DRN-4838898

The complaint

Mrs J complains that St. James Place Wealth Management Plc ("SJP") provided unsuitable advice for her to invest into two Enterprise Investments Schemes (EISs).

What happened

Before I set out the background, this complaint was raised by Mrs J's attorneys on her behalf and has been dealt with by them throughout and there has been communication with different attorneys during the course of the complaint. For ease of reference I will refer to the attorneys collectively as the representatives rather than identify them individually depending on which attorney has communicated.

In 2015 Mrs J's adviser carried out a confidential financial review (CFR) which identified that she potentially had a capital gains (CGT) liability of around £36,000 arising from the sale of a property which generated a gain of around £134,000. The CFR also identified that Mrs J wanted to mitigate her potential Inheritance Tax (IHT) liability.

Mrs J was advised to invest £70,000 in the Foresight EIS and £70,000 in the Triple Point EIS to meet her objectives to mitigate her CGT and IHT liabilities as well as, to a lesser extent, reduce her income tax liability for the current and next financial years.

Mrs J representatives complained by letter dated 2 January 2022. SJP didn't uphold the complaint. The representatives didn't accept the final response from SJP and referred Mrs J's complaint to our service. It was considered by one of our investigators who thought the complaint should be upheld. The investigator said that SJP should calculate redress by way of comparing the performance of the investments as against the benchmark we use for someone we think wanted to take no risk with their capital. She also said that SJP should take over the investments if possible.

SJP accepted the opinion of the investigator and provided a figure for redress based on the redress awarded by the investigator. The representatives said that tax advice was needed on the tax implications. They also queried how SJP could take over ownership of the investments when all but one company within the EISs had already been sold and money paid out.

The representatives thereafter provided a quote from an accountancy firm for it providing advice on; the tax implication of withdrawal of EIS reliefs following the companies losing their EIS status; the tax treatment and reporting obligations in respect of funds paid out on the encashment of investments, compensation received and interest from SJP; the IHT consequences of accepting the offer on Mrs J's estate.

SJP said that the redress awarded by the investigator in his original opinion was to put Mrs J in the same position as if she hadn't invested in the EISs so she wouldn't have benefitted from the associated tax savings these provided. The decision to seek tax advice on giving up the EISs appears to be personal choice to decide what would be better for the family going forwards.

The investigator thereafter provided a second opinion in which he said that but for the unsuitable advice Mrs J wouldn't have been invested in the EISs and given the potential complexity of the issues – with several companies having their EIS status withdrawn with appeals outstanding – it is reasonable that SJP pay the costs for advice on the tax implications limited to £2,137.50.

SJP didn't agree with the investigator on this and asked for referral to an ombudsman, although confirmed it still stood by the offer it made based on the original opinion of the investigator. It pointed out again that the redress put Mrs J in the position she would have been in if investment in the EISs hadn't taken place and it hadn't deducted anything for tax reliefs where HMRC had withdrawn tax relief.

As SJP didn't agree with the investigator's opinion that it should pay the accountant's fees for tax advice the matter was referred to me for review and decision. I issued a provisional decision upholding the complaint but awarded redress on a different basis to the investigator. The findings from my provisional decision are set out below.

"SJP agreed with the investigator's original opinion wherein he said that the advice to invest in the EISs was unsuitable and as such I will only make some brief findings on this as the main issue I need to determine in this complaint is the redress, in particular whether SJP should have to pay accountancy fees for Mrs J obtaining tax advice.

The suitability letter of 15 December 2015 sent to Mrs J started by referencing the long standing relationship and regular meetings between her and the adviser and that the only outstanding area at present was that she wanted some of her capital invested more tax-efficiently and the only objective identified was tax mitigation.

The suitability letter goes on to set out various potential investments that the adviser didn't recommend she invest in for tax mitigation, for various reasons - although in general it was because none of the options offered all the tax mitigation benefits of the EIS he recommended.

The Triple Point and Foresight EISs the adviser did then recommend undoubtedly had the potential to provide the tax mitigation that Mrs J had indicated to the adviser she wanted. In addition to providing CGT deferral and potential IHT mitigation benefits it also provided income tax relief to a lesser extent – the adviser calculated that Mrs J would be able to reclaim income tax of £6,080 in relation to this.

However, whilst the EISs undoubtedly provided the potential tax mitigation Mrs J wanted that doesn't of itself mean she should have been advised to invest in them. I think there are a number of issues with the advice provided to Mrs J in the circumstances.

In terms of risk the suitability report states:

"You confirmed you are a Medium Risk investor who is willing to accept an Upper-Medium level of investment risk in light of the tax advantages on offer. You are willing

to invest a proportion of your overall wealth in higher-risk assets with the potential for

significant IHT savings."

