DRN-3941530

The complaint

Mr W says the advice Canter Holland Ltd (CHL) gave him in March 2016 has or will cause him to incur higher tax liabilities in respect of his pension than should've been the case.

Mr W is represented by X-Claims Limited (XCL).

What happened

I start by noting that the advice complained about was provided to Mr and Mrs W. As this related to their individual pension provisions a case has been set-up for each to deal separately with their own position.

According to notes of a meeting between Mr W, his wife and CHL on 8 March 2016 and a follow-up email of 10 March 2016, they had approximately £270,000 cash in their limited company available for distribution. The main focus of discussion was their options for utilising these funds.

A financial review was conducted for Mr and Mrs W and it's recorded that their top priority was to make provision for their retirement. And in so doing: to make tax efficient investment from Mr W's limited company; to invest for the long-term; to adopt a high risk investment outlook; and to boost retirement funds. They both signed the review to acknowledge its contents at the end of March 2016.

At the time of the advice Mr W was aged 41, married with two dependent children. His expected income in 2016 was £85,000 a year from his public service, and a further £240,000 from his private activities. The family home was worth around £1 million with an outstanding mortgage of about £300,000. There were no other significant liabilities. Mr and Mrs W also held other savings and investments aside from their occupational pension scheme (OPS) provisions.

Mr W's OPS had a normal retirement date of 60 for his pre-April 2015 membership. And his retirement horizon was said to be 67.

CHL's recommendations to Mr and Mrs W were recorded in the following terms:

- *Draw dividends from your limited company that will be sufficient for your house renovations, ISA contribution this year for Mr W (£15,240) and ISA contributions for you both in the next tax year (£30,480).*
- *Make pension contributions for you both in this tax year at a level you feel appropriate from the limited company…*
- *Invest your ISA's (both existing and proposed) in a portfolio of funds managed by Canter Holland at a risk level 5. This is based on the long-term investment timescale for your pensions and is the level of risk your current ISAs are invested.*

In August 2020 XCL complained to CHL about the recommendations it had made to Mr W. The points raised by Mr W's representative about his case have evolved during its journey.

I'll be focussing on the matter he brought to this Service, which was about the advice he received in March 2016.

Essentially, Mr W is concerned about CHL's advice around the annual allowance and lifetime allowance (LTA) calculations, and what his representative asserts is a consequent exposure to actual and/or potential increased tax liabilities, that could otherwise have been managed better or avoided. XCL also says it advised him to liquidate his company and questions whether this was best advice.

CHL issued its final response to Mr W on 18 September 2020 and provided subsequent clarifications. It refuted his complaint points. It said it had followed appropriate guidance in calculating his annual allowance position. It said he was aware of the risks of exceeding his LTA in the future. And that it had not provided him with advice about liquidating his company.

The Investigator didn't uphold Mr W's complaint. He said he hadn't been provided with evidence of him incurring an annual allowance tax charge as a direct result of CHL's advice in March 2016. He concluded that given how far away Mr W was from retirement and the potential for future changes to the LTA tax regime, it wasn't possible to say whether he'll be worse off as a result of the decisions he took to open a personal pension in 2016. And he thought CHL had told Mr W to discuss the status of his business with his accountant.

XCL on Mr W's behalf disagreed with the Investigator's findings and conclusions. It re-iterated the arguments previously made and provided further information in support of his case.

As both parties couldn't agree to the Investigator's view, Mr W's complaint was passed to me to review afresh. I issued provisional decisions in November 2022 and January 2023. At each stage both parties have provided further detailed submissions and commentary on each other's positions.

I'm grateful for all submissions to what is a complex, highly contested and finely balanced complaint. I've reviewed the information and arguments received carefully in arriving at this final decision.

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.

Where there's conflicting information about what happened and gaps in what we know, my role is to weigh the evidence we do have and to decide, on the balance of probabilities, what's most likely to have happened.

I've not provided a detailed response to all the points raised in this case. That's deliberate; ours is an informal service for resolving disputes between financial businesses and their customers. While I've taken into account all submissions, I've concentrated my findings on what I think is relevant and at the heart of this complaint.

I'm upholding Mr W's complaint, but not to the extent he'd like. I'll explain why.

The first thing I've considered is the extensive regulation around transactions like those performed by CHL for Mr W. The FCA Handbook contains eleven Principles for businesses, which it says are fundamental obligations firms must adhere to (PRIN 1.1.2 G in the FCA Handbook). These include:

- Principle 2 - which requires a firm to conduct its business with due skill, care and diligence.
- Principle 6 - which requires a firm to pay due regard to the interests of its customers.
- Principle 7 - which requires a firm to pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.

