DRN-4501618

The complaint

Mr E complains that Quilter Financial Planning Services Limited gave him unsuitable advice to transfer his pensions to a drawdown plan. He could've funded his divorce settlement by other means which would have avoided losing valuable benefits.

Mr E is represented in this complaint by a claims management company ("CMC").

What happened

Mr E and his wife started divorce proceedings in 2020, but while Mrs E had legal representation Mr E did not. As part of the financial settlement they reached between them, Mr E paid his wife £90,000 in respect of her share of the marital home, funded by way of a mortgage, extending the term to age 71 when he intended to retire. Mr E had also agreed to pay his wife £52,000 to equalise their pensions, and the way in which Quilter recommended this be achieved has led to his complaint.

Mr and Mrs E had known financial adviser Mr R for many years, and he was engaged to advise on the pension element of the divorce settlement. Mr R worked for Warwick Road Financial Services Ltd, which is an appointed representative of Quilter Financial Services Limited ("Quilter"), but for simplicity I'll refer to Quilter in the decision.

Mr E had three defined contribution pension plans with Royal London, invested in their "With Profits" fund. These had valuable benefits which would be lost on transfer.

- Personal Pension (PP) ending *313 valued at around £50,627 had a guaranteed annuity rate ("GAR") from age 65 of 8%,
- An Appropriate Personal Pension (APP) ending *929 valued at around £59,962 made up of protected rights. The pre-1997 element had a GAR of 5% plus 3% escalation and post-1997 had a 3.5% GAR plus 5% escalation
- S226 retirement annuity contract (RAC) ending *391 valued at around £28,958.

Mr E was also contributing to his employer's group personal pension ("GPP") with Scottish Widows, valued at around £11,851, and his normal retirement age was 65 in June 2029. Having discounted other options, Quilter recommended that Mr E transfer his Royal London plans to an Old Mutual ("OMW") flexi-access drawdown plan on its platform. This would enable Mr E to release a tax-free lump sum to cover the majority of the amount he needed to pay his ex-wife. The balance to be raised by way of a taxable withdrawal, as Mr E had minimal savings. The advice was confirmed in the suitability letter dated 9 December 2020, addressed to Mr E at his home address, which referred to a meeting between Mr E and the adviser on 22 September 2020.

OMW wrote to Mr E on 5 January 2021 confirming receipt of the transfer application, and Mr E's three Royal London plans totalling around £137,903 were transferred to his OMW plan between then and April 2021. A tax-free lump sum of £34,476 was released, with the balance, after deducting Quilter's fee of £2,000, invested in its Balanced Passive fund, as Mr E was assessed as a "balanced" investor. Mr E then made a taxable withdrawal of £24,000 to make up the balance of the £52,000 settlement.

The divorce was finalised in December 2021. And Mr E has subsequently remarried and appointed a new financial adviser “K”. In November 2022 “K” switched Mr R’s plan valued at around £75,000 to a self-invested personal pension (“SIPP”) with another provider.

In December 2022 Mr E complained to Quilter that the advice hadn’t been in his best interests, as he’d lost valuable benefits by transferring his plans. Mr E says he never had a formal meeting with Mr R, and hadn’t seen the suitability letter, but admitted to signing documentation his ex-wife gave him without reading it properly. And in addition to the emotional toll of the marriage breakdown, he should have been dealt with as a vulnerable consumer due to his lack of financial knowledge. Mr E says he may have had other options to raise the funds which weren’t considered by the adviser. These included a pension sharing or earmarking order, further extending the mortgage to £142,000, still within the property valuation of £180,000, or even borrowing from his brother who ran the family business. Mr E had declined Quilter’s ongoing advice service yet was charged for it anyway. And he thought there may be a conflict of interest, as Mr R was acting for Mrs E rather than him. He said Quilter should pay compensation of around £200,000 to make up for the pension benefits he’s lost.

Quilter didn’t uphold the complaint. They said Mr R had been told by Mrs E’s solicitor that the parties had reached an amicable financial settlement whereby Mr E would pay £52,000 to Mrs E, as set out in the draft Consent Order, which enabled a “*clean break*”. Mr R denied any conflict of interest and explained the nature of his relationship with the family. In the past he’d worked with Mrs E’s father as an adviser for CIS, which later became part of Royal London, where he’d also advised Mr E’s other brother. Mr E had chosen not to be legally represented for the divorce and financial settlement, and their dealings had been mainly by phone, in view of Covid restrictions in place at the time. He hadn’t considered Mr E to be emotionally vulnerable, as at the time of the advice he was already in a new relationship with his now wife. Quilter said Mr E had no realistic alternative to releasing funds from his pensions. Increasing his mortgage borrowing to the necessary level would’ve been unaffordable, as the repayments would represent 53% of his monthly income. Quilter disputed Mr E’s claim not to know about the transfer, as he’d signed a form on 4 November 2020, confirming receipt of the firm’s guide to their service and terms of business, and the suitability report had been sent to his home address. And if Mr E was so unfamiliar with financial products they questioned why his new adviser had arranged the transfer to a SIPP.

