DRN-3941565

The complaint

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

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

What happened

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

According to notes of a meeting between Mrs W, her husband 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 Mrs and Mr 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 their 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 Mrs W was aged 42, married with two dependent children. Her expected income in 2016 was £90,000 a year from her public service. The family home was worth around £1 million with an outstanding mortgage of about £300,000. There were no other significant liabilities. Mrs and Mr W also held other savings and investments aside from their occupational pension scheme (OPS) provisions.

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

CHL's recommendations to Mrs and Mr 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 Mrs W. The points raised by Mrs W's representative about her case have evolved during its journey. I'll be focussing on the matter she brought to this Service, which was about the advice she received in March 2016.

Mrs W was primarily concerned about CHL's advice around the lifetime allowance (LTA) calculations. But later she has broadened her complaint points to encompass matters such as a potential HMRC avoidance enquiry into her personal pension contribution; the impact of CHL's advice on her Enhanced Protection; and issues with her annual allowance. In particular, what her representative asserts is consequent exposure to actual and/or potential increased tax liabilities, that could otherwise have been managed better or avoided. XCL also says it advised her to liquidate her company and questions whether this was best advice.

CHL issued its final response to Mrs W on 18 September 2020 and provided subsequent clarifications as her complaint developed. It refuted her complaint points. For example, it said it had followed appropriate guidance in calculating her annual allowance position. It said she was aware of the risks of exceeding her LTA in the future. It didn't think HMRC would challenge the basis of her pension contribution in April 2016 - it had followed tax rules. Her Enhanced Protection had been lost when she joined her employer's new occupational scheme. And that it had not provided her with advice about liquidating her company.

The Investigator didn't uphold Mrs W's complaint. He said he hadn't been provided with evidence of her incurring an annual allowance tax charge as a direct result of CHL's advice in March 2016. He concluded that given how far away Mrs W was from retirement and the potential for future changes to the LTA tax regime, it wasn't possible to say whether she'll be worse off as a result of the decisions she took to open a personal pension in 2016. No evidence had been provided of an avoidance investigation by HMRC into her 2016 pension contribution. And he thought CHL had told Mrs W to discuss the status of her business with her accountant.

XCL on Mrs 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 her case.

As both parties couldn't agree to the Investigator's view, Mrs 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 Mrs W's complaint, but not to the extent she'd like. I'll explain why.

The first thing I've considered is the extensive regulation around transactions like those performed by CHL for Mrs 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 Mrs W's complaint.

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

In my first provisional decision I said I was puzzled about why CHL and Mrs W were at such a variance about the correct calculation of her 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 deciding to uphold this element of Mr W's complaint in January 2023, I said:

"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…"

"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."

"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."

CHL's approach to working out Mrs W's annual allowance position in 2016 was similar to that used for Mr W. So, it follows that I'm also upholding this element of her complaint. I've set out considerations and proposals on assessing loss, if any, under the section on putting things right.

Next I'll turn to Mrs W's concerns about her LTA and the potential for her to incur higher tax in the future if she 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.

When XCL made Mrs W's complaint in August 2020 it said:

"In 2016 she was advised to make a contribution to a private pension when the reality is that her [OPS] will use all of her LTA; this clearly could have been avoided if a forecast to Normal Retirement Age of her [OPS] pension benefits had been made."

"It is also most likely that Mrs W will exceed her LTA with the [OPS] scheme on its own, particularly when taking into account future growth figures produced annually, in addition to her pension contributions. This will have future implications in extra tax due"

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 Mrs W about this matter, CHL said the following to her:

"…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.

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

"We considered all alternatives to a personal pension for Mrs W, but concluded that was the most appropriate option for meeting her objective of minimising tax upon withdrawing funds that were held within her limited company."

“Payments into a personally held ISA, Collective Investment Account, Enterprise Investment Scheme or Venture Capital Trust would have required Mrs W to draw funds from her limited company first, incurring income tax and potentially National Insurance liabilities.”

“If funds had been withdrawn as a salary then, for the 2015/16 tax year, the income tax rate for Mrs W would have been 40% and/or 45% (with potential loss of her Personal Allowance with earnings in excess of £100,000), whilst National Insurance liabilities would have included 13.8% employer National Insurance and 2% employee National Insurance (on earnings above £42,380).”

“If the funds had been withdrawn as a dividend, then the income tax rates at the time would have been 32.5% and/or 37.5% and the company would have been liable for 20% corporation tax (on the declared profit that dividends could be paid from).”

“An ISA or Collective Investment Account investment would not have generated any immediate tax relief to offset these income tax and National Insurance liabilities. We also note that Mrs W had already fully utilised her 2015/16 ISA allowance prior to engaging with Canter Holland, as confirmed in our email of 10th March 2016, and Mrs W went on to fully fund her ISA for the 2016/17 and subsequent tax years too, from personal funds.”