So, the Principles are relevant and form part of the regulatory framework that existed at the relevant time. They must always be complied with by regulated firms like CHL. As such, I need to have regard to them in deciding Mr W's complaint.

Turning firstly to the matter of the calculation of Mr W's annual allowance in 2016.

In my first provisional decision I said I was puzzled about why CHL and Mr W were at such a variance about the correct calculation of his annual allowance between 2012/13 and 2015/16. Broadly speaking, this was something that should've been a matter of fact.

I invited both parties to provide detailed feedback on the workings of the other parties' calculations. In addition, from CHL I requested copy statements it says it received from Mr W in 2016 to help it build its calculations. And from XCL I wanted evidence from the source of the figures it provided. In theory, the data should've been coming from the same place, Mr W's pension provider.

CHL didn't provide a copy of statements it received from Mr W in 2016, but responded in the following terms:

"The 1995 Section input figure for 2013/14 and 2014/15 is similar across both our and X-Claims calculations. The 1995 Section input figure for 2012/13 is however very different and this is the cause of the wide variance between our annual allowance figures and those produced by X-Claims, as our calculations leave some annual allowance to be carried forwards and X-Claims calculations do not."

"Attached is a copy of our full workings and how we calculated these pension input figures. For clarity, in the 2012/13 year (which is the period with a wide discrepancy) our workings were as follows:

- *At the start of the tax year: Annual pension of £13,386.75 x 16 + lump sum of £40,160.25 + CPI%* = The £254,348.25 value of [Mr W's] NHS Pension Scheme benefits at the start of the 2012/13 tax year.*
- *At the end of the tax year: Annual pension of £14,416.58 x 16 + lump sum of £43,249.75 = The £273,915.03 value of [Mr W's] NHS Pension Scheme benefits at the end of the 2012/13 tax year.*
- *The £273,915.03 value of [Mr W's] NHS Pension Scheme benefits at the end of the tax year – The £254,348.25 value of [Mr W's] NHS Pension Scheme benefits at the start of the tax year = £19,566.78 growth in [Mr W's] NHS Pension Scheme benefits for 2012/13."*

"The input figure used by X-Claims for 2012/13 is significantly higher than the input figures they have used in previous and subsequent tax years. This contradicts X-Claims' own statement that "Mr W's income levels had been consistent for years", as only a significant increase in [Mr W's] income should have increased his pension input by the amount they have calculated. On the contrary, X-Claim's statement seems to support our own calculations, whereby you can see that the input figures used were kept consistent across each tax year."

Mr W has provided what appears to be an extract from his OPS provider system showing details such as his reckonable service, employer pay and the opening and closing values of his scheme pension for the purposes of input to annual allowance calculations. He responded to my question in the following terms:

"The correct way the [OPS] input (95 section) is calculated is: - number of years and days / 80 X current pensionable pay. The pension this produces is multiplied by 3 to get the value of the lump sum. For annual allowance inputs the value is the pension x 16 plus the lump sum."

"This value is then uplifted by inflation from the previous August to give an opening value for the start of the new pension year and compared with the pension and lump sum (multiplied up by 16 plus lump sum) at the end of the pension year. The difference between these two schemes is the pension input."

"CHL's error…is to have used the pensionable pay of £82,380.48 which was correct ONLY for the 2014/15 pension year and they have assumed service of exactly 13 years starting at the 2011/2012 tax year. They have then carried out the following calculation for each year going forwards simply by adding on 1 year of service.

2011/12

13/80 X £82,380.48 = £13,386 per year pension with a lump sum of £40,158. They have then moved to the next year and calculated the following

2012/13

14/80 X £82,380.48 = £14,416.58 with a lump sum of £43,249. They have then compared the difference of the two annual pensions and multiplied this by 16 giving a pension input of £16,477."

This is completely the wrong way to work this out. As you can see from the service extract attached, my pensionable pay although £82,380.48 in 14/15 was only £63,348.00 in 2011/12. So even using CHL's (incorrect) format described above, use of the correct figures for pensionable pay would have produced a very much larger pension input."

I should make it clear at this point – it's not the role of this Service to check detailed calculations or test different technical methodologies. That said, I think both submissions have been helpful in getting to the nub of this issue.

I think there was something wrong in how CHL approached the calculation of Mr W's annual allowance position in 2016. It used incorrect information about his employer pay, taking his salary in 2014/15 as the basis for all its calculations. This meant it was significantly adrift, because the records show Mr W's relevant earnings had been far from steady – ranging from around £36,600 in 2010/11 to £88,200 in 2016/17.

