DRN-4829783

The complaint

Mr F and Miss P, as executors, complain on behalf of the estate of Mr I about the advice he received from Digby Associates an appointed representative of Quilter Financial Planning Solutions Limited (referred to as "*Quilter*").

In summary they say Mr I was advised to invest in a financial product that was unsuitable for him given his age and circumstances.

To put things right they'd like compensation for losses claimed in the sum of £70,000.

What happened

Mr I was first introduced to the adviser by Mr I's former adviser in 2019. But the initial meeting didn't take place until 23 June 2021 owing to the Covid-19 global pandemic. Quilter says that Mr I raised concerns about Inheritance Tax (IHT) and estate planning – he was encouraged to bring his family members along to the meeting.

I understand that an attitude to risk (ATR) questionnaire was completed, and Mr I was assessed as having a "*Balanced*" ATR – described as "*In general, Balanced investors prefer not to take much risk with their investments*".

In the annual review report Mr I's main goal was described as "*Growing your capital with tax efficient investing*" and "*…potentially taking action to mitigate Inheritance Tax (IHT)*".

It was recorded that Mr I answered "yes" to the following questions:

- I'm not comfortable with the ups and downs of stock market investments.
- People who know me would describe me as a cautious person.
- I generally look for safer investments, even if that means lower returns.
- I generally prefer bank deposits to riskier investments.

A meeting took place on 15 July 2021 and was attended by one of Mr I's daughters and her husband during which Mr I's IHT liability was discussed. Quilter says Mr I wanted to minimise his IHT liability whilst continuing to have access to his savings and investments.

I understand that some of the options discussed included making use of gifting, and the potential to invest in the Alternative Investment Market (AIM) in order to provide exemptions from IHT if held in qualifying companies for two years. Quilter says that an investment bond and general investment account (GIA) was also considered.

I note that qualifying AIM shares can be considered business property and if held (in certain trading companies) for a period of at least two years it becomes eligible for IHT 'Business Relief' (BR) at 100% and will fall out of the estate for IHT purposes. I note that this relief is a relief by value, in other words, the shares are treated as having no value for IHT purposes.

On 16 June 2021 Quilter wrote to the attendees confirming the volatility of AIM and that the adviser made the parties aware of the risks involved. Quilter says that prior to carrying out his research and presenting his recommendation the adviser explained the volatile nature of AIM investments and drew particular attention to the fact that during the 2008 global financial crisis they fell approximately 20% more than the FTSE Allshare index.

On 18 August 2021 Quilter issued its recommendation confirming that Mr I's ATR was balanced, but for this investment his ATR was changed to Dynamic risk. The recommended investments were also described as *"significantly higher risk than a Dynamic attitude to risk and the potential for loss is total or 100%"*. In other words, the adviser noted that whilst Mr I had a Balanced ATR, he was happy to take a far higher risk in his IHT planning.

On 9 September 2021 Mr I's son-in-law, via email, instructed the adviser to go ahead with the recommendation. Quilter sent a response accepting the instructions to proceed and confirming the IHT position.

The executors say Mr I was advised to place around £189,000 into a high-risk volatile AIM based investment at the age of 94 which was unsuitable for him given his age and circumstances.

Quilter didn't uphold the complaint. In summary it said that the recommendation was suitable for Mr I and that it met his objective for IHT mitigation. The risks were also made clear to him, and his family, and they were happy to proceed.

Unhappy with Quilter's response, the executors referred the complaint to us. One of our investigators considered the complaint and thought it should be upheld. In summary, he said:

- Whilst the adviser made clear the risks associated with this type of investment, the advice wasn't suitable for Mr I.
- The possibility of a "total or 100% loss" was mentioned in the report – and deemed suitable on basis that Mr I had invested in BR investments – but there's no further mention of what these products were or when Mr I invested in them. Mr I's family are unaware of any such investments.
- Although Mr I might've been comfortable with this type of risk in the past, it doesn't mean that he was at the time.
- Mr I was advised to invest 63% of his liquid assets (amounting to £194,674) into investments which had the possibility of losing 100% of his money. Although the adviser mentioned that he wouldn't normally recommend investing more than 25% of liquid assets in this way, he still went on to make the recommendation investing 63%.
- Mr I was 94 years of age at the time, based on the recommendation if he survived another two years, he stood to mitigate around £75,063.25. But the chances of the plan not working out were greater than the plan working out. Risking £194,674 to make a saving of £75,063.25 IHT liability wasn't suitable.
- The adviser had a duty to safeguard Mr I from putting his money into such a precautious position and failed to do so.
- The recommendation had a far greater risk than Mr I had tolerance for.
- Had Mr I not been given unsuitable advice to invest in the AIM and ITS, its likely he would've remained in the existing ISA, bond, and GIA. However, it's not known for sure what he would've done.
- To put things right, Quilter should compare the value of his investments against the 50/50% benchmark (because Mr I was willing to take some risk with his investment). If there's a negative difference, it should pay the loss with 8% simple interest from the date of payment to the date of settlement.