“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 income tax and National Insurance liabilities. More importantly we deem EIS and VCT investments as very high risk and illiquid products that were not commensurate with Mrs W’s attitude to investment risk.”

“In contrast, the employer contribution into a Personal Pension created no tax or National Insurance liabilities, either personally or for the limited company.”

The problem for XCL in making its case are the number of uncertainties between the point of the advice and when Mrs W’s pension benefits are likely to be assessed against the LTA, which will be between 19-26 years hence.

For example, there’s an argument that as Mrs W was 42 and was in a demanding profession she wouldn’t have waited until she was, say, 67 to start drawing her pension benefits. Earlier retirement would have implications for contributions and might lead to an actuarial reduction of her benefits. Of course, when Mrs W actually decides to retire is a matter of conjecture.

I’m also mindful of the strong position of Mrs W and her household finances, including her varied holdings. In such circumstances it’s possible she will ultimately decide not to take the benefits from her personal pension. While these sit in the plan they are treated as being outside of her 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 Mrs W was left in any doubt about the likely position with her LTA. In its advice to Mrs 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.

Mrs W has around 18 years until she reaches 67. We don't know when she will actually retire. We don't know when she 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 Mrs W in 2016 will be in 2041. And we don't know what effect mitigations taken between now and when Mrs W retires will be on any excess exposure she has to her overall tax bill.

Given the moving parts here, clearly Mrs W can't evidence a crystalised overall loss (or gain) at this time in relation to the advice CHL gave her to make a pension contribution in March 2016 and the impact on her LTA. Nor can she 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 Mrs W around the complaint she raises about her LTA exposure.

In an earlier submission to this Service Mrs W said:

"By advising on a personal pension contribution Enhanced Protection…was immediately lost and I see no discussion of the risks involved. Obviously, had Enhanced Protection been kept there would have been no lifetime allowance charge at all on the [OPS] Pension at retirement. I would expect the adviser to have drawn my attention to this significant fact."

This matter was addressed by the Investigator previously. CHL told this Service (bolding is my emphasis):

"We would firstly like to provide reassurance that Mrs W's Enhanced Protection was considered at length. In our email of 27th November 2015 we stated that 'I would like to further investigate your Enhanced Protection. It is not uncommon to see individuals with your earnings and likely career in the [OPS] apply for Enhanced Protection - this affords individuals an unlimited cap on pension benefits. Enhanced Protection will be lost if personal contributions are made or if the increase in benefits in a defined pension scheme (ie: the OPS]) exceed certain limits'."

"In our email of 18th December 2015 we stated that 'I am keen to explore further your Enhanced Protection as this will shape recommendations regarding funds held within the business'. ***After careful research and analysis, we ultimately concluded that Mrs W had already lost her Enhanced Protection prior to engaging Canter Holland, as a result of joining the new [OPS] in March 2015 (which pre-dated any communication with Canter Holland by several months)****."*

"We notified Mrs W of this during our meeting on 8th March 2016 and provided her with [OPS] Pensions factsheet "Lifetime Allowance: Loss of Enhanced Protection and Fixed Protection 2012 and 2014 because of the 2015 [OPS] Pension Scheme"

"Our written agenda for the meeting on 8th March also notes that 'Pensions (Enhanced Protection) – EP was lost in March 2015 when you both joined the [new OPS] scheme'. And we further confirmed this to Mr W in our email of 10th March 2016, clarifying that "you no longer have Enhanced Protection".

Mrs W hasn't engaged further on this complaint point, which seems relatively clear cut. There's no evidence that CHL's actions led to her loss of her Enhanced Protection.

Turning to the issue of a potential tax avoidance challenge from HMRC about the contribution to Mrs W's personal pension in 2016. CHL confirmed it had considered this matter carefully. It said:

“At the time of making the pension contribution Mrs W held 50% of the company’s Ordinary share capital and, alongside her husband, was one of two directors of [X Limited]…As such Mrs W had the ability to decide how she was remunerated, with her employer pension contribution forming part of this remuneration.”

“In accordance with the guidance in HMRC’s Business Income Manual

‘BIM46035 - Specific deductions: pension schemes: wholly & exclusively: controlling directors & shareholders’, we considered that the contribution for Mrs W met the requirements of being ‘wholly and exclusively for the purposes of the business’. HRMC guidance makes it clear that pension contributions will normally pass the wholly and exclusively test and qualify for tax relief and that “it will be relatively rare in the context of pension contributions to have to consider whether there is a non-trade purpose for the employer’s decision to make the contribution”

‘BIM46030 - Specific deductions: pension schemes: wholly & exclusively: introduction’. In the unlikely event of HMRC challenging the size of the contribution/remuneration package for Mrs W then we are confident that there were valid commercial grounds for making this pension contribution. [X Limited] had not previously made any employer pension contributions for its directors and it had built up significant cash reserves enabling it to make large pension contributions. The contribution of £80,000 for Mrs W was also broadly commensurate with a contribution of £100,000 made for her husband one day earlier, on 31st March 2016, indicating proportionality across both company directors. We would also like to point out that the company accounts for [X Limited] were prepared by Mr and Mrs W’s accountants and signed off by the company directors. Had there been any concern around the validity of the employer contribution(s), we would fully expect the accountants to have raised this at the time of drafting the accounts and to have advised the directors accordingly, in their role as the company’s representatives in dealings with HMRC.”

