DRN-4335054

The complaint

Mr N complains about the actions of Mr X of Harton Mortgage Services Ltd (Harton) – formerly an appointed representative of Quilter Mortgage Planning Limited (Quilter Mortgage). He says Mr X gave him unsuitable advice to move two pensions to a self-invested personal pension (SIPP) to make a high-risk unregulated investment.

What happened

Mr N says Mr X advised him to take out a SIPP and invest in the Harmony Bay Resort and Spa in 2012.

The Financial Conduct Authority (FCA) register shows Mr X worked for Harton. Harton was an appointed representative of Quilter Mortgage between 7 March 2012 and 19 October 2016. The Harmony Bay purchase agreement was dated 11 June 2012 and SIPP statements show:

- The SIPP was set up on 26 June 2012.
- Mr N's pensions – £34,911.83 and £6,838.61 – were moved to the SIPP on 20 August 2012 and 1 October 2012 respectively.
- £36,750 was invested in Harmony Bay on 11 October 2012.
- Rental income was initially received but the last payment was on 1 September 2015.

So, the events complained about happened when Harton was an appointed representative of Quilter Mortgage.

The Harmony Bay investment failed, and Mr N's representative initially made a claim against the SIPP provider to the Financial Services Compensation Scheme but was then directed to complain to Quilter Mortgage. Mr N's representative said the advice Mr N had been given was unsuitable and didn't match the level of risk he was prepared to take.

Quilter Mortgage issued a final response not upholding Mr N's complaint. It said the complaint had been made outside the time limits. But it said that in any event, there was no evidence Mr X had given Mr N any pension advice. It said Mr X's recollection was that during a mortgage review appointment, Mr N's pensions had come up and Mr X mentioned he'd recently invested in overseas property through his SIPP and so introduced Mr N to a separate firm – Firm A. It said Mr X therefore hadn't given any advice but even if he had, this would have been outside what it allowed him to do. It also said it has no relationship with the SIPP provider or Harmony Bay and received no remuneration.

An investigator concluded we can consider Mr N's complaint against Quilter Mortgage. In summary, she was satisfied the complaint had been made within the time limits. She was also satisfied Mr X had given Mr N advice and made arrangements in relation to his previous pensions and the SIPP and this was something that had been allowed under the appointed representative agreement. And she was satisfied the complaint should be upheld.

Quilter Mortgage didn't agree. It accepted the investigator's findings that the complaint had been made within the time limits. But it didn't agree that any advice that Mr X gave was authorised by it. Specifically, it said it doesn't have permissions for investment business so it couldn't have given Mr X authorisation to advise on and/or arrange pension switches.

The issue was therefore passed to me for a decision. I issued a provisional decision agreeing with the investigator that the complaint was in our jurisdiction and should be upheld. However, because I addressed issues not previously covered, I issued a provisional decision to give both parties the chance to comment further.

Mr N's representative replied saying it had nothing further to add. Quilter Mortgage replied saying it doesn't agree with my provisional decision. In summary it said:

- It accepts there's case law that says responsibility under Section 39 Financial Services and Markets Act 2000 (FSMA) should be determined by reference to the agreement in place rather than the principal's FCA permissions. But it's non-sensical that Quilter Mortgage, which has never had investment permissions, would allow Harton to carry out investment business.

- The conclusion that all permissions set out in the appointed representative agreement apply to all appointed representatives can't be correct. It's clear from Harton's offer letter that it only represented Quilter Mortgage. Common sense would therefore be that Harton could only carry out the types of business Quilter Mortgage was permitted to do itself.

- The paperwork the SIPP provider sent to Mr N confirmed that Mr X was a non-regulated agent who wasn't authorised to give any advice on the SIPP or the investment in it and it was Mr N's responsibility to obtain independent advice. Mr N signed his agreement to this.

- The paperwork the SIPP provider sent Mr N – which he signed – highlighted specific risks of the Harmony Bay investment. It's clear Mr N was fully aware of what he was investing in.

What I've decided – jurisdiction

I've considered all the available evidence and arguments to decide whether this complaint is one the Financial Ombudsman Service can consider against Quilter Mortgage. Having done so, I'm still satisfied it is. I've therefore repeated my provisional findings below with additional commentary on the points raised in response to my provisional decision.