This suggests that although Mrs J would be taking a bit more risk than her usual risk appetite she would still be investing in products that were still medium risk albeit at the upper end of medium risk. I think this was misleading and I am not satisfied the adviser made clear the actual risk of the EISs.

I am also not satisfied that the adviser provided the information Mrs J needed to make an informed decision. I am mindful that she wasn't familiar with EIS investments – the CFR refers to her only having heard about them through friends. The suitability report refers to Mrs J wanted EIS investments that focussed on capital preservation rather than growth.

The adviser stated that:

"Both the Foresight and Triple Point EISs are designed to provide investors with access to a portfolio of investments in unquoted companies that offer greater capital security and which qualify for the EIS tax benefits."

However, there is a significant difference to an EIS focussed on capital preservation – as only the Triple Point Information Memorandum referred to in any event as far as I can see – and capital preservation in the sense of other types of investment Mrs J will have been aware of. I am mindful also that although the adviser made reference in the suitability report to Mrs J being willing to invest in higher-risk investments the adviser had written to her following a meeting on 17 November 2015 setting out his initial thoughts which suggested the EIS were low risk.

The adviser set out his proposed strategy, to invest £130,000 into an EIS and £170,000 into the Ingenious IEP Care Plan. His summary thereafter included the following

"The plans proposed are designed to be relatively low risk"

And

"However you will retain access to all capital and income arising from the plans."

The adviser didn't in that letter specify any particular EIS but to refer to such investments as relatively low risk was in my view misleading - as was the suggestion that she would retain access to all capital and income arising given that an EIS requires investment in unquoted companies which are by their nature illiquid. I am not saying the adviser deliberately misled Mrs J, but what he said was in my view misleading.

In the circumstances, whilst I am satisfied Mrs J will have had a general understanding that her capital was at risk from investment in the two EISs, I have seen no persuasive evidence that her previous experience was such that she would have understood the actual risks of the two EISs - especially given the information provided by the adviser that I have referred to above. I am also not satisfied that if Mrs J had been provided with clear, fair, and not misleading information about the risks she would have been willing to take the risk presented by investing in the two EISs.

In all the circumstances, whilst the two EISs did potentially provide the tax relief that Mrs J wanted, I am not satisfied that they were suitable for her or that she necessarily understood the risks based on the information provided to her and I am not persuaded that she should have been advised to invest £140,000 in them.

The accountancy fees for advice about tax

I contacted the representatives explaining why I thought there was some merit to the argument put by SJP as to why it shouldn't be responsible for these. Their response was that the unsuitable advice has led to an almighty mess that needs to be resolved quickly. It was argued that this cost, not to mention the extra time and uncertainty and administration for everyone involved wouldn't have occurred but for what SJP did wrong.

I have some sympathy with that argument but I am not persuaded that this means SJP should pay for the tax advice for the three areas identified in the quote that has been provided.

In terms of the tax reliefs that Mrs J has already had the benefit of, ordinarily these would be deducted when carrying out the redress calculation as those are benefits that would not have been obtained but for being invested in the EISs. However, the redress I have set out doesn't allow for these to be deducted in relation to any of the companies whose EIS status has been challenged by HMRC so Mrs J will not be worse off even if HMRC are successful.

As for advice on holdover relief, I don't think it fair and reasonable SJP pay for such advice given the redress I am awarding is based on Mrs J not being invested in the EISs in the first place, in which case such relief isn't something she would have been entitled to.

Regarding advice being sought on the tax treatment of the compensation received and the IHT consequences of the redress being accepted, the redress we award may often result in tax consequences for a complainant but we wouldn't generally include within an award that a business pay for the complainant to get advice about this.

If Mrs J was dealing with matters herself I would have made a reasonable award for distress and inconvenience to allow for her time and effort in dealing with any issues around the tax. However, it is her representatives that are dealing with issues arising from the unsuitable advice and whilst I accept they will have spent time and effort already on dealing with this matter and may well have to spend further time doing so, I have no power to make any award to them."

I awarded redress on the basis of a comparison between the two EIS investments and our usual benchmark for someone willing to take a small risk with their capital rather than the no risk benchmark used by the investigator. I gave both parties the opportunity of responding and providing any further information they wanted me to consider before making my final decision.

SJP didn't agree with the redress I had awarded. It argued that all parties accepted the original adjudication by the investigator and the low risk benchmark he had specified and that the representatives referred it back to our service after the case had been closed and it had made an offer. SJP said it received a second adjudication which covered the accountancy fees issue and it was this issue it asked to be referred to the ombudsman. It said it was therefore unsure why the benchmark I had selected had changed.

