DRN-4902195

The complaint

Mr and Mrs P complain Scott and Casey Financial Management Limited ("Scott") instructed that their capital gains tax ("CGT") annual allowances be used by an investment manager without their knowledge or permission, and Scott knew these were fully used elsewhere.

Background

Mr and Mrs P had substantial funds in an investment portfolio managed by an investment manager that was recommended to them by Scott.

The portfolio started in 2017 when over £273,000 was invested for Mrs P. This was started with a £33000 ISA that was transferred into the portfolio. There was also cash from savings. There was also cash from investment bonds Scott had advised Mr and Mrs P to cash in for tax and investment reasons. When the portfolio started the ISA component made up about £53000 of the total, after £20,000 went into the ISA to use Mrs P's allowance that year.

Mr P had already used his ISA allowance that year, but the idea was that funds held in the portfolio by Mrs P but outside the ISA would in future be moved into Mrs P's portfolio ISA and also fund a portfolio ISA for Mr P until all funds were eventually in ISAs. This process was completed by the tax year that begun in 2023. Scott's 2017 advice letter said:

"…following my recommendation you would like to structure any reinvestment to take advantage of your available ISA allowances for both this tax year and future years and if this could be built in as an automatic feature you would be interested so that over time this money could become tax free."

Mr and Mrs P have explained that a significant amount of their income came from selling shares, and that in doing so they used their capital gains tax allowances in full. They say they told Scott this but Scott didn't tell the investment manager, and in the three tax years ending in 2023 the investment manager sold investments that had gains that used Mrs P's annual capital gains tax allowance. Mr and Mrs P say the result is Mrs P will have to pay around £2700 in extra tax on gains on assets she realised or were realised for her - and with interest, fines and associated losses, this loss could increase to £4000.

Mr and Mrs P seek compensation for this tax, on the basis that they only became aware the investment manager was using the capital gains tax allowance when it started to send them a separate *"CGT Disposals Report"* in 2023 – whereas this had previously formed part of a annual tax report. Mr and Mrs P say they had disregarded the annual tax reports because their investment was an ISA and Scott's advice letter had told them ISA investments weren't subject to capital gains tax and gains or losses on them didn't need to be put on tax returns.

Mr and Mrs P say Scott wrongly regards them as having been experienced investors, which they weren't, and the advice report Scott gave them didn't explain the investment portfolio might use Mrs P's capital gains tax allowance – and they didn't give permission for this.

Scott says some of the portfolio investments were held outside ISAs and were sold in order to move the funds into ISAs, and this process generated taxable gains. Mr and Mrs P have

said Mr P signed a form in 2018 that authorised the investment manager to use his unused ISA allowance, but no similar form was used to authorise the use of Mrs P's capital gains tax allowance – and it ought to have been.

Scott has drawn attention to words in its advice letter and in the investment manager's proposal that it says drew attention to the possibility that the investment manager would make use of Mr and Mrs P's tax allowances – and it says the use of the capital gains tax allowance by the portfolio was apparent in the tax reports from the tax year ending in 2019 onwards. Also Scott says Mr and Mrs P didn't enter any *"Investment Restrictions"* on their application form. It also says Mr and Mrs P signed to agree to tell the investment manager if their circumstances changed – and never told Scott their circumstances had changed.

Our investigator didn't think Scott was at fault. He thought Scott's 2017 recommendation had made clear the investment manager would use Mrs P's capital gains tax allowances – and he didn't think there was enough to show that Mr and Mrs P had told Scott this was already being used and shouldn't be used by the investment manager.

Mr and Mrs P didn't accept or agree with our investigator's conclusion and so, as the matter couldn't be resolved informally, it has been passed to me to decide.

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.

Having done so, I've come to the same conclusions as our investigator for broadly the same reasons. I'll explain my reasoning briefly.

Scott's advice was based on notes it made in a "fact find" document. This fact find was done in September 2017. Mr and Mrs P signed it in October 2017, so they saw its contents. I've looked carefully at what it says about Mr and Mrs P's tax position and in particular any use Mrs P was making of her annual capital gains tax allowance.

The fact find says Mr and Mrs P were retired. It said *"…clients are retired and are living on capital and dividends and savings".* It said Mrs P's income was £1000 from occasional work and Mr P's income was £10,000 from dividends. It recorded both as being "0%" taxpayers (the income being below the income tax personal allowance) and it recorded this wasn't expected to change.

