I've also considered the misstatements Mr S has pointed to. A lot of what he says is to do with the figure of 116.24% given in Quilter's final response letter dated 11 December 2020 for net cumulative performance whereas Mr S's own figure is 97.45%. It isn't the case that I don't consider the disparity to be significant. But Mr S points out that Quilter later accepted that its figure was in fact gross of management fees. In those circumstances and where it seems the figures aren't on a like for like basis I don't think any comparison is really relevant. But I recognise that, when queries have been raised or a complaint made, it's disappointing if further confusion results from any unclear, contradictory or inaccurate explanations. That won't restore a consumer's confidence and will likely cause further frustration which seems to have been the case here.

Overall there were some failures on Quilter's part in reporting performance to Mr S. But, as I've indicated before, I don't think it's for us to undertake what would amount to a full analysis of Mr S's pension fund and how performance has been reported over a ten year period and try to reconcile figures which may or may not be entirely accurate. Although I recognise how strongly Mr S feels, and the investment he's made both in terms of his own time and in instructing experts to assist him, I'm not going to say that Quilter needs to refund any of its charges or meet fees incurred by Mr S in connection with the complaint.

Mr S has suffered some distress and inconvenience (including loss of expectation or disappointment). I think the amount I've suggested, £750, is fair and reasonable in the circumstances I've outlined and taking into account the impact on Mr S of Quilter's service failings.

My final decision

I uphold the complaint in part only. Quilter Cheviot Limited must pay Mr S £750 for the distress and inconvenience caused by the service failings I've identified above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 28 September 2023.

Lesley Stead
Ombudsman