The main caveat I would place on my finding here is that pension data provided today can mask adjustments made during the lifetime of the scheme. Such changes, if there have been any, dependent on when they occur, how they apply and are reflected in the figures, would need to be considered. It wouldn't be fair to hold CHL responsible for matters it couldn't possibly have known in 2016.

For the avoidance of doubt, although CHL has previously argued it was difficult to obtain certain information from his employer about scheme benefits. The letter from his OPS provider which indicated such only related the 2015 scheme. And the proper methodology to assess the annual allowance position was driven by his annual salary – I think this basic information was more likely than not available at the time of providing him with advice, and certainly for prior years.

Specifically in respect of Mr W's 2015 OPS scheme (which appears to have been a replacement for his former OPS) Mr W says:

"To enter a zero sum in the 2015 section input is clearly erroneous; my salary for 2015/16 and the percentage pension contribution (13.5%) was also known. This could have given a figure roughly estimated at 13.5% x £82,348 = £11,117. The actual figure was £18,954.92. CHL obtained exactly this information regarding my wife's 2015 section [OPS] inputs at the same time."

CHL said:

"[Mr W] claims that we "failed entirely to suggest any pension input at all for the 2015 section" in the 2015/16 tax year. This claim is inaccurate. Our calculations show a total pension input of £16,456.29 for 2015/16. Our calculation sheet does not detail the split between the 1995 Section and the 2015 Section, but that is because the calculations were for our internal use only (hence the lack of headings, explanatory notes and other formatting that we would include on client-facing documentation)."

"[Mr W's] presentation of our calculations…in his latest submission is very misleading as we have never designated the accrual of £16,456.29 entirely to the 1995 Section in our own documents or calculations. [His] own calculations show accrual of just £4,065.35 within the 1995 Section for 2015/16. If we had not made any provision for 2015 Section accrual in our calculations, then we would have likely arrived at a similar pension input figure, rather than the significantly higher figure of £16,456.29 shown in our calculations."

I think CHL's approach, although significantly flawed for the reasons I've already set out, did provide some recognition of Mr W's 2015 OPS benefits. But the data extract he's provided from his OPS is also interesting because it shows as well as CHL needing to consider his new 'active' 2015 OPS, his then deferred 'section 95' benefits would also still accrue additional value, which counted towards his annual allowance calculations. This effect isn't captured anywhere in its advice to Mr W.

Further, I mentioned in my first provisional decision that I would've expected to have seen some reference from CHL to the new tapering arrangements for the annual allowance in its advice to Mr W in March 2016. These were introduced by Government from 2016/17.

XCL had said that by using up all Mr W's carry-forward of annual allowance entitlement in 2015/16, this impacted on his position in future years. I said it hadn't made a telling case that taking his maximum annual allowance entitlement in 2015/16, was less beneficial to him than spreading his allowance over future years. But given the information and arguments Mr W has made subsequently, I think this omission assumes more significance.

Finally, Mr W has also questioned further advice from CHL in 2016/17 for him to make a further £10,000 contribution to his personal pension. It's not clear from the information I have whether this was a personal or employer contribution. Given what I've already set-out, this recommendation needed more consideration of his annual allowance position.

So, I'm upholding this element of Mr W's complaint. I've set out considerations and proposals on assessing loss, if any, below.

Next I'll turn to Mr W's concerns about his LTA and the potential for him to incur higher tax in the future if he exceeds the limit at that time.

It's fair to say there's been a degree of policy change in this area over the years. The LTA was introduced in 2006 setting a maximum value of benefits someone could receive without a tax penalty at £1.5m. This increased each year until 2010-11, when it reached £1.8m. The

Government decided to reduce the LTA in 2012-13 when it was set at £1.5m. In 2014-2015 it fell to £1.25m. In 2016-17 the LTA was set at £1.0m and for a short period was then increased annually to take account of inflation. It's current policy to freeze the allowance until 2025/26 – but these matters are subject to review with each budget or fiscal event.

XCL told this Service:

"As regards the lifetime allowance, any competent IFA advising a high earning [individual] in a generous Defined Benefit Scheme would know that [he] would exceed the lifetime allowance. They can only assume that the LTA will continue and should never mislead a client into believing that the LTA would be abolished."

"At the time they advised Mr W to make this contribution he was 42 years of age. There is a normal retirement age of 67 for [his public service pension], and at the point they advised him on this, his pension was already worth about £20,000 a year with a tax free lump sum in excess of £50,000…in reality Canter Holland should have asked to see a Total Reward Statement from the client which would have shown them the actual value of the pension to date. This is and should be standard practice when dealing with [his sort of pension]. The value at the point they advised on the lump sum investment was more than £454,000 and the client had over 15 years of membership in [his occupational] Pension left."