It was recorded that their monthly net income was £900 and their expenditure was about £5000 and so exceeded their monthly income by around £4000. It later explained: *"[Mrs P and Mr P's] monthly outgoings are being met by their current incomes as noted as well as sums from their savings and shares to make up any shortfalls. Mrs P and Mr P have confirmed that they expect these sources of funding to last for 10yrs on this basis."* So it was clear to Scott that Mr and Mrs P were using proceeds from shares to fund their lifestyles.

The fact find recorded Mr P as having £500,000 in shares. This was value was handwritten, which may be explained by a note under *"Other Financial Assets"* which says: "*Mr P's share value will be confirmed in due course"*. There's no record of Mrs P owning these shares.

For Mr P the fact find referred to his *"Gross Annual Income"* as follows*: "Mr P dividends derive mainly from what was his parent company otherwise he lives on savings and occasional cashing in of his shares utilising his CGT allowance."* But for Mrs P this says only: "*Mrs P and Mr P are currently living on their savings primarily".* This suggests that the sale of these shares, and consequent use of the capital gains tax allowance, was understood by

Scott to affect Mr P only. There is no suggestion that Mrs P's capital gains tax allowance was being used through sales of these shares. So there was no suggestion here that shares were being transferred by Mr P to Mrs P to use her capital gains tax allowance.

I note the fact find did ask: *"Do you anticipate utilising your CGT allowance during the life of the investment?"* and this was answered *"Yes"* for both Mrs P and Mr P. This could mean they did tell Scott they were using Mrs P's capital gains tax allowance already, as they recall. But it could also just reflect that Mrs P's allowance was to be used by the proposed portfolio during the life of the portfolio. In light of what else was recorded, as discussed above, I think it is more likely the latter.

So, on balance, I'm satisfied that based on what Scott recorded – which I think is the best guide to what Scott was told by Mr and Mrs P – Scott wasn't aware that Mrs P was already making full use of her capital gains tax allowance each year.

As the portfolio investment was initially all in Mrs P's name, the 2017 advice letter was addressed to her. It said, of the portfolio and Mrs P's capital gains tax allowance:

"These investments have the potential to provide this potential [for active management] *whilst making use of your annual ISA allowances, as well as your personal income tax allowance where available and which is largely unused currently, your capital gains tax allowance, your tax-free interest allowance and your annual dividend allowance.*

You have the potential to split the investment over time by arranging to use [Mr P's] future ISA allowances in order to convert more of the non-ISA money to ISA's over a shorter period to create a larger tax-free pot, which we agreed would be a useful income source to utilise as part of your retirement income."

This statement was at the start in the advice letter's executive summary. In my view it did state that Mrs P's capital gains tax allowance would be used in connection with the portfolio Scott was recommending. The report also said, referring to Mrs P's tax position and to the potential of the portfolio:

"I am recommending that you surrender your investment bonds in order to firstly benefit from this investment potential also, as well as benefit from the use of your annual tax-free allowances. This is important as you are currently a non-taxpayer and are unable to reclaim any basic rate tax paid within the bonds for example."

This again suggested that Mrs P's annual tax allowances would be used by the portfolio. Indeed the potential to use them was being put forward as a tax advantage the portfolio could offer that her investment bonds hadn't offered. The advice letter explained that some funds would start outside the ISAs but then be moved into ISAs, in the following terms:

"Any remaining funds which are unable to go into ISA's at the outset will be invested in a taxable general investment account within the portfolio on the basis that your full ISA allowances will be utilised to gradually shelter the remaining funds over forth coming years.

In addition, you will be able to make use of any unused personal income tax allowances, your dividend allowance and your capital gains tax allowance in order to make your investment as tax efficient as possible.

It is important to note that we can arrange for an ISA to be set up for [Mr P] each year also. This would have the benefit of speeding up the rate at which the portfolio becomes fully tax free."

So this again referred to the portfolio making use of Mrs P's capital gains tax allowance.

Mr and Mrs P have highlighted the words *"…you will be able to make use* [their emphasis] *of any unused personal income tax, your dividend allowance and your capital gains tax allowance in order to make your investment as tax efficient as possible".* In my view where Scott refers to the use of capital gains tax allowances to make *"your investment"* tax efficient, it was referring to the investment Scott was recommending to Mrs P in the letter. So this was saying Mrs P could use her capital gains allowance to cover gains from the portfolio.

