DRN-3156509

The complaint

Mrs H complains, with the help of Mr H, that the advice St James Place Wealth Management Plc gave her to invest in an onshore bond was unsuitable.

What happened

Mrs H and Mr H saw an adviser for SJP in 2015 for advice about investing £1 million. Although the advice was to them jointly, the adviser recommended they invest in an onshore bond to be held in Mrs H's name only because she was a non-taxpayer.

The bond was surrendered in December 2020 and an early withdrawal charge (EWC) was paid as a result. Mrs H complained to SJP about the advice that she was given to invest in the onshore bond.

SJP didn't uphold the complaint. It said that after discounting investment in Unit Trusts and an ISA the default recommendation for someone who was a non-taxpayer and would remain so at the time of encashment was an International Investment bond. It said this option was discounted for the reasons set out in the suitability letter. It said that it had found no evidence the advice to invest in the onshore bond was unsuitable.

Mrs H referred the complaint to us. One of our investigators considered the complaint but didn't think it should be upheld. Mrs H didn't agree with the investigator and the matter was referred to me for review. I issued a provisional decision upholding the complaint. In summary I made the following key findings:

- I am not satisfied that the advice to invest in the bond was suitable.
- The adviser should have advised Mrs H to invest some of her money in a Unit Trust.
- The reason the adviser put forward in the suitability report, for not investing in a Unit Trust – namely that Mrs H and Mrs H already had around £200,000 in Collective investments and ISAs – wasn't a reason to invest everything in the bond.
- I'm not persuaded that Mrs H's and Mrs H's IHT position was a reason to invest everything in the bond, as the adviser has suggested was the case.
- Mr H may well have been financially astute but that doesn't mean he would necessarily have understood the benefits and downsides of the different investment options.

I didn't think it was possible to say exactly how much Mrs H should have invested in a Unit Trust and therefore said redress should be based on SJP repaying a third of the notional 20% deducted from the bond in respect of tax payable.

My findings are set out in full below:

"I think it is important to make clear that where there is a dispute between the parties my findings are made on a balance of probabilities – what is more likely than not. In simple terms, in this complaint the evidence would need to show that it is more likely than not the advice to invest in the onshore bond was unsuitable.

The suitability report sent with a letter dated 13 July 2015 from the adviser showed that Mrs H and Mr H had £100,000 in an EIS, around £56,000 each in Collective Investments, £60,000 each in Stocks and Shares ISAs and £2.1 million cash funds.

Their objectives were recorded as being to invest tax efficiently for the medium to long term – the adviser refers to 5-15 years and possibly longer - for capital growth and with the potential for income. I have noted that Mr H has suggested the 15-year figure was added by the adviser afterwards but I think it is likely there was some discussion about holding the bond beyond the initial five years.

The suitability report sets out the main alternatives for investment. This included both the possibility of using an International Investment Bond (an offshore bond) and the possibility of using a Unit Trust investment.

The use of an offshore bond was discounted on the basis that Mrs H could become a basic rate taxpayer in the potential timescale of the investment of 15 years or longer. The adviser also referred to the possibility of a significant tax charge being triggered on surrender (or on significant withdrawals from the offshore bond) given the timescale over which it could be held. The adviser went on to discuss the possibility of investing in Unit Trusts. She stated:

"For both basic and higher rate taxpayers (and indeed for some non-taxpayers who have larger sums to invest), the Unit Trusts almost always offers the highest assumed net return over the timescale we have discussed."

However, she went on to say:

"However, I have not recommended a Unit Trust for this proportion of your monies because you already hold over £200,000 in collective Investments and Stocks and Shares ISAs and it was important to you to begin diversifying your approach at this stage as you are mindful of the different tax treatment that Unit Trust and Investment Bonds attract."

And:

"As you do not currently have any Bonds and bearing in mind that you would like to have a number of flexible income streams available in future years, we agreed it would be sensible to lay the foundations for this now by diversifying across different types of investment."

I note that Mr H has suggested that the suitability report wasn't created at the time of advice because there is a reference to him setting up his own company and the possibility of him working part-time both of which weren't something he had considered at the time of advice.

However, SJP has provided the adviser's client transaction record which shows all the main notes of the various interactions she had with Mr H and there is a record on 13 June 2015 of the suitability letter being sent and an email the same date stating that the "FCA letter" was on its way.

In the circumstances I think it is more likely than not the suitability report SJP has provided was sent. It's possible it wasn't received as Mr H says they have no record of it, but even if that is the case, I think it is more likely than not that the report shows what was discussed with Mrs H and Mr H.

However, whilst I note the adviser's reason for recommending the bond over the Unit Trust I am not persuaded that her advice was suitable. The reason that the adviser recommended *the bond over a Unit Trust was stated to be to provide diversification of investment approach.*

However, the evidence doesn't suggest that Mrs H and Mr H were never going to invest into a Unit Trust. They had a further £1.1 million in cash left after the investment. Mr H was also due to receive further money from the takeover of his business.