SJP also made the point that if Mrs J hadn't invested in the two EISs she presumably would have paid her CGT liability up front and wouldn't have had the full sum to invest in line with the benchmark. It made the following additional points:

- The Foresight EIS exited fully on 10 February 2023 whereas the Triplepoint EIS is still in force.

- Comparisons against the benchmark should therefore be carried out to the date the Foresight EIS exited not the date of decision with 8% interest added to any loss from the exit date to date of settlement.

- Provided the Triplepoint EIS still exists and is open it will take ownership but will not be able to pay compensation until transfer of ownership so it will not be able to add up the figures between the two to work out if Mrs J has suffered a loss as set out in the provisional decision.

I responded to both parties to address the issues raised by SJP and said the following:

- I accepted Mrs J would more likely than not have paid the CGT liability immediately if she hadn't invested in the two EISs and that this amount wouldn't have been available for investment in an alternative investment.

- I agreed that for the Foresight EIS the comparison with the benchmark should be to 10 February 2023 being the date it exited with simple interest at 8% being calculated on any loss from that date until settlement.

- There is no reason to change the redress methodology in respect of the Triplepoint EIS.

- The benchmark used by the investigator was our usual benchmark for someone unwilling to take any risk with their investment and the one in the provisional decision is our usual benchmark for someone willing to take a small risk. Mrs J was an experienced investor with a medium risk appetite and the record of her preferring capital preservation over capital growth doesn't mean she was unwilling to take any risk.

I gave both parties the opportunity of providing further information or argument in response to the points I had made. SJP, in short, made the following points.

- It has been established that capital preservation was important to Mrs J and she proceeded with the EISs following a letter to her that indicated the plans were relatively low risk.

- The representatives had previously accepted the original adjudication with a benchmark comparison which assumed Mrs J wanted a low-risk approach.

- It is difficult to understand why, after receiving an offer letter based on the original adjudication – low risk benchmark - the representatives felt a different investment approach would have been taken with the funds.

- However, if the representatives are happy to accept the outcome of the provisional decision it will agree to settle in the way I have outlined.

The representatives responded and in short said that they strongly disagreed with my finding that SJP shouldn't pay the costs of tax advice regarding unravelling Mrs J's now complex tax liabilities caused by its actions. They asked for clarification that SJP would purchase the Triplepoint EIS from Mrs J and how this would be valued. As regards the benchmark they said that SJP had misclassified Mrs J as an experienced investor and they had contested this but that SJP had to live with its misrepresentation and as such the benchmark should reflect the higher risk profile it used to make the sale.

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.

In doing so, I've taken into account relevant law and regulations; relevant regulators' rules guidance and standards; codes of practice; and, where appropriate, what I consider was good industry practice at the relevant time. But I think it's important to note that while I take all those factors into account, in line with our rules, I'm primarily deciding what I consider to be fair and reasonable in all the circumstances of the case.

It is for me to decide what weight to give evidence a party relies on and where there is a dispute about the facts my findings are made on a balance of probabilities – what I think is more likely than not.

The purpose of my decision isn't to address every point raised and if I don't refer to something it isn't because I've ignored it but because I'm satisfied I don't need to do so to reach what I think is the right outcome. Our rules allow me to do this, and it simply reflects the informal nature of this service as a free alternative to the courts.

I have been provided with no information that would lead me to change the findings in my provisional decision, which findings form part of this final decision unless stated to the contrary.

Having considered the various points made by the parties I am not persuaded that I should depart from the redress set out in my provisional decision, save for the revisions identified in the email sent to both parties on 1 August 2024.

However, before I set out the redress I will address what the parties have said about the choice of benchmark in this case.

I think it is important to clarify that the representatives never accepted the original adjudication by the investigator as SJP has said. I appreciate it has made that argument based on what it was told by the investigator but the representatives made clear they intended to seek tax advice following receipt of his original opinion.

SJP continue to argue that I should not have departed from the benchmark used by the investigator. I have made clear to SJP, it is for me to decide what benchmark to use. I am not bound by the benchmark identified by the investigator. In any event, from what SJP has said it appears to have misunderstood both the original benchmark used by the investigator and the one I set out in my provisional decision in any event.

I say this because in support of its argument that I should adopt the benchmark used by the investigator it argues that Mrs J wanted a low risk investment, when that is the basis of the benchmark I have selected in any event. In short, I have used the appropriate benchmark for someone who wanted a small risk with their investment as explained in my provisional decision and in accordance with SJP's own argument. The benchmark used by the investigator in contrast was for someone who wanted no risk to their capital, which was clearly referenced in his opinion.