XCL's argument isn't without merit. But I don't think the position it asserts is as clear cut as it suggests.

In framing its advice to Mr W about this matter, CHL said the following to him:

"We looked at your current [defined benefit pensions] and ISA investments.…although we feel that your pension benefits will be close to the Lifetime Allowance at retirement we feel it is unlikely that they will breach the Lifetime Allowance (LTA). This accounts for some assumptions, the main two being that you remain in [the occupational] scheme until retirement and salary increases at 2.5% per annum together with the Lifetime Allowance increasing at 2.5% per annum from April 2019."

These seem reasonable assumptions at the time.

The problem for XCL in making its case are the number of uncertainties between the point of the advice and when Mr W's pension benefits are likely to be assessed against the LTA, which will be between 18-25 years hence.

For example, there's an argument that as Mr W was 41 and was in a demanding profession he wouldn't have waited until he was, say, 67 to start drawing his pension benefits. Earlier retirement would have implications for contributions and might lead to an actuarial reduction of his benefits. Of course, when Mr W actually decides to retire is a matter of conjecture.

I'm also mindful of the strong position of Mr W and his household finances, including his extensive and varied holdings. In such circumstances it's possible he will ultimately decide not to take the benefits from his personal pension. While these sit in the plan they are treated as being outside of his estate and so not subject to inheritance tax liabilities. And there could be tax advantages to any potential beneficiaries, subject to circumstance.

I think it's more likely than not it was CHL which introduced the possibility the LTA could be abolished in the future. It was an odd speculation, especially given what was known about this policy area at the time. However, I don't think Mr W was left in any doubt about the likely position with his LTA. In its advice to Mr W on 10 March 2016, CHL said:

"We feel that if you make a pension contribution it is likely that, together with your [occupational] pensions, your benefits will exceed the LTA in the future. Any pension benefits in excess of the LTA (when taken) will be subject to a tax charge of up to 55%.

"There is an argument that the LTA may no longer be in existence in the future, but making a pension contribution is a gamble that the LTA is abolished at some point in the future and there is no guarantee this will be the case. You may also feel that by taking the funds personally and them being subject to personal and corporation tax (instead of a pension contribution) that the tax position is "neutral" when compared to the LTA charge of 55%"

I think CHL made clear the risks of making a personal pension contribution in March 2016. Mr W has around 19 years until he reaches 67. We don't know when he will actually retire. We don't know when he will take the benefits. We don't know what the various tax and pension allowances will be at that time. We don't know what the relative performance of the investment options foregone by Mr W in 2016 will be in 2041. And we don't know what effect mitigations taken between now and when Mr W retires will be on any excess exposure he has to his overall tax bill.

Given the moving parts here, clearly Mr W can't evidence a crystalised overall loss (or gain) at this time in relation to the advice CHL gave him to make a pension contribution in March 2016 and the impact on his LTA. Nor can he project such with any confidence.

So, given this backdrop, it would be unreasonable for me to direct CHL to make an award of compensation to Mr W around the complaint he raises about his LTA exposure.

Finally, in responding to the Investigator's view, XCL questioned the validity of advising Mr W to liquidate his company and put all the funds into pensions, where the company wasn't paying a salary to the client. It questioned whether this was best advice. CHL said:

"We are not accountants so we did not tell [Mr W] to stop using the business for trading income. Our only recommendation was that [he] should discuss the continuation of the limited company with his accountant (who was independent from Canter Holland)."

""In our email of 7th November 2016 we actually encouraged [Mr W] that "our advice is to hold with the limited company for now until you have spoken with your accountant". In our email of 8th November 2016 we concluded that any winding up of the limited company was "certainly something that requires further discussion with your accountant – we would be happy to be party to this if you felt it appropriate"".

"Although we offered to take part in any discussions with [Mr W's] accountant, we ultimately were not invited to have any further input and so any decision to subsequently liquidate the company or to stop using the business for trading income was made by [Mr W] and/or his accountant without further input from Canter Holland."

It's clear there was discussion between Mr W and CHL about the status of his company. But I also think it's reasonably clear CHL set out the boundaries of its expertise and signposted him to other professionals to get advice on this matter.

As an aside, I note that Mr W's limited company is still in existence.

Putting things right

I'm upholding Mr W's complaint, but not to the extent he'd like. My aim is to return him to the position he'd have been in now, or as close as reasonably possible, had it not been for the failings of Canter Holland Ltd.

