DRN-4690367

The complaint

Mr C has complained about the advice he was given by St James's Place Wealth Management Plc ('SJPWM') to invest into an Enterprise Investment Scheme ('EIS') rather than a Venture Capital Trust ('VCT'). He says he was never advised there was a potential to not be able to crystallise his investment after three years, whether at a loss or otherwise. He cannot withdraw his investment which continues to fall in value.

He has suffered losses by not being able to have his funds returned to him after three years and says he has suffered considerable stress during this time.

What happened

In December 2015 Mr C invested £10,000 into an EIS – which I shall refer to as 'S' in my decision – on the advice of SJPWM. Mr C had an expectation that he would be able to withdraw from his investment three years later, but this didn't happen, and the value of his investment continued to fall. In 2023 Mr C raised his concerns with SJPWM.

SJPWM responded to Mr C's complaint. It said;

- It referred to Mr C's circumstances at the time the advice was given, and his primary objective was to set aside a sum of money to mitigate an income tax liability.
- Mr C was provided with a suitability letter and SJPWM was satisfied the recommendation given was in line with his chosen investment objectives and Mr C had met the team behind the EIS before investing.
- The risk involved in EIS investment had been made clear.
- SJPWM understood Mr C's disappointment with the performance of the investment and liquidity issues that had arisen, but it couldn't find any evidence that Mr C's concerns were attributable to the advice he had been given.
- It provided illustrations of how loss relief would assist to cap any losses.

Mr C wasn't happy with the outcome and brought his complaint to the Financial Ombudsman Service. Mr C said his complaint wasn't made on the basis of the risk to his investment, which he accepted, but he had stressed to SJPWM his need to access the money after three years and was directed to an EIS over alternatives with longer maturities.

As the complaint remains unresolved, it has been passed to me for a decision in my role as ombudsman.

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.

After doing so, I've reached the same conclusion as the investigator and broadly for the same reasons. I'll explain why.

When giving investment advice SJPWM had regulatory obligations to assess the suitability for Mr C. The regulator, the Financial Conduct Authority ('FCA') and the Conduct of Business Sourcebook provides detail of the information that a business should consider before giving investment advice;

'**Assessing suitability: the obligations**

COBS 9.2.1R (1) A firm must:

(a) take reasonable steps to ensure that a personal recommendation, or a decision to trade, is suitable for its client; and

(b) ensure that any life policy proposed is consistent with the client's insurance demands and needs.

(2) When making the personal recommendation or managing the investments, the firm must obtain the necessary information regarding the client's:

(a) knowledge and experience in the investment field relevant to the specific type of designated investment or service;

(b) financial situation; and

(c) investment objectives;

so as to enable the firm to make the recommendation, or take the decision, which is suitable for the client and for a life policy, to propose a contract that is consistent with the client's insurance demands and needs.'

I have borne this in mind throughout my decision.

SJPWM has provided a copy of the Confidential Financial Review completed with Mr C in October 2015. It's recorded that Mr C was 48 years of age, was director of his own business and had no dependents. He had an outstanding interest only mortgage of £155,000 with a remaining term of five years. He didn't have a payment vehicle in place which the adviser recommended he do. Mr C had reduced his working days to two from five and earned an annual income of £57,200. He had a monthly net disposable income of £870. At the time he had £170,000 in cash and including his property Mr C had total assets of £844,000.

I've seen a copy of the suitability letter of 10 December 2015. Its recorded Mr C wanted to focus on Investment Planning. His investment objective was to take surplus funds from his business as a dividend in the most tax efficient way and to ensure the payment was made in time so the associated tax would fall due for payment in January 2017. It continued;

'Although not guaranteed, there is more than a reasonable expectation that the EIS certificates which enable tax associated with the investment to be claimed will be available before this date…'

At the time Mr C's assets were recorded as being;

Bank accounts – cash	£45,000
Stocks and shares ISA	£127,000
Share portfolio	£57,000
Private Investment Company	£5,000

<u>£324,000</u>

Mr C was categorised as having an Upper-Medium Risk profile and that;

> 'You are willing to invest a proportion of your overall wealth in higher-risk assets with the potential for higher returns. You understand the additional risk of investing in overseas markets, including less developed economies, and are comfortable with some of your capital being invested in these markets. You are investing for five to ten years or longer, and recognise that you may experience significant falls in the value of your investments.'

It was recommended that Mr C invest £10,000 into an EIS which in turn invested into commercial film and/or television content and;

- 'Although this is a high risk investment it only constitutes a small proportion of your investment portfolio.
- You appreciate that investing in unlisted trading companies is very risky. However, you are prepared to accept this risk for the tax breaks provided and the significant investment returns that could be achieved.
- …'

I'm satisfied that SJPWM appropriately considered Mr C's circumstances, investment knowledge, experience, investment objectives etc before making the EIS recommendation. And taking account of Mr C's investment objectives, attitude to risk and capacity for loss etc, I don't find the recommendation to invest into an EIS to have been unsuitable for Mr C.

However, Mr C has said he accepted the risk inherent in EIS investment. Mr C says that had he been advised he would not be able to withdraw his investment eight years later, he would never have chosen it. It was the term of the investment that was his priority, and which led him to invest into an EIS rather than a VCT. To clarify, the rules that apply to both are;

- HMRC rules for EIS income tax relief is that the investor must hold the shares for a qualifying period of at least three years from the date of investment or if later, the date the company begins trading. An investor can claim up to 30% income tax relief on an EIS investment and offset any losses against an income tax bill.
- For VCTs an investor must be prepared to hold VCT shares for a minimum of five years. If the shares are sold before then, the investor will need to repay any upfront income tax relief claimed.