Quilter disagreed with the investigator's view and asked for an ombudsman's decision. In summary, it made the following key points:

- Not only was Mr I prepared to bear the higher risk for the product but both he and his family members were fully informed about the prospect of losses about this type of product, as well as the savings, if successful.
- The documentation records that Mr I was a higher risk investor in respect of both products and in terms of what he was trying to achieve with IHT mitigation.
- Clients can and do have multiple ATR positions at the same time, for example their position with regards to a longer-term product can be different to a shorter-term product.
- In this case, Mr I accepted the capacity for loss – or the higher volatility (risk) of the product – to meet his objectives.
- The adviser noted the following:
    - *"For me I cannot see how there could not have been a more robust process than the one we took with our firm & what I'm really struggling with is the contradiction in the FCAs own guidance that it is perfectly reasonable to have different ATRs for different goals – which is the point Mr P (name anonymized) has made repeatedly. I am not saying Mr I's balanced ATR is irrelevant but the acceptance of higher volatility for the purpose of IHT planning for the benefit of his beneficiaries is a feature not a fault of our recommendation as was the treatment of this solution as a long term (my emphasis) investment, clearly challengeable if it was for Mr I's benefit but absolutely appropriate in the context of this investing in the next generation ie. without needing to sell the underlying investment."*
- The risk of the product clearly wasn't (perhaps Quilter meant 'was') understood, the saving was considerable, but there were inherent risks involved with the product, especially over the short term.
- Any losses would've only crystalised at the point of death, not to be realised by the executors. And any losses in the product would only crystalialise at the point of sale but the executors have the option to transfer.
- According to Public Health England, life expectancy at older ages is the highest it has ever been. For 95 years old, it's another three years life expectancy.

The executors (with assistance from an IFA) provided the following points in response to Quilter:

- Clients can have multiple risk appetites attached to different products. But ATR and capacity for loss are two separate matters that haven't been considered here.
- The advice confirms a high degree of risk, but doesn't consider the capacity for loss, aside from statements that the loss can be as much as 100%.
- AIM was only one strategy where BR could be achieved but there were others that weren't considered.
- Asset-backed solutions could've had the same goal in so far as they would be exempt from IHT after a period of two years with far less volatility. These products are in the Octopus fund range and is one of their flagship solutions – they offer a targeted rate of return (not guaranteed) and offer greater capital security than the AIM. These products would've been available to the adviser.
- I have seen the email of the 18 June in which a list of asset back solutions were provided which were available at the time as an illustration of the opportunities to mitigate the risk of capital loss whilst still providing tax mitigation.
- The Office of National Statistics life expectancy is an average – 50% of people will reach it and the other 50% won't. A two year life expectancy is therefore not imminently achievable just because Mr I reached the age of 94.

- The suggestion that the beneficiaries could've held on to the investment for longer to allow for the fund to recover is a moot point.
- In conclusion, the advice was unsuitable. A few solutions would've been available to mitigate IHT given Mr I's age. An investment that qualified for BR is one such solution. If the investment horizon had been widened, a more suitable contract could've been found – one which presented less volatility than was experienced in the AIM market.

As no agreement was reached, the matter has been passed 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 agree with the investigator's conclusion for much the same reasons. I'm going to uphold this complaint.

On the face of the evidence, and on balance, despite what Quilter says, I'm unable to safely say that the advice was suitable for Mr I.

In other words, I can't say that the recommendation to invest in higher risk investments – at the risk of losing all the investment and/or not mitigating his IHT liability – for the purposes of IHT mitigation, was suitable for a 94-year-old who otherwise had a balanced ATR.

By way of redress, it's difficult to know for sure what Mr I would've done in the alternative. It's possible that he would've invested in something different – possibly from the list of the asset backed investments provided by the executors – or he could've just left his money where it was. On a balance of probabilities, if Mr I was aware of the risks involved, he probably would've left his money where it was.

Despite what the executors say, I simply can't say with any confidence what Mr I would've done in the alternative. So, in the circumstances, and on balance, to put things right I think Quilter should compare the performance of his investment with the 50/50 benchmark (as he was still prepared to take a risk), namely "For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds". If there's a negative difference, pay the loss with 8% simple interest from the end date to the date of payment.

So, I uphold this complaint, in summary, for the following reasons:

- Whilst I appreciate that investors can have a different ATR – in respect of different products (for different purposes) – I don't agree with Quilter that a higher risk (justifying its advice to invest in the AIM for BR) was suitable for Mr I in this instance.
- A product that was at risk of losing 100% of his money wasn't in my view suitable when there was a good possibility Mr I may not even survive the two years needed for his estate to benefit from the IHT mitigation it was intended to deliver, given his age and circumstances.
- It seems that the recommendation was higher than the revised dynamic risk, if that was the case, not only was it higher than the balanced risk, it was also higher than the revised Dynamic risk.
- Even if Mr I had invested in higher risk products in the past, this didn't justify the recommendation at that point in time.

