DRN-4456288

The complaint

Mr M complains that Quilter Financial Planning Solutions Limited (Quilter) received trail commissions on his Self-Invested Personal Pension (SIPP) despite it never telling him it had taken over his plan or offering or providing him with advice. He wants the commission refunded with interest and compensation for the inconvenience.

What happened

Mr M was advised to transfer to Standard Life by his financial adviser, Mr R in 2006. Mr R's firm was directly authorised by the then regulator the FSA. In July 2009 Mr R became an appointed representative of a firm called Positive Solutions, with his own firm closing down. In 2020 Positive Solutions rebranded to become Quilter.

Mr M says the transfer to Standard Life was on the basis that Mr R would receive a 3% upfront commission and an ongoing commission of 0.5% p.a. According to the suitability letter provided the ongoing commission would meet;

> *"the costs of ongoing administration. This will also cover the cost of any meetings required to reaffirm your position with regards to the pension fund."*

With the meetings to take place annually or every six months if Mr M preferred. The suitability letter also said that Mr R "*Would rely upon you to contact me to arrange these meetings."* Mr M says he last spoke with Mr R following a sharp fall in the value of his fund in around 2010/11. He says he decided to leave things to see if the value recovered. It was left that Mr M would contact Mr R when he was ready.

Mr M says he only became aware Quilter were involved with his plan and were receiving the commission when he made enquiries with Standard Life about his plan in 2021. He instructed Standard Life to stop paying the 0.5% commission in April 2021, before transferring his plan in October 2021 to Aviva. He complained to Quilter. He said it had never contacted him to tell him it was involved, had never provided him with advice and he hadn't authorised it to act for him. He said it should repay the commission it had received with interest and pay him compensation.

Quilter didn't accept the complaint. It said as his SIPP was taken out before 31 December 2012 it predated the FCA's Retail Distribution Review (RDR), which had abolished commission. It said the ongoing commission being paid usually came from product charges which Mr M had authorised when he took the plan out, so it wasn't refundable. It said it had no record of any post RDR agreement for it to provide Mr M with ongoing advice. It said the letter from Mr R's old firm had said it would be for Mr M to arrange any meeting. It also said regardless of these points it believed Mr M had brought his complaint too late. Because it was both more than six years since Mr R's firm had arranged the plan and more than three years since Mr M should have reasonably known he had grounds to bring a complaint.

Mr M referred his complaint to our service. He said the commission paid to Quilter had depleted his fund and as he wasn't aware it was involved; he couldn't request it to review his plan.

Our investigator looked into the complaint, she said it had been brought in time and could be considered by our service, but she didn't uphold it.

She said Mr M's SIPP began before RDR came into operation in January 2013. This had abolished commission and required any ongoing fees to be in return for agreed services. However, she said this hadn't affected existing products paying ongoing or "trail" commission and advisers could still receive this, and it wasn't refundable.

Mr M disagreed. He said our investigator had ignored the original contract he'd had with Mr R which was that he would provide ongoing advice. Mr M said he was dealing with one adviser not a large firm like Quilter, who he didn't know were involved. He said he wasn't aware how RDR affected the original contract, but other financial institutions he dealt with did advise him about changes in terms and conditions.

Our investigator said her view hadn't changed and she couldn't comment on the legality of the contract Mr M says he had with Mr R.

As Mr M doesn't agree it has come to me to decide.

My provisional decision

I issued my provision decision on 27 October 2023; I explained the reasons why I was planning to uphold the complaint. I said:

I think this is a complaint that our service can consider. Mr M is complaining about Quilter's failure to advise him it was involved with his policy. He wasn't aware of this until 2021 and he made his complaint the same year, so within three years of when he became aware of the issue.

I understand Mr M's annoyance about what has happened here. When RDR came into force it didn't abolish pre-existing trail commission payments. And any existing trail commission payments could also be re-registered to a new advisory firm. But for new arrangements commission could no longer be paid, being replaced by adviser charges which needed to be specifically agreed by the client.

Pre RDR commission can be a difficult area. It was generally an agreement between the product provider and the advisory firm rather than between the consumer and the product provider. Effectively it was a payment from the provider to the adviser for introducing the business to it. There was no requirement that the advisory firm would provide ongoing services in return for trail commission payments, although many offered to do so. Ongoing or trail commission was often, but not always, paid from the product charges the provider made. This might mean that product charges might not be reduced if it wasn't paid. But post RDR some product providers would reduce charges if the plan holder asked for trail commission to be stopped. And, trail commission could also be paid from a separate additional charge on top the providers own charges. Which would be cancelled if the plan holder requested it.