The suitability report also stated that Mrs H and Mr H could invest further funds into a Unit Trust at any time and that this may be something they would consider as further funds became available. In correspondence with Mr H when he first raised an issue about the advice the adviser stated that:

"We also discussed that the next tranche of your investment would be earmarked for a Unit Trust depending on the exchange rate of $:£."

So, I think future investment in Unit Trust was something Mrs H and Mr H were likely to make in the future in any event. Given the adviser was aware that Mrs H was at the time of advice a non-taxpayer and also that she wasn't making full use of her CGT allowance – as she stated in the suitability report that "you currently make <u>some use</u> (my emphasis) of your Capital Gains Tax allowance each year" – it would have made sense for the adviser to have advised Mrs H invest some of the money in a Unit Trust so she could benefit from her current tax position.

I acknowledge there is reference in the suitability report to Mr H possibly transferring shares to Mrs H to make full use of her CGT allowance and her becoming a basic rate taxpayer within the 15-year timescale referred to in the suitability report. Firstly, these were not certain and secondly, if anything, these potential future events made investing some money in a Unit Trust in 2015 rather than at some later date more suitable.

If Mrs H was fully utilising her CGT allowance in the future, she wouldn't be able to use this as against the gains made from some future Unit Trust investment. What the adviser knew in 2015 was that Mrs H was a non-taxpayer who was at the time not fully utilising her CGT allowance and so at that time further investment in a Unit Trust would have made more sense.

I can see no reason that the adviser didn't advise Mrs H and Mr H to invest some of their money in a Unit Trust in 2015 in Mrs H's name. The reason put forward in the suitability report – that they had around £200,000 in Collective Investments and ISA's already and wanted to diversify their investment approach – may have been a reason not to put everything in a Unit Trust and put some of the £1 million in a bond. I can't see it was a reason to put everything in the bond given investment into a Unit Trust is something Mrs H and Mr H were likely to do in the future in any event.

I note that the adviser, in response to a query that I put about investing the whole amount in the bond referred to Mrs H and Mr H having a large IHT liability. There is brief reference to IHT in the suitability report – it refers to Mr H being aware he would need to start mitigating this at some stage in the future and to the adviser making him aware that he may have a significant liability to IHT in view of the value of the joint estate.

However, the suitability report states that this wasn't something they wished to focus on and preferred to let things settle before undertaking long-term planning. The IHT position is not something that the adviser put forward in the suitability letter as a reason to invest in the bond rather than a Unit Trust. She also hasn't explained why this would mean investment in *a Unit Trust in 2015 was unsuitable. I'm not persuaded that Mrs H's and Mr H's IHT position was a reason not to advise investing some money in a Unit Trust.*

The adviser has also referred to Mr H being financially astute and that his professional experience included takeovers, mergers and corporate finance transactions. She said that he and Mrs H had shares and options for which they both utilised their CGT allowances each year.

I have considered what the adviser has said but Mr H and Mrs H came to her for her to use her experience and knowledge to advise them on what they should do. Mr H may well have been financially astute, but his professional experience wasn't in investments and doesn't mean he would have necessarily understood the benefits and downsides of the different investment options that were available. Also the evidence from the time of sale doesn't show Mrs H was fully utilising her CGT allowance at the time."

I gave both parties the opportunity of responding and providing any further information they wanted me to consider before making my final decision. SJP said that it didn't necessarily agree with the conclusion I had reached but were willing to accept my decision to bring matters to a conclusion although questioned the redress.

SJP said that whilst I thought it was difficult to say how much would have been invested in a unit trust and how much in the bond it still wanted to explore this scenario. It suggested that because the CGT rate was 18% in 2015/2016 this meant investing un a Unit Trust wasn't that advantageous at the time of advice and that redress should be calculated on the basis a sum of £220,000 was invested in a Unit Trust with the balance on the bond. The figure put forward was based on Mrs H using her CGT allowance of £11,100 and achieving growth of 5% on her investment.

I responded to SJP and said I wasn't satisfied that Mrs H would only have invested enough in a Unit Trust to make use of her CGT allowance. I pointed to what the adviser had said about a Unit Trust almost always providing better returns over the long run.

SJP provided a further response confirming full surrender of the bond in December 2020 and arguing that the EWC shouldn't be repaid to Mrs H on the basis that I had not found she would have invested nothing in the bond so a charge would have been payable in any event.

Mr H also responded saying he didn't understand why I had based redress on around a third of the amount being invested in a Unit Trust. He suggested at least two thirds should have been put into a Unit Trust. He also argued that the consequences of wrongly being totally invested in the bond weren't limited to the tax and identified other consequences of the unsuitable advice he thought Mrs H should be compensated for, such as repayment of the fees paid to SJP.

I responded to Mr H and said that I hadn't said a third of the amount invested would have been put into a Unit Trust as there is no way of knowing how much she would have invested in this. I said that documents didn't suggest Mrs H wasn't making any use of the personal allowance at the time and there was nothing to suggest she would have paid significantly less in fees if she invested in a Unit Trust.

Mr H provided a further response saying there was no evidence the suitability letter was sent and the reference to Mrs H potentially working was hypothetical based on the optimal outcome for the future – of him going to part time employment with his current employer around 2020. He said Mrs H had not paid tax for the 10 years or before the advice or since.