Asked what options it considered for utilising Mr W's available funds in 2016, CHL told this Service:

"…all of the above options were deemed suitable for [Mr W] and were used as part of [Mr W's] financial planning. We established a Stocks & Shares ISA for [him] and he fully utilised his ISA allowance for the tax year in question (2015/16) and for subsequent tax years. We also set up a Collective Investment Account for [Mr W], through which we made use of his annual exempt amount for capital gains tax. And we arranged an Enterprise Investment Scheme investment and several Venture Capital Trust subscriptions for [him], with him taking advantage of the "substantial tax relief up front" each time."

"However, the Personal Pension best met [Mr W's] objective of minimising tax upon funds drawn from his limited company."

"Further payments into his ISA, Collective Investment Account, Enterprise Investment Scheme or Venture Capital Trust would have required [Mr W] to draw funds from his limited company first, incurring corporation tax, income tax and potentially National Insurance liabilities. An ISA or Collective Investment Account investment would not have generated any immediate tax relief to offset these income tax and National Insurance liabilities. An investment into an Enterprise Investment Scheme or Venture Capital Trust would have generated initial income tax relief of 30%, however this would still have not fully offset the corporation tax, income tax and potential National Insurance liabilities (for example, the income tax alone for [Mr W] would have been 40% or 45% if drawn as salary and 32.5% or 37.5% if drawn as dividend)."

"In contrast, the employer contribution into a Personal Pension created no corporation tax, income tax or National Insurance liabilities, either personally or for the limited company, and so this was the most suitable option."

Mr W has told this Service he believes the bare minimum extra tax burden created by CHL was £21,000. But he went on to summarise his thoughts about what should've happened in the following terms:

"I would have invested funds within the company in a tracker fund and realised the proceeds at the end of my career, subject to Corporation Tax and Business Asset Disposal Relief. Instead, I was poorly advised to invest in a private pension fund, resulting in significant financial liabilities both now and in the future. This was due to large pension tax charges and also significant tax burden related to lifetime allowance excesses and subsequent income tax on pension income in the presence of a pre-existing [OPS benefits]."

"The alternative (and appropriate) strategy would have enabled access to favourable tax rates of 19% (corporation tax) on the growth within of the fund at the point that the underlying funds are sold down, & 10% (Business Asset Disposal Relief) at the point of withdrawal, up to the first £1m. In addition, there would also be the advantage of the flexibility of using funds earlier than a pension (e.g. for salary or dividends) if this had been required."

"As of today's date, the difference in the 2 strategies is £157,232.55 - £50,057.65 = £107,174.90. However, the overall balance of the alternative strategy at the time that I was planning to realise the investment (i.e. at retirement age) is demonstrated as the difference between the 2 investment strategies at age 65. This is £809,094.52 - £285,789.78 = £523,304.74"

I have informed Mr W that this Service has limits to the awards that can be enforced based on when the events occurred and when he brought his complaint to this Service. In his case that would be £160,000. As his expectation of compensation exceeded half a million pounds, I was bound to inform him that his only route to attempting to secure such would be through the courts. And that's not a matter I can advise him on.

Perhaps unsurprisingly the position of Mr W and CHL on the matter of loss are as night and day. The proposal I make to assess any financial detriment won't be perfectly satisfactory to either party.

So, for example, I'm assuming Mr W would've taken funds from his company in 2016, one way or another, whereas his favoured scenarios suggest he'd have kept funds in his company. I'll be assuming Mr W takes benefits from his pension, CHL will no doubt observe the possibility that he incurs no tax and funds pass to beneficiaries on a preferential basis.

Redress isn't often a scientific matter. I'm conscious of the need to avoid the benefit of hindsight. Nevertheless, I believe my proposals are fair and reasonable in the circumstances.

The framework for the redress I'm going to use is based on what we know from contemporaneous evidence. That is Mr W's objectives and requirements in 2016 were clear. His priority was planning for retirement. He wanted to take excess funds from his business. Context for this may've been discussions underway about the possible liquidation of his company.

I've already set out in some detail why I'm not providing for a calculation of potential loss in relation to Mr W's projected LTA position.

As the Investigator noted, it's rare we would say investing in a personal pension was unsuitable due to the necessity of providing for the future. However, CHL didn't give Mr W the full facts concerning his annual allowance, indeed it led him to believe he had plenty of headroom, when clearly he didn't. This was a material consideration that should've been weighed with other alternatives for utilising funds from his business for his personal benefit. But we also need to recognise these alternatives would've come with their own tax consequences.