Mr M says the last time he spoke with Mr R was around 2010/11. This was after Mr R had become an appointed representative of Quilter. It doesn't appear Mr M tried to contact Mr R subsequently, as he was dealing with Standard Life directly when he was told of Quilter's involvement and requested that the payments be stopped.

Mr M's agreement was with Mr R, and it does appear he never heard from Quilter. It says there was no agreement pre or after RDR with Mr M. Quilter had provided very little *information about its dealings with Mr M, basically just some copy valuation statements from Standard Life which had been sent to its head office. It said it hadn't assumed any responsibility for the advice Mr R provided before he joined it. But I thought it was unusual that Quilter had never contacted Mr M.*

So, I asked Quilter how it came to be the agent on Mr M's policy. There are broadly two possibilities here. First, Mr M could have completed a letter of authority formally transferring the advisory relationship to Quilter. Or, second there could have been a "novation" of Mr R's existing client bank to Quilter when he joined it. A novation is a process where a product provider internally moves clients of one advisory firm to another. Usually, clients should be informed that this is happening, so they have chance to opt out of it if they want to, it might have been Mr R's responsibility to do this. But either way Quilter hasn't been able to provide any records other than a few annual statements noted above, or I think, a proper explanation about what happened. It said:

> *"There was no novation or change to Mr M's relationship with Mr R, he remained as his client, it was only Mr R's authorisation status that changed, and the redirection of the pre-agreed commission payments to Positive Solutions."*

So, Quilter seems to be suggesting it was not involved, which I don't think is reasonable. I think this because Mr M appears to have discussed his plan with Mr R after Mr R had joined Quilter. And there isn't any record that Mr M had been advised about or agreed to this change. Nor is there any evidence that Quilter told Mr M that Mr R had left it in 2012. Or, that it appointed any of its other advisers to his account after this.

And whilst there might have been no requirement for Quilter to provide services in return for the trail commission paid to it, I don't think it has treated Mr M fairly. I say that because whilst RDR allowed existing trail commission payments to continue, the intention was that RDR would increase the transparency and fairness of adviser fees and the services offered in return for them. And whilst RDR had a specific start date regulated firms have to adhere to the regulator's overarching principles. The regulators handbook sets out 11 principles including:

> *Principle 6 – A firm must pay due regard to the interests of its customers and treat them fairly.*
>
> *Principle 7 – A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which was clear fair and not misleading.*

And the Financial Services Authority issued a policy statement (PS12/12) in respect of RDR which I think re-enforces the factors firms needed to consider. It said, with my emphasis in bold:

> *We also received requests for clarification on the following points …*
>
> *Advisers should be required to remind clients of trail commission they are receiving and discuss with them why an existing product may be better than a cheaper post - RDR alternative which does not pay commission – The Consumer Panel and one insurer suggested that communications to a customer should cover existing trail commission on a product.* ***We have not added specific guidance on this point, as we consider the overarching requirements in COBS 4.2.1R for communications to be clear, fair and not misleading and Principle 6 require firms to deal openly and honestly with their clients.***

As there's no evidence that Quilter ever contacted Mr M, let alone consider the issue highlighted above I don't think it treated him fairly or communicated with him in an open and honest manner. So, it didn't comply with either Principle six or seven. And whilst Quilter appears to be suggesting any communication failure was due to Mr R, as he was its appointed representative it is actually Quilter that is responsible for what did or didn't happen. And as it has been able to produce annual statements for Mr M's plan which were sent to its head office, it can't claim it had no knowledge of the arrangement.

Regardless of what happened when Mr M became Quilter's client, I think it should have at least contacted him in December 2012 to advise him that Mr R had left. Had it, I think it's highly likely that Mr M would have reappraised the position. It might be that at that point an agreement could have been reached with Quilter that one of its other appointed representatives, local to Mr M, could have advised him. If Mr M couldn't agree acceptable terms for that advice, he might have moved his plan to another advisory firm. Or, as he did in April 2021 instruct Standard Life to stop paying the trail commission. If doing that wouldn't have reduced the charges on the plan, Mr M might have explored transferring to a plan with lower charges.

