DRN-4939372

The complaint

The executors of Mrs B's estate complain that St. James's Place Wealth Management Plc ("SJP") gave Mrs B unsuitable advice regarding her inheritance tax liability, which led her to invest in higher risk investments than she otherwise would have.

What happened

In 2019 Mrs B met with SJP and over the months that followed was advised on three areas – inheritance tax ("IHT"), an immediate needs annuity and her ISA investments. This complaint only concerns the advice given to mitigate her potential future IHT. At the meetings, Mrs B was accompanied by her son and her daughter in law, who I'll call Mr and Mrs B2, as they held power of attorney for Mrs B.

Following the advice, in July 2020 Mrs B invested £325,000 across five investment providers in portfolios of investments that would attract business relief. If those investments were held for at least two years at the time of Mrs B's death, they wouldn't be considered as part of her estate for IHT purposes. In recommending these investments, SJP advised Mrs B that she could use the unused residential nil rate band left by her late husband, Mr B, but didn't include any of his basic nil rate band in their calculations. SJP calculated that their recommendation would reduce the IHT bill from £154,952 to £14,952.

Mrs B sadly passed away in December 2020. Following this, Mr and Mrs B2 were appointed as her executors. After going through probate, they found that there was no liability to inheritance tax, as Mrs B had inherited Mr B's residual basic nil rate band as well as his residential nil rate band. They also found that some of Mrs B's expenditure, namely paying school fees for her grandchild, were not considered gifts, as they were normal expenditure. However, SJP had considered these as gifts that reduced Mrs B's nil rate band, when calculating the IHT liability. So, Mr and Mrs B2 raised a complaint about the advice that had been given, as they didn't think there would have been any need to invest in the business relief schemes, had the calculations been carried out properly.

SJP didn't uphold the complaint – they said that there was uncertainty around whether Mr B's basic nil rate band had been used following his death, due to a court case. SJP said that in 2020 everyone was aware of this uncertainty and that SJP had made Mrs B and Mr and Mrs B2 aware that they were taking a cautious approach to the amount of tax that would be payable. However, they offered Mr and Mrs B2 £750 for the delay in replying to the complaint and for having to bring the issue to their attention.

Mr and Mrs B2 disputed SJPs points, saying that they were relying on SJP to advise Mrs B on the amount of her estate that would be taxable, as SJP had retrieved Mr B's probate information from the probate registry. So, they relied on SJP's expertise to interpret the documents and do the calculations. In turn, SJP said they weren't tax advisers and that they had made this clear to Mrs B.

The complaint was brought to our service and an investigator considered it. She found that the advice wasn't unsuitable given the information SJP had and the uncertainty around the

available inherited nil rate band. She found that SJP had pointed out that they weren't tax advisers in the recommendation letter.

Mr and Mrs B2 disagreed, in summary saying that the adviser had checked probate and told them Mr B's basic nil rate band wasn't available. If SJP were not certain of their advice, or the calculations that supported it, they ought to have made that clear to Mrs B. In order to put forward their case, Mr and Mrs B2 had instructed solicitors to reply to the investigator and asked for the costs of doing so to be awarded by our service. Mr and Mrs B2 asked for the case to be reviewed by an ombudsman and so the case was passed to me for a decision.

I issued a provisional decision, upholding the complaint. Part of the provisional decision that set out my findings is at the end of this document, and forms part of my final decision.

Replies to my provisional decision

Mr and Mrs B2 replied and accepted the decision – but pointed out that SJP had received a commission for the advice, which they'd calculated as £16,323.74, roughly 5% of the amount invested. In their experience other financial products cost around 2% - so if Mrs B had invested elsewhere, the fee would likely have been less. They were unsure if this would make a difference to the compensation award and so wanted to point it out.