I note Mrs W hasn’t provided evidence of an HMRC investigation into her personal pension contribution in 2016. And so, based on the evidence presented by both parties, it wouldn’t be reasonable for me to uphold this element of her complaint either.

Finally, in responding to the Investigator’s view, XCL questioned the validity of advising Mrs and Mr W to liquidate their 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 [Mrs W] to stop using the business for trading income. Our only recommendation was that [she] should discuss the continuation of the limited company with her accountant (who was independent from Canter Holland).”

““In our email of 7th November 2016 we actually encouraged [Mrs 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 [Mrs 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 [Mrs W and her husband] and/or her accountant without further input from Canter Holland.”

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

Putting things right

I'm upholding Mrs W's complaint in respect of what happened with regard to her annual allowance position, but nothing further. My aim is to return her to the position she'd have been in now, or as close as reasonably possible, had it not been for the failings of Canter Holland Ltd.

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

So, for example, I'm assuming Mrs W would've taken funds from her company in 2016, one way or another, whereas her favoured scenarios suggest she'd have kept funds in the company. I'll be assuming Mrs W takes benefits from her pension, CHL will no doubt observe the possibility that she 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 Mrs W's objectives and requirements in 2016 were clear. Her priority was planning for retirement. Mrs and Mr W wanted to take excess funds from the business. Context for this may've been discussions underway about the possible liquidation of the company.

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 Mrs W the full facts concerning her annual allowance, indeed it led her to believe she had plenty of headroom, when it seems she may not have. This was a material consideration that should've been weighed with other alternatives for utilising funds from the business for her personal benefit. But we also need to recognise these alternatives would've come with their own tax consequences.

CHL's advice to Mrs W in 2016 indicated the lead alternative to a pension contribution was taking dividends from the 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.

Mrs W thought my proposal on redress wasn't right. She 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."

"The advice 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; as referenced in the recent provisional decision regarding my complaint - "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 we do so."

"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). As alluded to in the more recent provisional decision and owing to the parallel circumstance to my husband's position, the investment advice given has indeed had an impact on my annual allowance tax liability as it voided any potential carry over of annual allowance entitlement to subsequent years."

"Shares in the company could also have been passed to my beneficiaries, thus allowing a facility for long term planning if not realised."

In responding to substantively the same argument put forward for redress from Mr W, 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."

I note that 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 Mrs and 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 staring 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 Mrs and Mr W in November 2015, CHL confirmed in a follow-up email 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. We would need to be mindful of any future pension contributions due to your Enhanced Protection."

According to a meeting agenda dated 8 March 2016 held between Mrs and Mr 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 which included the following notes of their conversation:

"…[Mr W'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, Mrs and Mr 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 established in what's available leads me to conclude on balance that it's more likely than not extraction of funds from the business was the main focus for the advice she and her husband sought.

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

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

It follows that I don't agree with Mrs 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 Mrs W's equivalent funds, had she taken dividends from the company and invested these, instead of making pension contributions:

i. Assume the funds Mrs W took from the company for her personal pension contributions in 2015/16 as advised by it, had instead been taken as dividends as soon as possible after its advice, and in the most tax-efficient manner.

ii. Calculate returns to these funds, had they been invested in the same holdings and in the same proportions as her personal pension, but instead within the most tax-efficient alternative investment wrapper available to her, 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 Mrs W's risk appetite, it should assume FCA's higher rate applies. Her 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 Mrs W's existing personal pension

i. Drawing on the existing value of Mrs 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 she is likely to be a higher-rate taxpayer in retirement given her OPS benefits.

ii. I'm not aware Mrs W has made further contributions to her pension (other than the disputed transactions). Nor whether she's taken any benefits or paid funds from it for matters not directly related to her 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 Mrs W's fund had she taken dividends and invested these, and the projected value of her personal pension will be her basic loss.

What I've proposed doesn't mean Mrs W would've utilised the 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, Mrs W has suffered a loss and that is the basic sum Canter Holland Ltd will need to pay her as redress. If the value of step two is greater than step one, she hasn't suffered financial detriment as a result of its failings.

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

Distress and inconvenience

When I'm considering a complaint like Mrs 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.

Mrs 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 her in 2016. I require it to make a payment of £300 to her in recognition of such.

My final decision

For the reasons I've already set out, I'm upholding Mrs W's complaint, but not to the extent she'd like. If she accepts my decision then Canter Holland Ltd will need to put things right in the way I've directed.

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