Mr H said that as the advice was wrong the fee should be repaid. He also said that it was reasonable to compound this as the money wrongly paid would have remained in the portfolio and grown in value. He set out how he thought redress should be paid. He calculated the total allowances for the period in question were greater than the tax paid on the bond so argued the total tax should be repaid. He also said the EWC should be repaid.

I thereafter fully reviewed the case and having done so was not satisfied that the redress I had set out was fair and reasonable as I was no longer satisfied Mrs H should have been advised to invest anything in the bond. I wrote to both parties explaining that my current view was that there was no benefit to Mrs H in investing anything in the bond at the time, given her non-taxpayer status. I said I thought the starting point for redress should be that Mrs H should have invested everything in a Unit Trust. I invited both parties to comment on this.

Mr H said that in principle he agreed with the approach I had indicated and that he could provide evidence of Mrs H's tax position whilst invested in the bond. He said if Mrs H had been invested in a unit trust there would have been no need to surrender this in 2020 as happened with the bond. He said Mrs H incurred a tax liability because of the surrender which would not otherwise have been incurred. He also said the EWC of £8,839.48 should be paid to Mrs H and argued that the charge made for the advice should also be repaid given the advice was wrong.

I asked for SJP's comments on the points made by Mr H as well as the change in my redress. It instructed its actuaries with a view to providing actual calculations in relation to the comparison between the bond and the position if Mrs H had been invested in a unit trust instead. This caused a significant delay and I therefore asked it to confirm just whether it agreed with the change to redress based on all the money being invested in a unit trust. SJP said that whilst it didn't necessarily agree that rerouting all funds originally invested in the bond into a unit trust constituted the optimal investment planning it would accept my view on this.

It also said that in theory it didn't object to repayment of the EWC but said this would be taken into account in the comparison between the bond and a unit trust investment. It also said that it didn't object in theory to repayment of the tax paid on surrender being incorporated in the redress. It pointed out that the bond had no initial charge but the unit trust would have had 5% deducted at the outset.

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.

There is now agreement between the parties as to the outcome of this complaint. In short SJP raise no issue with the complaint being upheld and have agreed the change to redress I have set out in subsequent correspondence – based on Mrs H being invested wholly in a unit trust. Likewise Mr H, on behalf of Mrs H, has broadly agreed the proposed redress although he has made certain points about the redress payable as set out above.

For the avoidance of doubt I am upholding this complaint on the basis that Mrs H should not have been advised to invest in the bond but should instead have been advised to invest the whole amount she was investing in a unit trust.

Putting things right

The purpose of the redress is to put Mrs H as close to the position she would have been in if she been advised to invest everything in a unit trust rather than the bond. On the face of it the redress payable as a result of this should be straightforward, in that to put Mrs H in the position she would have been in if she had been given suitable advice a comparison needs to be made between the investment she made in the bond and the investment she should have made in a unit trust, with SJP to pay any difference.

Mr H has said the EWC charge payable on surrender of the bond should be repaid to Mrs H. I agree, because if Mrs H was invested in a unit trust she would have had no reason to surrender this in 2020. SJP has also agreed that this should be repaid but has said this will form part of the calculation when comparing the bond with a unit trust.

I take it to mean that the calculation of what the unit trust would have been worth at surrender won't include the EWC whereas the figure for the bond will include this. If the EWC is taken into account when comparing the investment in the bond with investment in a unit trust then no separate amount is payable for this. However if that isn't the case for whatever SJP should repay this as separate amount.

Mr H has also argued that the advice fee for the bond should be repaid as the advice was unsuitable. However, that would only be fair and reasonable if Mrs H would not have paid anything if she had been given suitable advice. As there is an advice fee of 5% for the unit trust, which would be deducted at outset from the amount invested, there is no basis for asking SJP to repay the advice fee. This would put Mrs H in a better position than she would have been in if given suitable advice.

However, when comparing the bond with a unit trust investment SJP will need to take account of the what Mrs H paid by way of the fees for the bond and what she would have paid for the unit trust.

The tax treatment of the bond and a unit trust investment are different. In short, for the bond a notional 20% is deducted from the bond itself regardless of the investors tax position whereas for a unit trust the tax is payable on income from interest and dividends and on any capital gains - subject to any allowances the investor can use such as any unused allowances for dividends, interest, or CGT.

In calculating redress SJP will need to calculate the tax that Mrs H has paid as a result of being invested in the bond as against the tax she would have paid if invested in the unit trust and pay the difference. It will therefore need to know what allowances Mrs H would have been able to utilise as against any tax it calculates would have been payable if Mrs H had invested in a unit trust. As part of its calculations in relation to tax SJP will also have to take into account the tax that Mrs H paid on surrender of the bond.

SJP will have to pay simple interest at 8% each year on any amount it calculates is payable.

My final decision

I uphold this complaint for the reasons I have explained. St James Place Wealth Management Plc must calculate and pay redress as I have set out above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mrs H to accept or reject my decision before 2 August 2022.

Philip Gibbons
Ombudsman