So, I asked Standard Life what happened with the plan when Mr M asked it to stop paying trail commission to Quilter. It said that the commission that was being paid was fund based renewal commission (FBRC) paid for by "disinvestments from his plan" each March. It said Mr M had transferred his plan in October 2021, but if he hadn't there would have been no further disinvestments for the FBRC. That means this was an explicit additional charge rather than something paid out of Standard Life's own product charges. Which means the charges on Mr M's plan would have been reduced by 0.5% per annum.

That means there would have been no need for Mr M to transfer his plan to reduce the existing charges after Mr R left Quilter in 2012.The relevant date I think, because after this there was no prospect of being able to contact Mr R if he'd needed to. And I think it's likely that the extra charges Mr M continued to pay have resulted in financial losses for him. If Quilter had dealt openly and honestly with Mr M I don't think these costs would have been incurred.

Standard Life have provided a schedule of the commission deducted from Mr M's plan since outset. The renewal commission totalled £1,916.37 of which £1,177.53 appears to have been paid after Mr R left Quilter in December 2012. So, it does seem likely that Mr M has suffered losses as a consequence of what has happened, and he should be put back into the position he should have been in. I also think Mr M has been inconvenienced, but as he wasn't aware of the issue until shortly before he complained I think the distress suffered is relatively minor. But it is fair that he also be compensated for this.

I then set out how I thought Quilter should calculate and pay compensation to put Mr M back in the position he should have been in. And also that it should pay him £75 compensation for the distress and inconvenience he'd been caused.

I asked both parties to send me any further information or comments they would like me to consider.

Response to provisional decision

Mr M accepted my decision but said he was owed a greater refund as he had two plans with Standard Life on which Quilter was receiving renewal commission. He provided a further document from Standard Life confirming the commission payments on the second plan. He also provided a letter from Standard Life confirming the basis under which his plans came under Quilter's agency, which was by novation. He asked for clarification on the tax treatment of any compensation payment as he was concerned about a double tax penalty if this wasn't paid into his current pension plan. He said as he was over age 75 his current pension provider had advised there wouldn't be any tax relief on a payment made to it.

Quilter didn't accept my decision. It said Mr M had agreed the trail commission pre RDR to pay *"for the initial advice over the life of the plan."* It said Mr M's arrangement was with Mr R, not with it and it had no obligation to provide any service or to advise that Mr R had left Quilter. It said if Mr R hadn't left Quilter the trail commission would still have been paid, and in any case its involvement was *"moot"* as Mr M hadn't tried to contact Mr R.

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 decided to uphold the complaint.

I can see that when Mr M first complained to Quilter it sent him a form to complete and set out the details of his complaint. On this he entered both Standard Life plan numbers. I also note that the limited information Quilter sent our service about the complaint included an annual statement for one plan from 2010 and from 2012 for the other. The plan numbers correspond to the commission information now provided by Standard Life. I'm satisfied that Mr M has complained about both Standard Life plans and that the rejection of his complaint by Quilter is in respect of both.

Before setting out why I think the complaint should be upheld, I'll clarify how any compensation due could work for Mr M. Any loss arising from commission payments unfairly deducted from the plans needs to be calculated. Compensation for this can either be paid into Mr M's existing plan or directly to him if that isn't possible or desirable. If compensation was to be paid to his pension, any money he subsequently takes out may be subject to income tax.

If the compensation was instead paid directly to Mr M, it wouldn't be subject to income tax (although any interest might be). That's why it is fair that any payment paid to him directly is notionally reduced to allow for this, so he ends up with the same net amount as if he'd taken the money out of his pension. So, there won't be a "double" tax hit if any compensation due is paid directly to Mr M.

Having considered the new evidence I note that contrary to what Quilter has said Standard Life confirmed Mr M's plans were moved to its agency by novation. Standard Life said:

> *"Novation is the discharge of rights and obligations between contracting parties and a recreation of them in a new contract between a third party (replacing an original contracted party) and the remaining contracting parties to the original contract."*

Novation is commonly used in the financial services industry. My understanding is that all parties affected must agree to it. So, Mr R's firm, Quilter and Mr M in this case. What would normally happen is that the existing firm would write to its clients advising it was joining, merging, selling out, and so on with or to a new firm and that existing plans would be novated over. Unless the client didn't want this to happen, in which case they were asked to get in touch. So, a type of implied consent.

As Mr M knew nothing about Quilter and asked Standard Life how his plans had come under its agency, I don't think he was made aware of the novation. If so, Quilter perhaps had no right to ever receive any payment from Standard Life. But if there was a novation, then it seems to me Mr M was Quilter's client. So, it's surprising that it doesn't know how his plans came under its agency. Because as well as receiving commission it was also being sent annual valuation statements by Standard Life.