SJP didn't accept the decision – in summary they said:

- While they agree a more balanced view should have been set out by the adviser, they don't believe this would have resulted in a different outcome.
- The adviser had made it sufficiently clear that the IHT calculation was based on the information supplied by Mrs B and she could have verified it with a separate adviser. It was pointed out that SJP were not tax advisers. As IHT was so important to the family, they could have sought specialist tax advice.
- As Mrs B didn't inherit Mr B's estate, they don't think its unreasonable to assume Mr B's nil rate band wasn't inherited by Mrs B and this is only something that would be found out on death.
- There isn't sufficient evidence to show that the adviser had reassured Mrs B that he had checked Mr B's probate. Regardless, the probate document makes no mention of how Mr B's remaining nil rate band could be used.
- They said the errors in the suitability letter wouldn't have made a difference to the recommendation and questioned that if she had identified errors, why did Mrs B proceed with the investment?
- They agreed that the adviser didn't completely understand the ramifications of the court case – but that it was Mrs B's responsibility to provide him with information about this and they would have expected more information to have been supplied.
- Even if other calculations had been put forward, Mrs B wanted to ensure her estate was protected from paying IHT as much as possible – so would have gone with the most cautious calculation, which is the one put forward by the adviser.
- Though the initial suitability letter was issued before the adviser had sight of Mr B's probate document, they issued an addendum letter after receipt of those documents, so they were taken into account.
- The school fees were being paid from Mrs B's savings, not income, as she was exceeding her monthly income through her normal expenditure.

SJP went onto explain, that if the complaint continues to be upheld, then they had the following comments regarding the redress method:

- Even if they were to accept the school fees wouldn't be considered as gifts, using the calculation set out in the provisional decision of an IHT bill of £46,000 then this would have resulted in an investment of £115,000 in the business relief portfolios.
- The benchmark chosen assumes Mrs B would have invested all her funds into medium risk assets or higher – but Mrs B had an attitude to risk of low-medium.
- Given her age and health, they don't think it would have been suitable for Mrs B to invest £325,000 at a medium level of risk – she only invested in the high-risk investments for the IHT mitigation.
- The money would have been more likely to be held on deposit, so a benchmark consisting of the returns from fixed rate bonds would be more appropriate.

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 not been persuaded to depart from the findings I made in my provisional decision for the following reasons:

- I know the adviser wrote in the suitability letter that they had relied on the information provided by Mrs B in calculating the IHT due. However, I'm not persuaded that this is reflective of what they actually did. In his email of 7 February 2022 when passing the complaint to SJP, the adviser said "*I spoke to tax & tech about this at the time and they confirmed that there was no nil rate band to utilise for [Mr B] against [Mrs B's] estate. However, his RNRB could be used as it didn't exist at that time, so wouldn't have been used at that time either."* So, I'm satisfied that the adviser wasn't relying on information provided by Mrs B about this – but rather their own independent research into the situation. By the adviser's own recollections, the inability to use Mr B's nil rate band was a conclusion reached by himself with assistance from the tax team at SJP. On balance, I've not been convinced that Mrs B told the adviser she couldn't use that nil rate band.

- It's not unreasonable that in asking SJP for advice on how to mitigate IHT, that Mrs B trusted the information provided by the adviser. As I set out in my provisional decision, in deciding to carry out the calculation themselves, the adviser had a duty to act with due skill care and diligence. The fact that Mrs B could theoretically have gotten the calculation checked by another professional does not in any way mitigate SJP's duty. If the adviser did not want to take on the responsibility and consequences of carrying out the calculation, then they ought to have refused to do so. I do not accept that the single line of text that says SJP are not tax advisers in the suitability letter, mitigates that responsibility. As a result, I find SJP's suggestion that Mrs B ought to have checked the calculation elsewhere to be unreasonable.

- Regarding the ability to transfer an unused basic nil rate band, SJP has not explained why they thought that Mrs B wouldn't have been entitled to it – or even why there was a concern that she *might not* have been entitled to it. The guidance issued by HMRC is very clear that it can only be inherited by a spouse or civil partner – so it wouldn't have been transferable to anyone else. I can see that the details of the court case that the adviser was aware of, as set out in the suitability letter, was that Mr B's children were awarded his estate.