Mr E referred his complaint to this service in July 2023, saying that Quilter should’ve recommended a way to raise the necessary funds which avoided the loss of valuable GARs and escalation. And reiterating the conflict of interest with Mr R appearing to have considered Mrs E’s interests over his own.

Our investigator didn’t uphold the complaint. He said Quilter had been engaged to advise on the best way to meet Mr E’s obligation under the pension equalisation settlement which had been mutually agreed between the parties. It wasn’t for Mr R to have commented on this, or to recommend Mr E be legally represented. He was satisfied the draft Consent Order had specified the £52,000 was to come from Mr E’s pensions, and that partial encashments or transfers of pension plans aren’t possible. Releasing tax-free cash from the three plans meant the taxable withdrawal meant Mr E was taxed at basic rate. But if he'd only transferred two plans in order to retain one plan with a GAR, this would’ve required a larger taxable withdrawal which would’ve pushed him into the higher rate tax bracket, making him liable for an additional £10,000 in income tax. And although the drawdown plan was subject to some investment risk, the plans had been invested in the Royal London (CIS) With-Profits fund, which last paid an annual bonus in 2003, meaning it hadn’t grown for around 20 years. As Quilter’s advice meant Mr E had complied with the draft Consent Order, he didn’t think it had been unsuitable.

Mr E's representatives requested an ombudsman's decision. They pointed out a number of "*procedural irregularities*" including that Mr E's phone number and email address in Quilter's records were actually those of his ex-wife, he hadn't received the suitability report, nor signed an authority to proceed with the transfers, negating the advice. Quilter hadn't explored the possibility of transferring the plans to Mr E's workplace pension rather than a drawdown plan. And they thought Mr E would've been better off paying the additional tax on a larger withdrawal rather than losing the valuable GAR and escalation.

The investigator considered these arguments, but they didn't change his mind. He explained the calculation which compared retaining the GAR and paying the additional tax. This showed that if Mr E had retained the APP and transferred the PP and RAC to drawdown he'd have to wait until 83 for the benefits from the APP to match the drawdown plan, and until age 98 to be better off, which he subsequently revised to age 96 as annuity rates have since improved. But with the other option of retaining the PP and transferring the APP and RAC to drawdown he'd never have been better off. And he responded to the points relating to whether Mr E could've met or spoken to Mr R at the relevant time, the incorrect contact details, and the possibility of Mr E borrowing from his brother.

Mr E's representatives still maintain Mr E should've been advised to raise the funds by secured borrowing, rather than accessing his pensions, so they requested an ombudsman's decision.

So the case has come to me for review.

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.

Having done so I've come to the same conclusion as the investigator, for broadly the same reasons. Let me explain.

It doesn't appear to be in dispute that Mr E had agreed to pay his ex-wife a pension equalisation payment of £52,000 as part of their divorce settlement. This was in addition to the £90,000 he'd already paid in consideration of the marital home being placed into his sole name. He had financed this payment by way of a mortgage, meaning he incurred sole responsibility for a significant debt which delayed his retirement to 71. And he'd done all of that based on the agreement reached, he hadn't been compelled by the court. Legal representation can be useful in such disputes, but it's not a requirement, can be very costly, it's noted that Mr E dismissed the idea of legal representation for this reason, and arguably in this case was unnecessary as the parties had come to an agreement between themselves. So it wasn't for Quilter to interfere with that, they had to assess Mr E's circumstances and recommend the best way to meet his financial obligation.

A consent order legally formalises an agreement already reached by the parties, and Mr R had been sent a copy of the draft Consent Order on 9 December 2020 by Mrs E's solicitor. This confirmed that on 22 September 2020 the marital home had been transferred into Mr E's sole name for which he'd paid his ex-wife £90,000. It also confirmed "*that [Mr E] had made a further lump sum payment to [Mrs E] of £52,000 on [date left blank] following drawdown from his private pensions*". The aim of which was to achieve a "*clean break*". I think it was reasonable for Quilter to have accepted the consent order which stated the parties had arrived at a mutual agreement, even though the solicitor had noted the order hadn't been formally approved by the court. Particularly as it included a warning about the consequences of failing to comply. As Mr E had taken action in respect of the marital home without waiting for court approval, I've no reason to think he wouldn't have done the same in respect of the pension equalisation aspect. And I agree with the investigator that the order did state the funds would come from Mr E's private pensions, not from other sources of funds.

Mr E has subsequently confirmed he isn't disputing the need to raise £52,000 to pay his ex-wife. But he didn't think Quilter had adequately explored alternative ways to do so, which would have avoided the loss of valuable pension benefits such as GARs and escalation. And that the advice process was flawed.