Also I note *"unused"* in the letter refers to *"unused personal income tax"*, meaning income of the portfolio would be taxable but use any unused income tax allowance available, so it was assumed there could be other income using up some part of that allowance – and Mrs P had been recorded as having income. But for capital gains tax the reference was to *"your capital gains tax allowance",* so referred to the whole of the capital gains tax allowance rather than just to any unused part of it.

Mr and Mrs P accept the letter was very clear in stating that the portfolio had *"the potential to"* use tax allowances where they were not fully used elsewhere. But they say expected the manager or Scott to check on their own use of them first – and they never agreed to the manager using allowances unilaterally and without consultation with them.

They say that the reference to their *"personal income tax allowance" being "largely unused currently"* demonstrates their use of annual personal tax allowances elsewhere was changeable and so, logically, the potential underutilisation or otherwise of any of their allowances would need to discussed first and not used without their express permission.

They say their consent should have been obtained explicitly and specifically for this – whereas Scott relied on an *"apparently implied agreement or understanding"*. They say they were asked to, and did, sign forms to allow the investment manager to use their respective annual ISA allowances to annually transfer non-ISA funds into the ISA. They say they surely should've been asked to sign and return a similar agreement to allow the manager to use Mrs P's annual capital gains tax allowance.

But I'm satisfied that the point that the portfolio would make use of Mrs P's capital gains tax allowance was made at a number of points in the advice letter. Mr and Mrs P signed the letter to agree to this plan. Also Mrs P signed to allow the investment manager to manage the portfolio and make the necessary sales as it saw fit. Also Mrs P's portfolio application was for continuous ISA use, so she agreed that the investment manager would fund her ISA more in future - which is why only Mr P had to sign something later to agree to fund his ISA.

Also I note that the portfolio proposal that had been given to Mr and Mrs P had said: *"One of the key benefits of our discretionary service, is that we will always look to structure your investments to maximise the use of your annual tax allowances, thereby delivering the most efficient returns for you as the investor…"*

It also said: *"Capital Gains Tax - The capital gains tax (CGT) allowance currently stands at £11,300, which allows you to realise gains up to this value, in any one year, without incurring tax. We would therefore look to exhaust the CGT allowance each year in order to generate tax free profits and retain the ability to be able to diversify the portfolio as much as possible. The proceeds from these sales can be used to potentially fund your ISA subscription."*

Mr and Mrs P say Scott ought to have clarified with them how much of their capital gains tax allowance they were using. They say the manager couldn't *"look to exhaust"* something without first knowing how much of it was left and what was being used elsewhere. But I think this statement refers to the manager's intention to realise gains and to use the capital gains

tax allowance each year (with proceeds then being available to fund ISAs) – so it indicated to Mr and Mrs P that this was what was likely to happen.

Mr and Mrs P say that as only Mrs P's annual allowance was used, Scott must have given instructions specifically to authorise the use of her allowance. They also say the fact Mr P's allowance wasn't used indicates that the subject of using such allowances was discussed at the meeting and that sometime afterwards Scott incorrectly advised the investment manager that it was authorised to use Mrs P's annual CGT allowance but not Mr P's.

But in my view the reason Mrs P's allowance was used is because she owned the portfolio holding the non-ISA assets. Mr P didn't hold non-ISA assets in the portfolio so there were no such assets in his name to sell to generate taxable gains. So it wasn't the case that Scott had to give the investment manager specific instructions about Mrs P's capital gains tax allowance being available and Mr P's not being available. Also, insofar as the sales were done to generate cash to invest into the ISAs, the sales were bound to be of non-ISA funds.

Mr and Mrs P point out the investment manager didn't use Mrs P's allowance in the first three years of the portfolio, apart from a small amount in one year, and used it partially in the tax year ending in 2021 before using the full amount in the following two tax years. They say that if they had agreed that Scott or the investment manager could use annual capital gains tax allowances, the manager would surely have used them fully from the start and not waited for three years.

I don't agree that this does follow, so this doesn't make me think that Scott didn't act fairly. I would observe that neither Scott nor the investment manager could guarantee there would be gains to be realised and fully use allowances each year – and presumably the amount of growth to be realised would vary from year to year and hopefully build up over time. In any case Mr and Mrs P's claim isn't for loss arising from allowances not being used – and the use or not of allowances once the portfolios started was down to the investment manager and not Scott. What is relevant for this complaint is that the manager's intention to realise gains and use the capital gains tax allowances was, in my view, outlined at the start in what Scott sent Mr and Mrs P, as discussed above.