The Financial Ombudsman Service can't look at all complaints. Before we can consider a complaint, we need to check, by reference to the FCA's Dispute Resolution Rules (DISP) and the legislation from which those rules are derived, whether it's one we have the power to look at.

I haven't considered the time limit rules because Quilter Mortgage confirmed it was satisfied with the investigator's explanation of why Mr N's complaint had been made in time and it no longer objected to us considering the complaint on that basis.

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 2.3.3G says that:

> *complaints about acts or omissions include those in respect of activities for which the firm…is responsible (including business of any appointed representative or agent for which the firm…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*.

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

- What are the specific acts Mr N has complained about?
- Are those acts regulated activities or ancillary to regulated activities?
- Did Quilter Mortgage accept responsibility for those acts?

What are the specific acts Mr N has complained about?

Mr N says Mr X gave him unsuitable advice to switch two pensions to a SIPP to invest in an unsuitable high-risk investment.

Are those acts regulated activities or ancillary to regulated activities?

Regulated activities are those activities that are specified in Part II of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the RAO). They include:

- Advising on the merits of buying or selling a particular investment which is a security or a relevant investment (Article 53 RAO).
- Making arrangements for another person to buy or sell or subscribe for a security or relevant investment (Article 25 RAO).

The events complained about here involve specified investments so I'm satisfied regulated activities would have been carried out if advice was given, or arrangements made, in relation to them. Unfortunately, there isn't much evidence available from the time of the pension switches and investment but taking everything into account, I'm satisfied it's most likely Mr X was involved. I say this because:

- The SIPP application form, which was signed on 20 June 2012, had "*AGENT/EXECUTION BASIS ONLY*" filled in in the introducer details section. And in answer to the question of whether advice had been given, "*No*" had been ticked. But in the section "*Please confirm any linked organisations with whom you are authorising us to correspond*", Mr X of Harton's name, address and contact details were provided.

- The 2015 annual report Mr N was sent by the SIPP provider named Mr X of Harton in both the introducer and "*Investment Manager/Agent*" sections.

- A letter to Mr N from the SIPP provider dated 7 August 2012 said the SIPP application had been received from Mr X at Harton.

Mr X has told us that at a review of Mr N's mortgage the conversation moved onto pensions, and he told Mr N he'd invested in overseas property and introduced Mr N to Firm A because Mr N said this seemed like a good idea. However, that doesn't explain why Mr X submitted the SIPP application and why both he and Harton were named on the SIPP application form.

It therefore seems as though Mr X had much more involvement in the switches and investment than he's acknowledged, and I'm satisfied it's most likely he was involved in making arrangements for setting up the SIPP, the pension switches and the Harmony Bay investment.

I'm still satisfied it's also most likely Mr X advised Mr N to switch his pensions to the SIPP to invest in Harmony Bay. Although suitability reports are one of the indicators that advice was given, the absence of one doesn't mean advice wasn't given. I note Quilter Mortgage's comments on the letter from the SIPP provider dated 7 August 2012 which referred to Mr X as a "*non-regulated agent*" and went on to say:

> *For the sake of clarity a non-regulated agent means that the introducing agent is not authorised by the Financial Services Authority (FSA) to give any form of financial advice on either the SIPP or any investment within it, and you must ensure that if you believe that you need such advice that it is taken from a suitably regulated and authorised person.*

I can confirm that I carefully considered this letter when reaching my provisional decision and I've done so again. However, as I set out in my provisional decision, I think it's highly unlikely Mr N would have taken the decision himself to switch his pensions to a SIPP to invest in Harmony Bay without receiving advice. And taking everything into account, I still think it's most likely that advice was provided by Mr X. The fact Mr N didn't query the SIPP provider's letter before signing it does him no credit, but we often see cases where consumers sign paperwork without carefully reading everything as they should have.

Did Quilter Mortgage accept responsibility for those acts?

I haven't seen any evidence that Mr X was acting in any capacity other than as Harton – and therefore for Quilter Mortgage – at the time of the events complained about.

As I've set out above, 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*.

So, Quilter Mortgage is only responsible for complaints arising from anything done or omitted by Harton in the carrying on of business for which Quilter Mortgage accepted responsibility.