- Despite what Quilter says, I don't think that if Mr I (and his family) were made fully aware of the risks involved – including the risk of him losing his capital and still having to pay IHT- he would've gone ahead with the recommendation.
- In other words, although the suitability report suggests that Mr I was prepared to accept this level of risk for IHT mitigation purposes – even though it was (far) above his risk rating – I'm not persuaded he would've done so if he understood the real risks involved.
- I note Mr I's family say that had Mr I been aware of the high risk of losing money he wouldn't have invested with this company- "*but would have left his money in an interest bearing account which he could watch grow via his ipad*".
- I think it's possible that Mr I would've invested in something different – but notwithstanding a range of products available (as referred to by the executors), I can't safely say what he would've done.
- In the circumstances I think it would be wrong to choose a product that I think he would've invested in with the benefit of hindsight – because I don't have the evidence to say what he would've done.
- I'm not persuaded that Mr I, normally a balanced risk investor who hadn't previously prioritized IHT mitigation, was willing to do so at the age of 94 – risking (up to 100%) a substantial part of his assets – on the chance that he might survive another two years and/or mitigate some of his IHT liability.
- It's arguable that this was akin to a gamble – risking £194,674 to mitigate around £75,000 IHT liability, knowing that there was a material risk that Mr I might not survive and/or he might lose his money. I'm not persuaded that Mr I had that kind of (significant) capacity for loss.
- I note the executors say that as of October 2022, Mr I's estate sustained a loss of around £70,000 (with a tax saving of £28,000) – which is what they'd like back but for reasons I've explained that's not how redress works which is why I've recommended the methodology that I have. In any case, I'm unable to say what Quilter should've done with the benefit of hindsight.
- I appreciate what the adviser says about the benefit to the beneficiaries, but Mr I was its customer and therefore the advice was for his benefit. In any case, it's arguable – given the risk involved – that this approach wasn't good for Mr I, or his beneficiaries, to whom he was hoping to pass his assets on to.
- The adviser wasn't just there to "advise", he was there to provide advice that was suitable – on this occasion for the reasons set out above, I can't safely say that he did this.
- I note that family members were present when matters were discussed at the key meeting. However, I agree with the executors that family members being present during the meeting with the adviser doesn't make an unsuitable recommendation suitable. I note they say they were there just to make sure that Mr I wasn't "ripped off" they weren't there in any advisory capacity.
- The situation would've been materially different if the adviser had said that that AIM investment was an option, albeit a risky one (risking 100% of his capital and with no guarantee that it will mitigate his IHT liability) and for that reason he's not able to recommend it and Mr I insisted he wanted to go ahead in any event. But that's not what happened here, and Mr I wasn't an 'insistent' customer.

Putting things right

Fair compensation

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

I take the view that Mr I would have invested differently. It is not possible to say *precisely* what Mr I would have done differently. But I am satisfied that what I have set out below is fair and reasonable given Mr I's circumstances and objectives when he invested.

What must Quilter do?

To compensate the estate of Mr I fairly, Quilter must:

- Compare the performance of each of Mr I's investments with that of the benchmark shown below.

- A separate calculation should be carried out for each investment.

- Quilter should also add any interest set out below to the compensation payable.

Income tax may be payable on any interest awarded.

Investment name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Octopus AIM ISA IHT Service	No longer exists	For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	Date of investment	Date ceased to be held	8% simple per year on any loss from the end date to the date of settlement
Octopus AIM IHT Service	No longer exists	For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	Date of investment	Date ceased to be held	8% simple per year on any loss from the end date to the date of settlement

For each investment:

Actual value

This means the actual amount paid or payable from the investment at the end date.

Fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, Quilter should use the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

Any additional sum paid into the investment should be added to the *fair value* calculation from the point in time when it was actually paid in.

Any withdrawal, income or other distributions paid out of the investments should be deducted from the fair value calculation 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 totals all those payments and deducts that figure at the end to determine the fair value instead of deducting periodically. If any distributions or income were automatically paid out into a portfolio and left uninvested, they must be deducted at the end to determine the fair value, and not periodically.

Why is this remedy suitable?

I have decided on this method of compensation because:

- Mr I wanted Capital growth with a small risk to his capital.

- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to his capital.

- The FTSE UK Private Investors Income ***Total Return*** index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is a mix of diversified indices representing different asset classes, mainly UK equities and government bonds. It would be a fair measure for someone who was prepared to take some risk to get a higher return.

- I consider that Mr I's risk profile was in between, in the sense that he was prepared to take a small level of risk to attain his investment objectives. So, the 50/50 combination would reasonably put the estate of Mr I into that position. It does not mean that Mr I would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker fund. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mr I could have obtained from investments suited to his objective and risk attitude.

- The additional interest is for being deprived of the use of any compensation money since the end date.

My final decision

I uphold the complaint. My decision is that Quilter Financial Planning Solutions Limited should pay the amount calculated as set out above.

Quilter Financial Planning Solutions Limited should provide details of its calculation to the estate of Mr I in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mr I to accept or reject my decision before 12 February 2025.

Dara Islam
Ombudsman