Mr and Mrs P say a tax report was provided after each financial year end but they we paid no attention to it because the fund was an ISA and so no taxes were due. But it is plain that only a minority of the investment was within an ISA to start off with. They have also said:

"…the only opportunity that either of us would have had to realise that [the investment manager] *had been using* [Mrs P's] *CGT allowance was if we had scrutinised the CGT Disposals Report at the back of the annual Tax Report and, under oath, we would both testify that until the first, separate CGT Report was received in September 2023 we had never looked at this section of the annual Tax Report whether, in hindsight, we should have done so or not."*

Examination of the first tax report for 2017/2018 wouldn't have helped Mr and Mrs P, as it didn't contain anything about capital gains tax disposals – because there weren't any. The portfolio had started in December 2017 and the activity shown was buying investments only. There was about £50,000 left after accounting for all the investment purchases, which I presume was left to fund the next year's ISA allowances – so there was no need to sell anything at that stage for this and so no gains were realised by such activity that tax year.

So if Mr and Mrs P had assumed the format would be the same in later years, they wouldn't have expected to see any capital gains tax allowance calculation included. But in later years, where sales had occurred, these were detailed in the report. The disposals report shows the use of the exemption and shows the gains deducted from the allowance and what amount of

the allowance wasn't used. I think this is very clear. I tend to agree the quarterly reports were so detailed that it isn't surprising Mr and Mrs P just looked at the values and didn't review all the details. I'm not sure that doing more would've told them much more about the use of the capital gains tax allowance. But I can't agree that the same can be said of an annual report that is called a taxation report, with a section for capital gains disposals, that calculates how much of the annual capital gains tax allowance has been used by the portfolio and shows how much is left. In my view this information was clear and showed the use of the allowance.

In particular the tax report for the tax year ending 2019 set out the actual use of £220 of the capital gains tax allowance. This was some years before the larger use of the allowances that led to Mr and Mrs P's claim for £4000 to cover tax and penalties or interest. So even if I were to conclude that what Scott told Mr and Mrs P at the outset was deficient – which I'm not persuaded it was – it seems to me Mr and Mrs P had information alerting them to the fact the portfolio was using Mrs P's capital gains tax allowance some years before this led to the substantial loss they are now seeking to recover from Scott. Mr and Mrs P haven't claimed that this information wasn't there or wasn't clear – just that they didn't look at it or give it meaningful attention. Given that had they done so in 2019 they could've avoided the loss they are claiming for now, there is a question as to whether it would be fair to ask Scott to cover this loss now even if there were grounds to ask it to do so otherwise. But as I'm not persuaded that there are such grounds, I reach no concluded view on this question here.

Scott's advice letter had said: *"We will during our annual reviews consider how things progress and will review your risk profile in order to ensure that the portfolio is meeting your needs."* Mr and Mrs P say in the reviews it had with them, Scott never touched on the use of their capital gains tax allowances and they had no reason to look out for such usage because they hadn't authorised it. But I think the fact the capital gains allowance would be used was covered in what Scott told Mr and Mrs P, and the investment manager did have Mr and Mrs P's authority to make the sales it made and realise the gains that were realised.

That said, I note the reviews focussed on whether the risk levels of the portfolio were still suitable and whether to stay invested or not given investment performance. I accept what Mr and Mrs P say when they say that at no time during these, or in later correspondence, was the level of their annual use of their capital gains tax allowances raised or discussed.

For example the February 2019 review letter referred to the process of selling assets to fund the ISAs as follows: *"You have confirmed that you both wish to continue to make use of your annual ISA allowances, using [Mrs P's] non-ISA part of the portfolio to fund these, so that over the time the funds are shared between you under tax free ISA umbrellas".* There wasn't any statement specifically about Mrs P's capital gains tax allowances being used by this.

The 2020 review letter covered similar ground. The February 2023 letter said slightly more about tax in saying: *"You did during our meeting* [say] *that you may decide to begin the taking of regular withdrawals from your ISAs in the new tax year as a result of forthcoming capital gains tax changes which will cause you to re-evaluate your income sources and adapt accordingly. You have confirmed that you will keep me informed of your plans in this respect."* But there wasn't any statement about Mrs P's capital gains tax allowances being used by the portfolio – and it is plain that Scott didn't ask Mr and Mrs P about their own use of this allowance. I note that the reviews were not full reviews of all of Mr and Mrs P's circumstances, but Scott plainly could still have done more and asked about Mr and Mrs P's income sources and tax position. So I've considered carefully whether it was at fault for not doing so. Having done so I've concluded, on balance, that it was not.