In its letter of 7 August 2012, the SIPP provider said Mr X wasn't authorised to give advice on either the SIPP or the investment in it. But the SIPP provider's understanding of what Mr X was, and wasn't, allowed to do isn't relevant. Instead, what I must consider is the express agreement between Quilter Mortgage and Harton – the appointed representative agreement. As I explained in my provisional decision, this was drafted to cover appointed

representative relationships with two principal businesses – Quilter Mortgage and Quilter Financial Planning Limited. At the time of the agreement, Quilter's name was Intrinsic so references to Intrinsic should be read as Quilter.

The agreement read:

> *The Member is an Appointed Representative of Intrinsic for the purpose only of carrying on the Business.*
>
> *The Member is not permitted 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.*

There aren't any further provisions in the agreement that expand on this. But the compliance manual read:

> *The regulated activities for which Intrinsic has approval are as follows:*
>
> *a) Arranging (bringing about) deals in;*
> *b) Making arrangements with a view to transactions in;*
> *c) Advising on; or*
> *d) Agreeing to carry on a regulated activity in (a)-(c)*
>
> *in relation to designated investments, mortgages, pure protection and mortgage-related general insurance.*
>
> *As appointed representatives of Intrinsic, members can therefore carry out those activities detailed above (dependent upon any restrictions inherent in your contract), these are referred to as the 'Scope of Permissions'.*
>
> *All firms regulated by FSA entered the 'depolarised regime' on 1 June 2005. As an appointed representative of Intrinsic you will be restricted to the distribution channels and product ranges chosen by Intrinsic.*
>
> *Intrinsic has chosen to offer the products from a limited number of companies in respect of Designated Investment business, commonly referred to as a 'Multi-tie'…*
>
> *Your membership of Intrinsic means that you can only provide advice within the product areas covered by Intrinsic's Scope of Permission. Giving advice in some areas is simply not permitted (for example Unregulated Collective Investment Schemes)…*
>
> ***Business for which you are not licensed***

Individual Shares or Gilts and Unregulated Collective Investment Schemes (UCIS)

Advice in these areas is a specialist activity and outside your scope of permission through the Intrinsic. You are therefore not permitted to undertake work in this area. Such cases should be introduced to specialist stockbrokers.

Quilter Mortgage has made two arguments here:

- That the permissions it gave Harton were necessarily restricted by the permissions it itself held with the FCA.

- That the agreement requires any recommendations to relate to an approved institution and unregulated collective investment scheme (UCIS) advice wasn't allowed more generally.

Were Harton's permissions restricted by Quilter Mortgage's?

Although the agreement was stated to be with Intrinsic, "*Intrinsic*" was defined as:

> *Intrinsic Financial Planning Limited and/or Intrinsic Mortgage Planning Limited according to which company(ies) is/are expressed in the Offer Letter as the company(ies) offering the Membership Agreement to the Member.*

And I've been provided with Harton's offer letter dated 17 March 2012 which read:

> *We are delighted to offer you a Membership Agreement representing Intrinsic Mortgage Planning Limited.*

The FCA register shows that Quilter Mortgage only has mortgage, non-investment insurance and some consumer credit permissions. And I have no reason to believe it had investment permissions previously. Quilter Mortgage says it therefore couldn't give Harton permission to carry out regulated investment activities – because it didn't have those permissions from the FCA itself. However, I don't agree.

In the case of *Anderson & Ors v Sense Network Ltd* [2018] EWHC 2834 (Comm), the High Court said:

> *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.*

And this was then approved in the Court of Appeal ([2019] EWCA Civ 1395) which said:

> *Mr Sims submits that the purpose of the words "the whole or part of that business" is to enable an AR to have agreements under section 39 with more than one authorised person. They cater for the situation where more than one authorised person has accepted responsibility for the business to be carried on by an AR and each authorised person is itself authorised for only one or some but not all of the businesses to be carried on by the AR. An authorised person cannot accept responsibility for a business for which it does not have authorisation from the FCA. While I accept that the words "the whole or part of" facilitate the involvement of more than one authorised person with the same AR, I do not see the basis for restricting the clear and unqualified words of section 39(1) to this situation. The purpose of*

> *section 39(1) is to confer exempt status on persons in a manner which will fulfil the underlying regulatory and protective purposes of the legislation. It may make perfect sense to limit an AR to a partial exemption, having regard to the breadth and depth of the expertise of that AR or indeed of the authorised person. If, as Mr Sims submits, the legislative intention is to make an authorised person responsible for all the activities of an AR that fall within the authorised person's own authorisation, it is inexplicable that section 39(1) is not drafted in clear terms to have that effect. For my part, I find it impossible to spell it out of section 39(1) as it is in fact drafted.*

The case law is therefore clear that responsibility under Section 39 FSMA should be determined by reference to the agreement in place, not by reference to the principal's FCA permissions. And the agreement in place here did allow investment advice and arranging.