Mr E maintains he didn't meet Mr R and had no direct contact or communication with him, and that no advice was given to him personally. He said the adviser was liaising with and working on behalf of Mrs E. This is strongly refuted by Mr R who says he was in direct contact with Mr E, by telephone due to the restrictions which applied at the time. And although he knew both parties and the wider family over the years, he wasn't acting for Mrs E. I think the suitability report evidences that Quilter advised Mr E. But even if Mr R was working for both parties in respect of the divorce, I don't find this to be a conflict of interest, or even that unusual, particularly if he'd been their adviser in the past.

Mr E described being in an emotional state as a result of the divorce and admitted signing some documents put before him by his wife without reading them. If he did so, I can't hold Quilter responsible for that, and I've seen no evidence documents requiring Mr E's attention were sent to Mrs E. But in any case, the transfers didn't need signed instructions as they were completed using the electronic "*Origo Options*" system. I'm sure Mr E was upset at the end of his marriage, but it seems at the time of the advice he was already in a new relationship. And I don't consider his lack of financial knowledge meant Quilter should have treated him as a vulnerable consumer, or that if they had, the advice would've been different. Overall I'm not persuaded the transfer took place without Mr E's knowledge or consent, or that his lack of financial expertise meant he didn't understand the process.

There are some inconsistencies between Mr E's recollection of events and the account given by the adviser, including some discrepancies in the records, such as Mr E's phone number and email address. The documents state a meeting with Mr E took place on 22 September 2020, the same day the property was transferred into his sole name, "*at the client's place of work*". Mr E doesn't have a fixed workplace, and this was apparently at a time he was working "*away*", although Quilter says the location was walking distance from his home address, and Mr R says he often sees clients outside of business hours, and in any case it would've been a telephone appointment. While businesses should keep accurate records, I'm not persuaded this is evidence of the advice itself being flawed.

It's fair to say a spouse would be able to provide a significant amount of personal and financial information, but it seems likely the fact-find and supplementary questionnaire, which related to Mr E's plans at retirement, financial needs and objectives were completed with Mr E's direct input, as they included details of his occupational pension contributions, state pension entitlement and a breakdown of his monthly expenditure. And I think it's unlikely an adviser would be prepared to provide advice without contact with the client.

Mr R would be aware of his obligations under COBS 9.2.1R to make a personal recommendation which is suitable for its client, by obtaining the necessary information regarding their:

- *(a) Knowledge and experience*
- *(b) financial situation.*
- *(c) Investment objectives*

And the advice was subject to Quilter's compliance check, which required a number of additions and clarifications before it was signed off.

I'm satisfied Mr E signed Quilter's "*Authority to Proceed*" form on 4 November 2020, which stated he'd been given a guide to their services and terms of business on 22 September 2020, and that the adviser had been engaged to "*review pensions reference divorce settlement"* at a fee of £2,000. Mr and Mrs E both work for the family business, and Mr R said Mr E was agreeable to documentation being forwarded to the office for signing. So whether forms were sent to Mr E to sign and return, rather than being signed during a face-to-face meeting, I think Mr E was aware Mr R had been engaged and why.

Mr R also produced an initial Retirement Options report dated 17 November 2020 which included a paragraph which said that the report "*may seem quite long, however it is important you take the time to read it".* And it set out general information about how pension benefits can be accessed, the benefits and risks of each, and the scope of the advice to be provided. It's not clear how this was delivered to Mr E, as I've not seen a covering letter or email. But I think as Mr R wanted Mr E to read it carefully it's most likely he would've received it.

The FCA handbook at COBS 9.4 sets out the circumstances when a suitability letter or report should be issued. and what it should contain.

COBS 4.7 requires that the report must at least:

> *(1) specify, on the basis of the information obtained from the client, the client's demands and needs;*
>
> *(2) explain why the firm has concluded that the recommended transaction is suitable for the client having regard to the information provided by the client;*
>
> *3) explain any possible disadvantages of the transaction for the client;*

As far as I can see the report Quilter produced for Mr E does that. It set out that Mr E's main objective was the need to raise £52,000 (plus £3,000 for divorce expenses) from his pensions. It noted that apart from an "emergency fund" of around £7,800 in an ISA, Mr E had no other savings. It was specifically noted that Mr E realised borrowing more by way of a mortgage or loan would be unaffordable, and he had no wish to further increase his monthly outgoings. I think this is reasonable, given the divorce meant as well as the mortgage Mr E had taken on sole responsibility for running the marital home on one income rather than two.