  HMRC's IHT manual has a section on transferable nil rate bands, and states at IHTM43002: *"While the benefit of the unused nil rate band passes to the estate of the surviving spouse or civil partner, assets do not have to have passed to the spouse or*

civil partner on the first death. The legislation refers to unused nil rate band rather than assets passing to the surviving spouse or civil partner." In carrying out the calculation that involves a transfer of a nil rate band, I consider that a reasonable step for the adviser to take would have been to familiarise themselves with the relevant guidance and rules – which included the HMRC manual. SJP hasn't put forward their reasons for believing Mrs B wasn't entitled to it – just that it was uncertain. Based on the section of HMRC's manual above, I'm not persuaded that it was reasonable for SJP to have concerns that Mrs B wouldn't have been able to utilise Mr B's nil rate band.

- I've considered SJP's comments that even if everything had been set out clearly, Mrs B wanted to ensure no IHT would be payable, so would have invested the same amount regardless. However, Mrs B didn't fully mitigate the tax position as set out by the adviser, despite having the resources to do so. So, on balance, I don't have enough to be persuaded to agree with SJP – though I accept that some likely would have still been invested in these schemes.

- I agree with SJP that it was reasonable for the adviser to not be certain about how the school fees would be considered by HMRC. As I said in my provisional decision, SJP ought to have presented it as an uncertain area and they didn't. I still consider it to be unreasonable that the adviser didn't clearly explain that they were unsure of the basis of their calculation, so that Mrs B could make an informed choice about the amount of caution she wished to take in her inheritance tax planning.

  As SJP has pointed out, Mrs B's normal attitude to risk was not high. She had agreed to take a very high level of risk in order to mitigate what was previously considered a large tax bill, which was much higher than her normal attitude to risk. It's possible that Mrs B would have still invested some of her money in the inheritance tax schemes – but SJP has not convinced me, on the balance of probabilities, how much she likely would have invested, given the potential options about the amount. As there's no evidence of conversations about any other potential IHT calculations, I can't be sure of Mrs B's intentions. I've not got enough evidence to reasonably conclude the amount she would have chosen to invest, and how fully she would have wanted to mitigate the tax, had Mrs B been given the opportunity to make an informed decision.

For these reasons I find the advice given to Mrs B was not suitable, and so SJP did not treat Mrs B fairly and reasonably. I've set out below how SJP should put things right, having considered SJP's comments on the redress method I proposed. Bearing in mind that we are an informal service, it is not always possible for us to be forensic in how a firm ought to calculate redress. Our use of benchmarks is reflective of that – we use them as a broad reflection of the types of returns an investor could have achieved when it's not possible to say precisely where an investor would have invested or how much.

I note SJP's comments that the benchmark chosen, the FTSE UK Private Investors Income Total Return Index, is reflective of a medium level of risk. In my provisional decision I didn't use the word medium – rather I said that its appropriate because Mrs B wanted to take "some investment risk". Currently, the benchmark includes around 45% equities and 40% fixed interest, with the remainder in cash and other investments. I understand SJP's comments that it wouldn't have been suitable for Mrs B to invest the whole £325,000 at this level of risk and that some would likely have been kept on deposit. However, I consider this benchmark reflects the fact that I believe some would have been invested in the high-risk portfolios, and some likely would have been invested at a lower level of risk. So, while I appreciate its not precise, I am satisfied it is a fair measure to use, given the circumstances.

Regarding Mr and Mrs B2's points about the fees paid. My understanding is that these were deducted from the amount invested – so in Mrs B's case the actual amount invested would have been £325,000 less the fee. In the calculation I've set out, no deduction is made for fees, so Mrs B's estate won't be disadvantaged.

Fair compensation

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

I take the view that Mrs B would have invested differently. It is not possible to say *precisely* what Mrs B would have done differently. But I am satisfied that what I have set out below is fair and reasonable given Mrs B's circumstances and objectives when she invested.

What must SJP do?

To compensate the estate of Mrs B fairly, SJP must:

- Compare the performance of Mrs B's investment with that of the benchmark shown below and pay the difference between the *fair value* and the *actual value* of the investments. If the *actual value* is greater than the *fair value*, no compensation is payable.

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

- Pay to the estate of Mrs B £750 for the distress and inconvenience caused in bringing the complaint and the delay in responding to the complaint.