I note Quilter Mortgage's comments about it being non-sensical that it'd allow Harton to carry out investment business when it didn't have permission to do this itself. However, by having an appointed representative agreement that covered two principals with two different sets of FCA permissions, this was a risk that was taken. I agree that Harton's offer letter was clear that Quilter Mortgage was its principal. But I can't ignore the fact the appointed representative agreement didn't differentiate between the two principals it covered when setting out what appointed representatives could, and couldn't, do.

Were there restrictions in the agreement that meant activities had to relate to approved institutions and UCIS advice wasn't allowed?

Whilst the agreement supports there being a list of approved institutions, Quilter Mortgage hasn't provided us with a copy of that list. I therefore can't reasonably conclude that the institutions involved here weren't approved institutions.

I accept that the appointed representative agreement says advice on UCIS isn't allowed. But this complaint isn't just about UCIS advice. The complaint is about advice to take out a SIPP to replace existing personal pensions in order to make a UCIS investment. And it seems the advice in relation to Mr N's previous pensions and his new SIPP was allowed under the appointed representative agreement and was business for which Quilter Mortgage accepted responsibility.

In my view, advising on and arranging the UCIS (even if carried out here in breach of the appointed representative agreement) was closely associated or intrinsically linked to the advice on, and arranging in relation to, the previous pensions and new SIPP. They were part of the same transaction. The advice wasn't given on a stand-alone basis but was part of a single piece of advice to switch the pensions to a new SIPP and invest in the UCIS. I'm satisfied that's consistent with the approach taken by the courts (*Martin & Anor. v Britannia Life Ltd* [1999] EWHC 852 (Ch) and *Tenetconnect Services Ltd, R (on the application of) v Financial Services Lts & Anor* [2018] EWHC 459 (Admin)). So, because Quilter Mortgage authorised part of the advice, it's responsible for the single piece of advice in its entirety.

My decision – jurisdiction

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

Having done so, I'm still satisfied the complaint should be upheld. I've therefore repeated my provisional findings below with additional commentary on the point raised in response to my provisional decision.

Unfortunately, there isn't a fact find available from the time and Mr N says one wasn't done. However, Mr N has told us that at that time he had a salary of around £35,000; no previous investment experience and that he had a low capacity for loss and didn't want to take much risk. He says he now knows the Harmony Bay investment involved more risk than he was prepared to take.

In terms of the pension switches, it seems Mr X's only reason for recommending them was so that Mr N would have the money to make the Harmony Bay investment. And I haven't seen any documentary record of why Mr X recommended that.

UCIS investments carry significant risks and a lack of protections. Everything I've seen suggests Mr N was an ordinary retail investor with little or no investment experience. There's nothing that suggests to me he was the sophisticated type of investor for which unregulated high-risk investments would be suitable. And there's nothing that suggests he could afford to take significant risks with his investments. Mr X would have known all of this.

In these circumstances I'm satisfied advice to switch his pensions to a SIPP to invest in Harmony Bay wasn't suitable and should never have been made as a recommendation to him.

Quilter Mortgage says Mr N clearly understood the risks of the Harmony Bay investment because they were set out in a letter from the SIPP provider dated 7 August 2012 that he signed. And it says he chose to go ahead knowing these risks. But I'm satisfied these risks read as generic risk warnings – for example, one begins "*If applicable to your investment*" – and that Mr N wouldn't have placed weight on them over advice from Mr X.

Putting things right

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

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

In summary, Quilter Mortgage should:

1. Calculate the loss Mr N has suffered as a result of making the switches and investing in Harmony Bay.
2. Take ownership of the investment held in the SIPP if possible.
3. Pay compensation for the loss into Mr N's pension in respect of his pension losses. If that isn't possible, pay compensation for the loss to Mr N direct. In either case, the payment should take into account necessary adjustments set out below.
4. Pay Mr N's SIPP fees for the next five years, in the event he's now not able to close his SIPP.
5. Pay compensation of £300 for the trouble and upset caused to Mr N.