So, from the evidence available, I think Quilter should have sent its terms of business and other details to Mr M. Whilst this might have been Mr R's immediate responsibility, I'd expect there to be some record of this. Because once Mr R was an appointed representative (AR) of Quilter, it was responsible for his activity, something I think it seeks to ignore here. I've already set out the regulator's Principle 6 and 7 in my provisional decision and won't repeat these here. But they require that Mr M be treated fairly and also communicated with clearly. This didn't happen. Had it, he might have moved his plans to another adviser or took some other action. Quilter also ignores the regulator's policy statement (PS12/12), which expected firms to consider whether products paying renewal commission remained appropriate.

So, I think Quilter's argument that Mr M was never it's client and it could just keep these ongoing payments is flawed. But it also states these payments were part of the original initial commission payable when Mr R set the plan up and agreed by Mr M. This isn't correct either. As from the written evidence, it is categorically clear that Mr M didn't agree the ongoing payment was for the initial setting up of the plan.

They were a variable amount based on the current value and deducted directly from the plans in addition to Standard Life's own charges. And Standard Life would have stopped making the deduction at any time had Mr M requested it – as it did in April 2021. I asked Standard Life about the ongoing payments, it said these were *"Fund Based Renewal Commission (FBRC)"* which;

> *"as an ongoing charge, it would be expected that the level of FBRC would be agreed between the IFA and their client as remuneration for the ongoing service that the IFA was providing."*

So, exactly what Mr M thought the charge was for. It clearly isn't part of any initial commission for the original advice. It was specifically for the additional services agreed. So, whether Mr M was Quilter's client or not, there was no right for Mr R's firm or then Quilter to continue to receive these payments just by virtue of the plan having been set up back in 2006. And, once Mr R had left Quilter, these services couldn't be provided unless it appointed another adviser to Mr M's plans, and it didn't do that. As Quilter never contacted Mr M to advise him Mr R had left, he had no ready means to contact it. So, I don't think that was treating him fairly. And as it wasn't entitled to receive the FBRC by virtue of the initial advice, I think it's fair that it refunds the payments it received after Mr R left as there was no prospect of the ongoing services being provided.

Putting things right

My aim in awarding fair compensation is to put Mr M back into the position he should have been in. Quilter must;

- Establish the number of additional units that both Mr M's Standard Life plans would have held when he transferred in October 2021 and what their values would have been if the FBRC hadn't been paid to it after December 2012.

- It should then calculate what the additional fund values would now be worth had they been transferred to the Aviva plan in October 2021. That is Mr M's loss, which should be compensated.

- The compensation amount should if possible be paid into Mr M's Aviva pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.
- If a payment into his pension isn't possible or has protection or allowance implications, it should be paid directly to Mr M as a lump sum after making a notional reduction to allow for future income tax that would otherwise have been paid.
- When benefits are paid from a pension plan, they provide a taxable income. So, adjusting the compensation to notionally allow for any income tax that would otherwise have been paid ensures the compensation is a fair amount. It isn't a payment of tax to HMRC, so Mr M won't be able to reclaim any of the reduction after compensation is paid.
- As Mr M could have taken a tax-free cash entitlement, 25% of the loss would be tax-free and 75% would have been taxed according to his likely income tax rate in retirement. Mr M has confirmed he is a basic rate taxpayer. So, making a notional reduction of 15% overall from the loss adequately reflects this.
- If there is any delay between Quilter completing these calculations and making payment to either Aviva or Mr M as appropriate. It should calculate interest at 8% per year simple on the loss figure it has arrived at from the date of calculation until the date it pays the compensation and pay this interest to Mr M.
- If Quilter considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr M how much it's taken off. It should also give Mr M a certificate showing this if Mr M asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.
- Provide Mr M with a simple calculation of how it arrived at the final figures.
- Quilter should pay Mr M £75 for the distress and inconvenience he has suffered as a result of its error.

My final decision

For the reasons I've given above and in my provisional decision, my final decision is that I uphold this complaint against Quilter Financial Planning Solutions Limited.

I direct Quilter Financial Planning Solutions Limited to undertake the calculations set out above and pay any compensation due as described.

I further direct Quilter Financial Planning Solutions Limited to pay Mr M £75 compensation for the distress and inconvenience he has been caused.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 9 January 2024.

Nigel Bracken
Ombudsman