

The complaint

Ms H and Pentrust Limited (“the trustees”) were the trustees of the R Trust and complain that Brewin Dolphin Limited t/a RBC Brewin Dolphin failed to warn them that its advice to change from an advisory service to its managed portfolio service (MPS) would result in a chargeable event for capital gains tax (CGT) purposes.

What happened

The R trust was set up in 2011 with Ms H being the main beneficiary as well as a trustee of the trust. The trust assets consisted solely of death in service benefits of Ms H’s late father who had died the previous year. According to the trust document she was the named beneficiary under the death in service benefits scheme. The trust portfolio was managed on an advisory basis until 2021 with Ms H receiving the natural income generated by the portfolio as well as being advanced some of the value of the portfolio in 2019 to fund the purchase of a house.

In May 2021 Brewin Dolphin advised the trustees to switch from its advisory service to a discretionary one – namely its MPS. It provided the same advice in respect of a second trust portfolio and to Ms H in respect of another portfolio in her own name both of which were also being managed on an advisory basis but which are not the subject of this complaint.

Ms H as a trustee of the R trust accepted the advice regarding the trust and the portfolio was duly transferred into the MPS. This change resulted in the assets in the portfolio being sold which created a chargeable gain and charge to CGT. Ms H complained that Brewin Dolphin had failed to provide any information about CGT arising as a result of its advice to change to the MPS and that as such she hadn’t been able to make an informed decision.

This contrasted with information it had provided to Ms H in her personal capacity when advising her about changing her own portfolio to its MPS, which information had included an illustration that showed the CGT impact. Ms H said that if Brewin Dolphin had made her aware of the chargeable gain that would arise from changing the R trust to the MPS she wouldn’t have proceeded with changing the service.

Brewin Dolphin didn’t uphold the complaint. It acknowledged that it hadn’t provided a tax illustration to the trustees as it had to Ms H for her own portfolio but said it had made clear it didn’t provide tax advice and that the trustees should seek advice elsewhere if this was required. And whilst the acceptance of its advice was by Ms H only, it said that she could sign on behalf of the trust.

The trustees referred their complaint to our service and it was considered by one of our investigators. He made the following key findings:

- Given the information provided to Ms H in her personal capacity, it is likely that Brewin Dolphin had available the information to enable it to provide an illustration for the capital gains implications for the R trust of its advice.
- On balance Brewin Dolphin should have provided that information to the trustees

given Ms H was on the same platform and invested in the same or similar assets.

- The trust doesn't appear to be a bare trust as Ms H only became entitled to the assets as the beneficiary when she attained a certain age and therefore any disposal of assets would create a chargeable event for capital gains tax purposes.
- Disposal of assets would include fund switching, encashing and then rebuying – as happened in this case – or the trust being wound up.
- Given the R trust was due to come to an end about a year after the advice - when Ms H reached the age the trust would be wound up and assets released to her – this would have triggered an unavoidable capital gain in any event.
- The advice to change to the MPS was to implement a long term strategy over at least a 10 year horizon and to change the focus from income generation to capital growth.
- Had Brewin Dolphin explained that capital gains would arise both as a result of the advice and on the trust being wound up then on balance this wouldn't have deterred the trustees from accepting the advice and changing to the MPS.
- Given that the tax liability would be due at the latest on wind up of the trust in any event it is unlikely the trustees would have continued with what was now considered an unsuitable strategy for the potential saving of a small amount of capital gains that might have arisen if the portfolio value fell before the trust was wound up.

Ms H didn't agree with the investigator and made the following key points:

- She was never the owner of the assets that went into trust.
- She would, on attaining 30 years of age, have applied for 'holdover relief' taking the trusts book costs as her own.
- She would then have been able to manage or elect to crystallise funds at the prevailing CGT rates at the time over a number of years.
- The failure by Brewin Dolphin to provide information as to capital gains that might arise as a result of its recommendation was a meaningful oversight that affected the decision to seek advice.
- In advising to change to the MPS Brewin Dolphin didn't take into account the fact that capital gains could arise when the trust came to an end in any event as it didn't consider capital gains at all.
- The trust would best be described as a contingent discretionary trust.
- If Brewin Dolphin had explained the capital gains implications arising from its advice she wouldn't have accepted the recommendation.
- If she had decided to go ahead with the recommendation she would have executed migration to the discretionary service using her annual CGT allowance over a number of years, having used holdover relief.

The investigator explained that he didn't think holdover relief would have been available to Ms H and wasn't minded to change his opinion. Ms H didn't respond but as the trustees didn't agree with the investigator the matter has been referred to me for review and 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.

I must determine a complaint by reference to what, in my opinion, is fair, and reasonable in all the circumstances of the case. In making that determination I must take into account but am not bound by; relevant law and regulations; regulators' rules, guidance, and standards; codes of practice; and (where appropriate) what I consider to have been good industry practise at the relevant time.

Having considered the available evidence I agree with the conclusion of the investigator that whilst there were shortcomings in the information provided by Brewin Dolphin, there is no reason to think Ms H wouldn't have accepted its advice if it had provided information about potential CGT arising as this would have had to be paid in due course anyway. I set out below why I have come to the same conclusion.

The suitability report of May 2021 shows that the trustees objectives were to implement a long term strategy over at least 10 years with the removal of the need for pre-authorisation for investment action and a more active management style with a focus on capital growth. Putting on one side the issue about the lack of information about the potential CGT liability, I am otherwise satisfied that the advice to change the service to the MPS was suitable based on the objectives shown in the suitability report.