CHL's advice to Mr W in 2016 indicated the lead alternative to a pension contribution was taking dividends from his company (and presumably investing these). So this was the comparator I proposed should be used in considering what if any redress was required. This would need to consider not only the impact of upfront taxes and reliefs for each option, and the effects of these on investment returns, but also the effect of these matters when withdrawing benefits. Certain assumptions would have to be made and that wasn't a straight-forward matter.

Mr W thought my proposal on redress wasn't right. He said:

"The proposed framework for redress relies on two assumptions that would not have been prudent at the time. The first assumption is that I would be taking money out of the company, secondly that the company was to be liquidated. Neither of these assumptions are correct."

"In the recent provisional decision it is stated "He wanted to take excess funds from his business" and "I am assuming that Mr W would have taken funds from the company in 2016". This is not the case. The advice I sought in 2016 was to determine how best to use company funds for retirement planning. There was no specific decision nor necessity to withdraw funds from the company. It should be noted that the alternative scenario of keeping money within the company is documented to have been discussed with CHL; this is referenced in the recent provisional decision upholding my wife's complaint regarding the same advice "I can see one alternative scenario she indicated earlier was to have kept funds in the company". Therefore the assumption that I would have taken funds from the company in 2016 is incorrect."

“Indeed, withdrawing funds would have been inadvisable in those circumstances. CHL did not advise me to liquidate the company. Nor did I do so. I continue to use the company for the purposes of my private medical practice and also to invest excess capital funds within the company for the long term.”

“If withdrawal of funds from the company as dividends had been advised in 2016, that advice would, in and of itself, have been questionable. It would have made me liable to immediate dividend tax and would not have been compatible with my stated investment aims of tax-efficient long term investment. Such advice would have been in breach of Principle 6 of the Principles of Business as outlined in the FCA handbook, which requires a firm to pay due regard to the interests of its customers.”

“Funds withdrawn from the company in 2016 would have been subject to dividend tax. In addition, this could also lead to increased annual allowance charges due to the tapering of AA thresholds with higher incomes.”

“If funds were managed within the company, tax would only have been payable at the end of the investment term. Funds invested within the company would have numerous advantages if not held in a pension scheme (eg. no effect on Annual Allowance pension tax charges, no effect on potential lifetime allowance charges and ease of access at any age). Shares in the company could also have been passed to my beneficiaries, thus allowing a facility for long term planning if not realised.”

“Given their advice to ‘hold with the limited company’ and had they correctly calculated the excess pension tax charges liable, the correct alternative investment strategy, given my stated aims would have been to keep and invest capital funds within the company. This would have been more beneficial in terms of long term investment, avoidance of large pension tax charges and potential implications on lifetime allowance charges.”

In responding CHL said:

“Mr W states that his alternative to making a pension contribution or drawing dividends would have been to invest funds within his company…and that this should be the comparator option used.”

“We disagree with Mr W and do not feel that this is a realistic comparator. Although it clearly was an option in 2016, it was not an option that [he] seriously considered at the time, nor is it an option that ourselves or Mr W’s company accountant would have been likely to recommend.”

“Investing such significant sums through [his business] would have almost certainly changed the company status in HMRC’s view from being a Trading Company to being an Investment Company. Investment Companies are subject to Corporation Tax on the income and gains received from the investments they hold and so Mr W is wrong to state that “tax would only have been payable at the end of the investment term” – Corporation Tax would either be payable on investment income and gains each company year or (if the limited company qualifies as a micro-entity) at the point of any withdrawal. This is far less beneficial than the gross (tax-free) growth available within a personal pension scheme.”

“Furthermore, Mr W would still need to withdraw the funds from the company in the future. Mr W previously stated that he would do so by liquidating his limited company at retirement and utilising Business Asset Disposal Relief (formerly Entrepreneurs’ Relief) to pay Capital Gains Tax at the reduced rate of 10%...[but] Business Asset Disposal Relief is only available to Trading Companies and not to Investment Companies. Mr W would therefore be liable to Capital Gains Tax largely at the higher rate of 28% (at the time of our advice in 2016).”

“Alternatively Mr W could have drawn funds from the company periodically, pre or post retirement, as he suggests in his most recent response. Such withdrawals would attract the same Dividend Taxation, or Income tax and National Insurance liabilities, that [he] says he

was so keen to avoid. We feel that this is therefore a moot point as such taxes would seemingly always be payable at some stage – either upon dividend withdrawals at the outset in 2016 (as per your proposed scenario) or upon dividend/salary withdrawals in later years."