The representatives argue that the benchmark should reflect the higher risk profile SJP wrongly used to make the sale to Mrs J. However, the purpose of the redress is to put Mrs J as far as possible in the position she would have been in if SJP hadn't done anything wrong. As such it isn't appropriate to use a benchmark based on the risk of the unsuitable investments SJP recommended.

I am satisfied from the information in this complaint that Mrs J wasn't a no risk investor but was prepared to take a small risk with her investment. In the circumstances I am satisfied that the benchmark identified in my provisional decision is the appropriate benchmark to use in this complaint.

I have accepted SJP's argument that Mrs J would have paid her CGT liability if she hadn't invested in the two EISs - other investments which would have allowed her to defer or mitigate her CGT liability would also have been high risk and as such unsuitable. In the circumstances she wouldn't have invested this amount and the calculation of the redress will have to take this into account.

I have noted the representatives disagreement as to SJP paying for the tax advice they say will now be needed but they have provided no additional information or argument that would lead me to change my finding that this isn't something SJP should have to pay.

The representatives have also asked for clarity as to SJP taking ownership of the Triplepoint EIS. The redress set out in the provisional decision treats the value of the Triplepoint EIS as zero on the basis it is illiquid. SJP has to compare that with the benchmark and pay the difference, it isn't required to pay anything else in respect of Triplepoint if ownership is transferred.

Putting things right

In assessing what would be fair compensation, I consider that my aim should be to put Mrs J as close to the position she would probably now be in if she had not been given unsuitable advice.

I think Mrs J would have invested differently. It is not possible to say *precisely* what she would have done, but I am satisfied that what I have set out below is fair and reasonable given Mrs J's circumstances and objectives when she invested.

What should SJP do?

To compensate Mrs J fairly, SJP must:

- Compare the performance of each of Mrs J's investments with that of the benchmark shown below on the basis that the amount Mrs J would have otherwise invested would have been less her CGT liability with this being treated as being deducted equally in respect of each investment.

- A separate calculation should be carried out for each investment but the resultant figures added up to work out if Mrs J has suffered a loss.

- SJP should also add any interest set out below to the compensation payable.

Income tax may be payable on any interest awarded.

Investment name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
Triple Point EIS	Still exists but illiquid	For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the complainant's acceptance)
Foresight EIS	No longer exists	For half the investment: FTSE UK Private	Date of investment	10 February 2023	8% simple per year from the end date to

		Investors Income Total Return Index; for the other half: average rate from fixed rate bonds			settlement.

For each investment:

Actual value

This means the actual amount paid or payable from the investment at the end date.

If at the end date the investment is illiquid (meaning it could not be readily sold on the open market), it may be difficult to work out what the *actual value* is. In such a case the *actual value* should be assumed to be zero. This is provided Mrs J agrees to SJP taking ownership of the investment if it wishes to. If it is not possible for SJP to take ownership, then it may request an undertaking from Mrs J that she repays to SJP any amount she may receive from the investment in future.

SJP may add to the actual value any tax reliefs Mrs J received by virtue of making the investment but only insofar as Mrs J's entitlement to such relief isn't currently at risk due to HMRC's actions. SJP can ask Mrs J for evidence in respect of such reliefs.

Fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, SJP should use the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

The wrapper only exists because of illiquid investments. In order for the wrapper to be closed and further fees that are charged to be prevented, those investments need to be removed. I've set out above how this might be achieved by SJP taking over the investment, or this is something that Mrs J can discuss with the wrapper provider directly. But I don't know how long that will take.

Third parties are involved and we don't have the power to tell them what to do. If SJP is unable to transfer ownership of the investment, to provide certainty to all parties I think it's fair that it pays Mrs J an upfront lump sum equivalent to five years' worth of wrapper fees (calculated using the fee in the previous year to date). This should provide a reasonable period for the parties to arrange for the wrapper to be closed.

Why is this remedy suitable?

I have chosen this method of compensation because:

- Mrs J wanted Capital growth with a small risk to her capital.

- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to her capital.

- The FTSE UK Private Investors Income *Total Return* index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is a mix of diversified indices representing different asset classes, mainly UK equities and government bonds. It would be a fair measure for someone who was prepared to take some risk to get a higher return.

- I consider that Mrs J's risk profile was in between, in the sense that she was prepared to take a small level of risk to attain her investment objectives. So, the 50/50 combination would reasonably put Mrs J into that position. It does not mean that Mrs J would have invested 50% of her money in a fixed rate bond and 50% in some kind of index tracker fund. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mrs J could have obtained from investments suited to her objective and risk attitude.

My final decision

I uphold the complaint. My provisional decision is that St James Place Wealth Management Plc should pay the amount calculated as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs J to accept or reject my decision before 23 October 2024.

Philip Gibbons
Ombudsman