I think there are two main issues in this complaint. The first is whether Brewin Dolphin should have provided information to the trustees about the potential CGT liability arising from the change to the MPS so that the trustees could make an informed decision as to whether the advice should be accepted or not. If Brewin Dolphin should have provided the information the second issue is whether the trustees would have in any event proceeded with changing to the MPS if it had done so.

In considering the first issue I acknowledge that Brewin Dolphin didn't hold itself out as providing tax advice and the general risks and warnings included in the suitability letter included the following statement:

"Brewin Dolphin is not a tax specialist so you should always check the tax implications of our advice with your accountant."

However, whilst I acknowledge that Brewin Dolphin didn't give tax advice and made this clear, I don't accept that this meant it couldn't and shouldn't have made any reference to possible tax consequences arising from its advice. I can see no reason why it didn't at least inform the trustees that there could be a potential CGT liability if there was a change from the advisory service to the MPS. This wouldn't amount to tax advice and is in my view within the remit of a firm providing the sort of service it provides.

I am reinforced in that view by the fact that in its suitability letter to Ms H a few months earlier in respect of her personal portfolio the same risk warning was provided but Brewin Dolphin provided a reasonable amount of information about her potential CGT liability - including an illustration with calculations showing crystallised gains and the estimated CGT payable, which in her case was zero.

This doesn't support the idea that Brewin Dolphin appears to be putting forward that it doesn't make any comment on tax issues because it doesn't provide tax advice. Even if it is argued that it wasn't required to provide the same level of detail to the trustees as it provided to Ms H personally, there is no reason why it shouldn't at least have identified that a potential

CGT liability would arise if the trustees changed to the MPS.

If it had warned the trustees that a potential CGT liability could arise this would likely have prompted the trustees to make further enquires of Brewin Dolphin and if that hadn't provided the detail they needed, to then seek further advice elsewhere. In the circumstances I think the failure to make any reference to the potential CGT liability meant that Brewin Dolphin didn't provide the information the trustees needed to make an informed decision about whether to accept the advice.

However, as I have indicated above that is not the end of the matter, as I then need to consider what, more likely than not, would have happened if Brewin Dolphin had made the trustees aware that changing to the MPS could result in a CGT liability arising. In considering that question I have taken into account the fact that the trust was due to come to an end shortly in any event. This is because the trust document states that *"the trustees shall transfer the trust fund to Ms H when she attains the age of 30 years free from the terms of settlement"*.

Ms H was 30 on 13 March 2022. So, less than 12 months after the advice to the trustees to change to the MPS the trustees were bound to transfer the trust fund to Ms H in any event. I note that the suitability report of 14 May 2021 to the trustees refers to Ms H taking control of the remaining funds in March 2022 at age 30. So, this was something the adviser obviously was aware of and had in mind when providing his advice some 10 months earlier.

The effect of the trustees having to transfer the trust fund to Ms H when she turned 30 is that she became absolutely entitled to the trust property on that date. This creates a deemed disposal at market value of the trust property by the trustees at that time. This means that a chargeable gain and CGT liability would have arisen on 13 March 2022 in any event.

Ms H has argued that if she had been made aware of a potential CGT liability arising both from the change to the MPS and from her becoming absolutely entitled to the assets in the portfolio on turning 30 in 2022, she wouldn't have accepted the advice to change to the MPS. This is because she argues that she would have been able to take advantage of holdover relief in respect of the CGT liability arising when she became absolutely entitled to the trust property in 2022. However, Ms H hasn't provided any evidence that supports her argument that she was eligible for holdover relief.

I am also mindful that the investigator explained that he wasn't persuaded Ms H would have been entitled to holdover relief and Ms H has had the opportunity of explaining why she doesn't agree with him. However, she has provided no response to what the investigator said or evidence in support of her contention she would have been entitled to holdover relief.

Given Ms H hasn't provided any information that supports her argument that she would have been entitled to holdover relief I have based my findings on my understanding of this. From the information I have considered it appears that holdover relief is potentially available where the property in question consists either of business assets or where the disposal of the assets would give rise to an Inheritance Tax (IHT) liability at the same time as a CGT liability. The trust property obviously didn't consist of business assets and I have seen no evidence that any IHT liability arose as a result of Ms H becoming absolutely entitled to the trust property in 2022.

I am mindful that the trust property consisted of the death in service benefits payable as a result of the death of Ms H's father and she was the named beneficiary. My understanding is that such benefits wouldn't ordinarily fall into the deceased's estate such that an IHT liability would have arisen when Ms H became absolutely entitled to the trust property in 2022. So, on the information available to me I am not persuaded that Ms H would have been able to

claim holdover relief when she became absolutely entitled to the trust property.

Given my finding on this it follows that Ms H would have been in no better position in 2022 than in 2021 so far as CGT was concerned and as such there was no reason for her not to go ahead with the change to the MPS as advised by Brewin Dolphin – which advice was otherwise suitable, as I have said. In the circumstances I am satisfied that if she had been provided with information that made clear the tax position Ms H would have had no reason not to go ahead with the change to the MPS and it is more likely than not she would've have done so.

I appreciate that Ms H is likely to be disappointed that, as with the investigator, I have found Brewin Dolphin didn't provide the information it should've done but have not found that this doesn't change anything. However, for the reasons I have explained I am not satisfied that if Brewin Dolphin had provided the information it should have done to the trustees about potential CGT this would have resulted in the trustees deciding to do anything different.

My final decision

I don't uphold this complaint for the reasons I have set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms H and P as trustees of the R Trust to accept or reject my decision before 17 May 2024.

Philip Gibbons
Ombudsman