"Mr W also states that "Shares in the company could also have been passed to my beneficiaries, thus allowing a facility for long term planning if not realised". Estate planning has not been a significant factor in Mr W's complaint thus far, but as he raises the matter we feel that it is prudent to point out that by investing within his limited company and turning it into an Investment Company, [it] would no longer qualify for Business Relief (formerly Business Property Relief) in the event of [his] death. This change means that his beneficiaries would likely be deprived of 100% relief against Inheritance Tax on Mr W's shares in [his company] as this relief is generally only available to Trading Companies and not to Investment Companies. Conversely, Mr W's personal pension is outside of his estate for Inheritance Tax purposes and in the event of his death funds can be passed to his beneficiaries with no Inheritance Tax liabilities."

"Finally and ironically, we note that Mr W states "CHL did not advise me to liquidate the company". This is quite confusing as until very recently a key point in his complaint was precisely that we had advised him to liquidate the company! This complete reversal could be somewhat amusing, were it not for the frustration of how much time and effort all parties have spent corresponding on this point. Nonetheless, we are pleased that Mr W is now in agreement with our position on the matter."

In his last submission Mr W said CHL's argument about the status of his company changing from trading to an investment status if he'd invested available funds through it was wrong:

"The purpose of my investments was to fund retirement. As such, the limited company would clearly no longer be required when I retire. It would be prudent, tax efficient, legal and wise to have invested within the company for retirement, draw down the invested funds to cash 2 years prior to winding up the company and then realise the funds. As long as there was no investment activity within the last 2 years of trading, Business Asset Disposal Relief (BADR) is entirely sensible and legal."

"For completeness, I have also had the chance to confirm this fact with my Independent Financial Adviser and also with my specialist tax accountant…. They have confirmed both current precedent and legality for this approach."

I think these exchanges have been helpful in the sense that they illustrate the matters here are technical, specialist and cover different personal and business tax regimes. They also exhibit different professional opinions about what would've been the best strategy for Mr W to have followed.

I reiterate – it's not the role of this Service to weigh alternative tax planning methods.

Further, these submissions come several years after the event, and while I am sure they express genuine views of alternative futures from a 2016 starting point, I'm bound to be mindful of the influence of hindsight. If we consider the dynamic nature of personal and business taxation alone over the period since the advice, had such changes been foreseen it's more likely than not they would have a significant influence on any advice.

I tend to place more weight on evidence contemporaneous with the events complained about.

Following a meeting between Mr and Mrs W in November 2015, CHL confirmed one of their objectives was to look at the most tax efficient use of the funds currently held in their business. It was noted that:

"One of the most tax efficient uses of funds held within a company is to make pension contributions for its directors/employees. These are treated as a business expense and are not subject to corporation tax - the individual also pays no personal taxation on the contributions…"

According to a meeting agenda dated 8 March 2016 held between Mr W and Mrs W and CHL the main topic for discussion was expressed in the following terms:

"1. Limited Company:

Use of company funds: There is over £200,000 within the limited company which you would like to utilise in a tax efficient way. I believe you have two options:

i. Pay funds as a dividend to receive £138,029.86 (2015/16) or £124,811.69 (2016/17)

ii. Pay £200,000 to allocate to your pension accounts.

Considerations:

- *Use of funds (if taken now, if invested to pension)*
- *Term of investment*
- *Lifetime Allowance (LTA)*
- *Inheritance v LTA (estate planning)*
- *Investment returns v tax"*

On 10 March 2016 CHL provided a follow-up email to Mr W which included the following notes of their conversation:

"…[Mr M's] limited company is holding about £275,000 as cash and we discussed the options of how to use this in the most tax efficient way, if you are to take any dividends, this should be done in this tax year before the changes (and ultimate increase) in the dividend tax. The other option is to make a pension contribution for one or both of you."

"Making a pension contribution from a limited company is the most tax efficient way of moving funds from a limited company in your own name. We feel that if you make a pension contribution it is likely that together with your NHS pensions your benefits will exceed the LTA in the future. Any pension benefits in excess of the LTA (when taken) will be subject to a tax charge of up to 55%. There is an argument that the LTA may no longer be in existence in the future, but making a pension contribution is a gamble that the LTA is abolished at some point in the future and there is no guarantee this will be the case. You may also feel that by taking the funds personally and them being subject to personal and corporation tax (instead of a pension contribution) that the tax position is "neutral" when compared to the LTA charge of 55%."

Later in March 2016, Mr and Mrs W signed a financial review form. This confirmed their top priority was to make provision for their retirement. And in so doing to:

- Make tax efficient investment from the limited company.
- Invest for the long-term.
- Adopt a high-risk investment outlook; and
- Boost retirement funds.