I reach this view bearing in mind that Scott in my view had made clear at the outset the intention that Mrs P's capital gains tax allowance be used by the portfolio. That situation hadn't changed, so I don't fault Scott for not revisiting the point. Also Mr and Mrs P told Scott

that their circumstances hadn't changed – and they hadn't. So I don't fault Scott for not revising the question of their income and how they were funding their outgoings.

Also it seems to me the specific promise Scott made in its 2017 letter - to review Mrs P's risk profile to check the portfolio was still meeting her needs - was something it did carry out at the reviews – as risk questionnaires were completed for this and the matter was touched on in the letters sent afterwards.

Also I bear in mind that by the time of the reviews preceding significant use of Mrs P's capital gains tax allowance by the portfolio, Mr and Mrs P had been receiving reports for years that set out specifically how Mrs P's annual capital gains tax allowance was used each year by the portfolio. Scott was aware of this and aware that Mr and Mrs P had raised no concerns with Scott about this.

So, on balance, and with all I've said above in mind, I conclude Scott wasn't at fault for not going further at the reviews and revisiting this matter, whether by seeking information from Mr and Mrs P again about how they were covering their living costs or in some other way.

In reaching my conclusions here I don't overlook what Mr and Mrs P recall about telling Scott they would be selling investments themselves that used their capital gains tax allowances. But what I have from the time in my view doesn't tend to support these recollections. What I have rather tends to point to the conclusion that Scott and the investment manager expected that gains would be realised from the portfolio that would need to use the capital gains tax allowance, and what was said in the advice letter was designed to point this out. This in my view doesn't support the idea that Mr and Mrs P made Scott aware that Mrs P's capital gains tax allowance wouldn't be available for this purpose or might be used up by investment sales Mr and Mrs P might make themselves.

That said, I don't agree with Scott's suggestion that this is something Mr and Mrs P ought to have told the investment manager on the 'investment restrictions' section of the application form. The investment manager's proposal said of *"Investment Restrictions" – "We take account of any specific investment restrictions. Typically these would be to avoid investing in areas where clients have ethical concerns, the most common of which are alcohol, tobacco and armaments. However, such constraints are becoming ever wider and where direct equity investment is desired, our stock screening systems allow us to filter our investable universe to identify any such activities. We understand there are no restrictions at this point in time."* In my view this supports the point Mr and Mrs P have made about what this section of the form was for. But this doesn't affect my overall conclusion above.

Mr and Mrs P say it is wrong to say they had sufficient experience or knowledge to know the investment manager was likely to use Mrs P's capital gains tax allowances. They say there is no evidence to show their experience or knowledge would've led them to this view. I don't disagree with this – nor do I doubt what they have said about the nature of their professional experience and how this is distinct from expertise in personal taxation and investments. But my decision isn't reached on the grounds that Mr and Mrs P would've already known how the portfolios would work or how capital gains might be realised by the portfolios to use capital gains tax allowances. Rather my view is this was covered sufficiently by Scott in its advice letter, and in comments from the investment manager in its proposal before that, as discussed above. My view is Scott did explain this sufficiently to Mr and Mrs P.

So, in light of what I've said above, and for the reasons I've given, I've decided not to uphold this complaint.

I note that Mr and Mrs P's complaint did also raise questions about the investment manager's buying and selling decisions – on the basis that asset sales generated gains even

when the portfolio had decreased in value overall. But such matters are not matters for Scott but for the investment manager.

Mr and Mrs P have also raised a question about a change by the manager in its charging dates – and said Scott hadn't come back to them with an answer on whether they had been overcharged. I don't know whether it has since done so, but this wasn't a matter raised with us originally within this complaint - and so if this matter hasn't yet been resolved and is one Mr and Mrs P still wish to pursue, it is something that will need to be looked into separately.

In closing I acknowledge that my conclusions will disappoint Mr and Mrs P. I'm grateful to them for the prompt and courteous responses they have provided to us during the course of our consideration of this matter – and for the assistance they have given us throughout.

My final decision

In light of what I've said above, and for the reasons I've given, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P and Mrs P to accept or reject my decision before 30 December 2024.

Richard Sheridan
Ombudsman