6. Pay interest on the above if fair compensation isn't paid within 28 days of notification of acceptance by Mr N.

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

1. Calculate the loss Mr N has suffered as a result of making the switches and investing in Harmony Bay

To do this, Quilter Mortgage should work out the likely value of Mr N's pensions as at the date of my decision, had he left them where they were instead of switching to the SIPP.

Quilter Mortgage should ask Mr N's former pension providers to calculate the current notional transfer values had he not switched his pensions. 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 pensions hadn't been switched.

The notional transfer values should be compared to the transfer value of the SIPP at the date of my decision, and this will show the loss Mr N has suffered.

Any additional sum that Mr N 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 Mortgage 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. Mr N would then be able to close the SIPP, if he wishes, and avoid paying further fees for the SIPP. For calculating compensation, Quilter Mortgage should agree an amount with the SIPP provider as a commercial value for the Harmony Bay investment. It should then pay the sum agreed plus any costs and take ownership of it.

If Quilter Mortgage 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 Mortgage 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 Mortgage may then ask Mr N to provide an undertaking to account to it for the net amount of any payment the SIPP might receive from the investment once he's been compensated in full for his losses if the award limit applies and Quilter Mortgage chooses to limit compensation to it. That undertaking should allow for the effect of any tax and charges on the amount Mr N may receive from the investment and any eventual sums he'd be able to access from the SIPP. Quilter Mortgage will need to meet any costs in drawing up the undertaking.

3. Pay compensation to Mr N for the loss he's suffered in (1)

Since the loss Mr N has suffered is within his pension, it's right that I try to restore the value of his pension provision if that's possible. So, if possible, the compensation for the loss should be paid into Mr N's pension plan if it still exists. The compensation shouldn't be paid into the pension if it would conflict with any existing protection or allowance. Payment into the pension should allow for the effect of charges and any available tax relief. This may mean the compensation should be increased to cover the charges and reduced to notionally allow for the income tax relief Mr N could claim. The notional allowance should be calculated using Mr N's marginal rate of tax.

If it's not possible to pay the compensation into Mr N's pension, the compensation should be paid to Mr N direct. But had it been possible to pay the compensation into the pension, it would have provided a taxable income. Therefore, the compensation for the loss paid to Mr N should be reduced to notionally allow for any income tax that would otherwise have been paid. The notional allowance should be calculated using Mr N's marginal rate of tax in retirement. For example, if Mr N 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 Mr N 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 Mr N is unable to close his SIPP once compensation has been paid, Quilter Mortgage 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 Mr N wouldn't be in the SIPP but for the unsuitable advice. So, it wouldn't be fair for him 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 Mr N £300 for the trouble and upset caused. I'm satisfied Mr N has been caused significant upset by the events this complaint relates to, and the loss of a significant portion of his pension fund. I think that a payment of £300 is fair to compensate for that upset.

6. Pay interest

Quilter Mortgage should pay fair compensation as set out above within 28 days of being notified that Mr N 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 Mortgage deducts income tax from the interest, it should tell Mr N how much has been taken off. Quilter Mortgage should give Mr N a tax deduction certificate in respect of interest if Mr N asks for one, so he can reclaim the tax on interest from HM Revenue & Customs if appropriate.

My final decision

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £160,000, plus any interest and/or costs/interest on costs that I think are appropriate. If I think that fair compensation is more than £160,000, I may recommend that the business pays the balance.

Decision and award: I uphold the complaint. I think that fair compensation should be calculated as set out above and Quilter Mortgage Planning Limited should provide details of its calculation to Mr N in a clear, simple format. My decision is that Quilter Mortgage Planning Limited should pay Mr N the amount produced by that calculation – up to a maximum of £160,000 plus any interest.

Recommendation: If the amount produced by the calculation of fair compensation is more than £160,000, I recommend that Quilter Mortgage Planning Limited pays Mr N the balance.

This recommendation is not part of my determination or award. Quilter Mortgage Planning Limited doesn't have to do what I recommend. It's unlikely that Mr N can accept my decision and go to court to ask for the balance. Mr N may want to get independent legal advice before deciding whether to accept this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 4 October 2023.

Laura Parker
Ombudsman