So, while the information from the time of the events complained about is far from perfect, the pattern from what's available leads me to conclude on balance that it's more likely than not extraction of funds from Mr W's business was the main focus for the advice he sought.

I note that when Mr W's complaint was brought to this Service, one of the key complaint points made was that CHL had advised him to liquidate his business. As I've already found, it's clear there was discussion between the parties about the status of his company. But I also think it's reasonably clear CHL set out the boundaries of its expertise and signposted him to his accountant to seek further advice on the matter. Leaving aside that Mr W seems to face in a different direction on this point now, I note in his most recent submission he has also drawn on the opinion of his specialist tax accountant.

I think this is important because in the matters he was seeking advice on in 2015/16 there was clearly a strong interconnection between his personal and company requirements. Effective communications between his financial advisers and his accountant would've been paramount. I can see that CHL suggested discussions between it, the accountant and their mutual client. But no evidence of such communication has been provided. I think such liaison would've been important given Mr W's circumstances, but I find no evidence of such. He held the ring here and so must take some responsibility.

It follows that I don't agree with Mr W's alternative proposal on redress. And so neither do I find it necessary to make provision for a specialist actuarial firm to make the calculations. I think what I've set out should be relatively straight-forward for CHL to deliver.

So, I'm requiring Canter Holland Ltd to assess any loss using the following framework.

Step one – assess the notional value of Mr W's equivalent funds, had he taken dividends from his company and invested these, instead of making pension contributions:

i. Assume the funds Mr W took from his company for his personal pension contributions in 2015/16 and 2016/17 as advised by it, had instead been taken as dividends as soon as possible after its advice, and in the most tax-efficient manner. It should also assume any personal pension contribution it recommended in 2016/17 was also paid into this replacement vehicle.
ii. Calculate returns to these funds, had they been invested in the same holdings and in the same proportions as his personal pension, but instead within the most tax-efficient alternative investment wrapper available to him, taking into account any existing investments that may've used some or all the available reliefs and allowances. For estimating returns beyond the date of my final decision, given Mr W's risk appetite, it should assume FCA's higher rate applies. His recorded preference at the point of advice for retirement at the age of 67. It should assess any notional tax due on returns and withdrawal of benefits, assumed to be taken in broadly equal instalments until average life expectancy as calculated by the Office for National Statistics.

Step two assess the projected value of Mr W's existing personal pension

i. Drawing on the existing value of Mr W's personal pension and using the same assumptions as per step one in relation to future rates of return, age of retirement and the horizon for taking benefits, CHL should derive a comparator projection. It should assess notional tax due on returns and withdrawal of benefits, for example we know he is likely to be a higher-rate taxpayer in retirement given his OPS benefits.
ii. I'm not aware Mr W has made further contributions to his pension (other than the disputed transactions). Nor whether he's taken any benefits or paid funds from it for matters not directly related to his complaint. After confirming the detailed position, then the value CHL obtains or the calculations it makes can assume these adjustments would still have occurred and on the same dates. The adjusted, as appropriate, like for like difference between the notional value of Mr W's fund had he

taken dividends and invested these, and the projected value of his personal pension will be his basic loss.

What I've proposed doesn't mean Mr W would've utilised his excess business funds in the way I've set out. Rather, it's a reasonable proxy based on my findings and conclusions for what could've happened and a basis to compare potential financial outcomes.

So, discounted cash-flow calculations are required to compare each step. If the value arrived at from step one is higher than the value at step two, Mr W has suffered a loss and that is the basic sum Canter Holland Ltd will need to pay him as redress. If the value of step two is greater than step one, he hasn't suffered financial detriment as a result of its failings.

CHL will need to provide Mr W with details of its calculations in a clear format.

Distress and inconvenience

When I'm considering a complaint like Mr W's, I think about whether it's fair to award compensation where failings have occurred, separate from pure financial loss. This isn't intended to fine or punish a business – which is the job of the regulator. But when something's gone wrong, recognition of the emotional and practical impact can make a real difference.

We're all inconvenienced at times in our day-to-day lives – and in our dealings with other people, businesses and organisations. When thinking about compensation, I need to decide that the impact of Canter Holland Ltd.'s actions was greater than just a minor inconvenience or upset. It's clear to me that this was the case here.

Mr W has been caused trouble in trying to get to the bottom of the effect of Canter Holland Ltd.'s failings in the advice it gave him in 2016. I require it to make a payment of £300 to him in recognition of such.

My final decision

For the reasons I've set out, I'm upholding Mr W's complaint but not to the extent he'd like. I now require Canter Holland Ltd to put matters right in the way I've directed.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 16 March 2023.
Kevin Williamson
Ombudsman