Although the report included details of the workplace plan Mr E was contributing to, the Scottish Widows GPP valued at around £11,851, he didn't wish it to be included in the review. The report included an analysis of the benefits for each of the Royal London plans, including details of the GARs, and the growth necessary to match the benefits. The Royal London plans offered no flexibility, Mr E couldn't release a tax-free lump sum while keeping the balance invested, nor could he drawdown the funds flexibly. So Quilter recommended the transfer to OMW and funding the payment to Mrs E by taking the maximum tax-free lump sum, plus a taxable withdrawal. Limiting the taxable withdrawal would realise slightly less than the £55,000 Mr E said he needed, but this would ensure he avoided being taxed at the higher rate. The report is addressed to Mr E at his home address where his ex-wife no longer lived, so I think it's most likely Mr E received a hard copy, even if he didn't receive it by email.

It's generally preferable to retain pension provision where possible, particularly those with guaranteed benefits, but I can't see Mr E had any other reasonable alternatives to raise the necessary funds to ensure a clean break settlement. While GARs are valuable, they were defined contributions plans so were already subject to some investment risk, and hadn't been performing well, being invested in Royal London's "with profits" fund which hadn't paid a bonus for around 20 years.

Mr E's representatives have put forward a number of options they say weren't explored - borrowing from his brother who runs the family firm, extending his mortgage even further, transferring only two of the plans in order to retain one plan with a GAR, or transferring the plans to the workplace GPP rather than Quilter/OMW.

The suitability report shows that borrowing from a financial institution was considered but discounted by Mr E himself. While there may still have been excess equity in the property, increasing the mortgage by the necessary amount would've been unaffordable for Mr E, even if he could find a lender prepared to consider the proposal. Mr E's representatives acknowledge that finding a willing lender may have been "*difficult to almost impossible".* Borrowing an additional £52,000 over 15 years even on interest-free terms, would add an additional £289 to Mr E's monthly expenditure, which he didn't want to do. Mr E had already delayed his retirement from 65 to 71, so a further term extension doesn't seem realistic, particularly for someone in a manual occupation. If Mr E didn't want to increase his outgoings and didn't think increasing his mortgage was affordable, I don't think it can be considered a realistic alternative.

Mr E has subsequently explained that his brother had offered to pay for his divorce, but he refused, as it was "*all taken care of".* His brother is now sadly deceased, so whether he had the necessary means to help Mr E by way of a loan or gift cannot be confirmed. But I don't think I need to consider this point further, as Mr E declined the offer when it was made.

An ear-marking order was suggested, which would've meant Mr E retaining ownership of the pensions and benefits such as the GAR. But Royal London would've been required to make a payment to his ex-wife when Mr E took benefits, which may not be until 71. The consent order specified a clean break, which was important as Mr E was already in a new relationship with his now wife. And that the payment would be made concurrent with the decree absolute, so Mrs E may not have agreed to wait, or to accept the same amount being paid in the future.

Pension offsetting can be discounted as Mr E couldn't raise the necessary funds from other assets. A pension sharing order would require the court's approval and would involve the funds being transferred into a pension for Mrs E, rather than paid in cash as per the agreement. As I've said, I don't consider it was Quilter's responsibility to revisit the settlement agreed by the parties as set out in the draft consent order, or to direct Mr E to renegotiate it with legal representation.

The investigator has already explained that the smaller tax-free lump sum available if only two of the three plans were transferred would've required a larger taxable withdrawal, which would've been worse financially for Mr E, and releasing the tax-free cash without transferring wasn't possible. As far as I can see, there's no advantage in transferring from Royal London into Mr E's GPP, as the GARs would still be lost, and he could only pay Mrs E by taking his benefits, which he didn't want to do, as he intends to work and contribute for another 15 years.

I can't see Mr E's point about being charged for ongoing advice which he declined has been addressed, but I think Quilter recommended he have annual reviews, and his new financial adviser has transferred his plan to a SIPP, which will also involve charges. And in any case I don't think this point is key to the crux of the complaint about the unsuitable advice to fund Mr E's divorce settlement.

I think there were some procedural and administrative failings in the way the process was carried out and recorded. And I agree Quilter had a responsibility to ensure Mr E understood the benefits he'd lose by transferring. I'm satisfied the alternatives were explored by Quilter and borrowing commercially or from his brother were rejected by Mr E himself. As the objective of the advice was to enable Mr E to raise £52,000 in order to achieve a clean break settlement, I don't think there was a realistic alternative to the plans being transferred, which involved regrettably losing the GARs. But it must be acknowledged that the divorce settlement itself will inevitably impact Mr E's retirement provision, as in addition to forgoing some of the pension savings he'd built up, the additional mortgage repayments will reduce his disposable income with which to make contributions.

Overall, I'm satisfied given Mr E's circumstances, the advice wasn't unsuitable, and so I don't uphold the complaint.

My final decision

I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr E to accept or reject my decision before 8 March 2024.

Sarah Milne
Ombudsman