I note the suitability letter recorded other options than an EIS investment was considered which included a VCT;

> 'An investment into a VCT was discounted because whilst it contains many similar characteristics to an EIS, it has a minimum holding period of five years. This option was discounted as you require the investment to be considered over a lesser period.'

I've reviewed all of the documentation provided to assess whether Mr C was given clear, fair and not misleading information about the EIS term before he invested.

I can see in the suitability letter that one of the key factors taken into consideration was the predictability of when the scheme would mature, and Mr C's funds returned to him. But equally I can see the adviser's comments – about the recommendation meeting his investment objectives – didn't refer to Mr C being able to withdraw his funds after three years. So, while Mr C recalls this being discussed, it doesn't appear that this was made a point of priority by the adviser at the time. Three years is mentioned but only in the context of Mr C not selling the EIS shares within three years of their issue to take advantage of the tax benefits.

However, the suitability letter goes on to say the particular EIS chosen was because of 'the predictability of when the scheme will mature…' It's recorded it was the manager of the discretionary managed portfolio – 'S' – that would choose the underling investment, but it said it was one of the leading providers of this type of investment and;

> 'each iteration had exited promptly and line with its investment objectives upon conclusion of the minimum maturity period of three years for EIS.'

And I note the Track Record details of the manager confirmed that over 126 of the manager's EIS companies had;

> 'gone through the minimum three years hold period and shareholders in each of the companies have achieved a successful exit.'

So clearly the manager had a good track record of returning funds after the three-year period which would suggest this was S's managers' continued intention and no doubt this would have given Mr C some reassurance. Mr C went ahead with the investment and the S's December 2015 update confirmed Mr C's £10,000 investment had been split between six investee companies.

I've considered the information and warnings Mr C was given in advance of his agreement to invest. The application for the EIS had a suitability heading and which referred to any investment being made on the basis that it should be left intact for at least three/three and half years and Mr C had to tick to confirm that he understood his investment would be held over the 'medium term'. I can see the application also asked investors whether they had any significant capital commitments within the next four years which suggests to me that the EIS manager envisaged the funds not being returned to investor before then.

The Executive Summary of the EIS manager included risk factors, one of which was;

> 'You should consider an investment in the service as a medium-term investment and investments made by the Manager are likely to be illiquid. The investment horizon is at least three years.'

The EIS manager's brochure stated in the 'returns' section of the risk factors that;

> 'After holding the Qualifying Shares in the Investee Companies for the Relevant Period, it may be difficult to realise the Qualifying Shares or to obtain reliable information as to their value, as there may not be a ready market for them'

And under the 'investment horizon' section it says;

> 'Having regard to the Relevant Period and the feasibility of obtaining a realisation thereafter, the investment horizon is approximately 3-3.5 years, but there can be no guarantee that all of the Qualifying Shares will be realised within this period…'

SJPWM's EIS – Client declaration said;

> '…the fact that EIS companies are not listed on an exchange means that they are inherently illiquid, and you may be unable to sell them at the point you wish to.'

The risk warning section of S's third-party tax shelter report of the spring of 2015 said;

> 'Investments are illiquid and need to be held for at least three years in order to keep EIS/SEIS tax benefits…
>
> An EIS/Seed EIS investment should be viewed as a long-term investment'

I appreciate that Mr C has said his priority was to have his funds returned to him after three years and it wasn't the risk of the investment itself that concerned him. However, I think part of the risk inherent in EIS investments is that the return – including the date of the return – couldn't be guaranteed. The three years referred to throughout refer to the minimum period as defined to by HMRC for the investor to take advantage of the tax benefits.

And clearly it was the intention of all parties that investors should have their funds returned to them after that period. But EIS are high risk investments and there can't be any guarantees. I am of the opinion that there were sufficient warnings given throughout the documents about the high-risk nature of the investment and in my view, not having a guarantee of funds being returned after the three-year period was part of that risk.

Mr C was an experienced investor at the time of the EIS investment and so would have been aware of the volatility and risk of investment. And part of the risk of investment is liquidity and performance. I do appreciate Mr C's disappointment and frustration with the investment.

An EIS rather than a VCT was suggested to him because of the five year 'rule' for VCTs. So, Mr C invested with the expectation that he would be able to have any funds returned to him after three years or so. While it's clear that the discretionary manager's track record suggested this had been successfully done in the past – which must have been a comfort to Mr C – and this was the intention for Mr C's EIS investment, this didn't prove to be the case.

However, the EIS wasn't a guaranteed fixed term product. While one of the unique selling points of the EIS investment was the tax advantages which couldn't be realised until the investment was held for at least three years, but that HMRC requirement didn't guarantee the investment would return the invested funds after three years.

The underlying investments were high risk and illiquid with all the potential investment pitfalls that could expose the investor to. I think Mr C was sufficiently warned – in all of the documentation – about the high-risk nature of EIS investment and in my opinion that high risk extended to the date of return for the funds invested.

Taking all of the above into account, I don't think it would be fair and reasonable for me to make a finding that the EIS recommendation was unsuitable for Mr C, and I'm satisfied he was given sufficient warning about the high-risk nature of the investment of that. It follows I don't uphold Mr C's complaint. No doubt Mr C will be disappointed with the outcome – it's clear he feels strongly about it, and I thank him for the effort and time spent in bringing it – but I hope I have been able to explain how and why I have reached that decision.

My final decision

For the reasons given, I don't uphold Mr C's complaint about St James's Place Wealth Management Plc.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr C to accept or reject my decision before 13 December 2024.

Catherine Langley
Ombudsman