Income tax may be payable on any interest awarded.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
£325,000 investment in Business Relief portfolios	No longer in force	FTSE UK Private Investors Income Total Return Index	Date of investment	Date ceased to be held	8% simple per year on any loss from the end date to the date of settlement

Actual value

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

Fair value

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

Why is this remedy suitable?

I have decided on this method of compensation because:

- Mrs B wanted capital growth and was willing to accept some investment risk.

- 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.

- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mrs B's circumstances and risk attitude.

My final decision

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

St. James's Place Wealth Management Plc should provide details of its calculation to the estate of Mrs B in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I am required to ask the executors on behalf of the estate of Mrs B either to accept or reject my decision before 13 September 2024.

My provisional findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I need to consider whether SJP acted fairly and reasonably in the advice they gave to Mrs B to invest £325,000. In giving advice over 2019 and 2020, SJP had certain obligations towards Mrs B, including making a suitable recommendation, based on Mrs B's circumstances, objectives, investment experience and attitude to risk. The information supplied by SJP about their recommendation needed to be clear fair and not misleading, in order for Mrs B to make an informed decision about whether to accept the recommendation. The heart of this case is the calculation of Mrs B's potential IHT liability, and whether or not Mrs B was able to use any of Mr B's residual basic nil rate band. So, the focus of my decision is on this element of the advice.

Based on the suitability letter issued on 18 May 2020, I'm satisfied that SJP had carried out a calculation and provided this figure to Mrs B – as opposed to the other way round. The fact find document supports this, in that its clear the adviser asked a number of questions about the gifts Mrs B had made in the last few years, in order to calculate how much of her nil rate band had already been used. The adviser also took steps to find out about Mr B's unused nil rate band – he asked Mr and Mrs B2 to provide Mr B's details so he could look up probate, and he received a grant of probate issued in 2001 from the registry.

Given those details, I'm persuaded that the adviser had made it clear that he was giving advice on both the amount of Mrs B's potential IHT liability, as well as how to mitigate it. Where SJP are holding themselves out as carrying out this calculation, they ought to act with due skill, care and diligence and explain things in a clear fair and not misleading way.

I can see that SJP included the following in the suitability letter: "Please note we are not tax advisers and the figures I have provided are only indicative. You should refer to an accountant or tax specialist for specific tax advice." However, I don't consider this to be enough to absolve them of their responsibilities. If they didn't want to be held responsible for the tax calculation, then they shouldn't have carried it out – they could have explained to Mrs B that she needed to come to them with a figure calculated herself, or by another professional. As it was, SJP carried it out themselves and as the professional in the situation, Mrs B would have naturally trusted the advice and information given by SJP.

When the complaint was made, the adviser gave their recollections of the conversations that took place and said that everyone involved in 2019 and 2020 understood the complexities, and that due to those complexities, they understood he was taking a cautious approach. This is denied by Mr and Mrs B2, who said they were reliant on the adviser to provide them with the calculation, and to tell them how much of Mr B's nil rate band was available, as they didn't know. They say the adviser gave the advice with certainty - there was nothing from the adviser to show that they weren't sure of nil rate band.

As the recollections of events differ, I've considered the paperwork from the sale to see if this indicates either way. I can't see that the adviser set out in writing that he was taking a cautious approach to the estate and assuming Mrs B would have as little as possible of the nil rate band to use. So, I'm not persuaded that Mrs B was aware that a cautious approach was being taken to the calculation. I'm also conscious of the fact that the adviser had gone as far as speaking to the SJP tax specialists and had promised to look into probate – though I note they didn't actually do the latter until after issuing the suitability letter.

The adviser's notes show that they spoke to the tax specialists in 2019 – they got the documents from the probate registry in June 2020. In holding themselves out as giving advice on the IHT bill, I'd have expected them to have gathered all the relevant information in order to fully advise on it. From the emails Mr and Mrs B2 have provided I'm satisfied that there was a conversation about this in 2019 – they sent the adviser Mr B's information on 18 November 2019, so they could search the probate registry. However, the adviser didn't carry out that step until after setting out their recommendations, and importantly, once they got the information, they didn't revise their advice to take what was shown on Mr B's grant of probate into account.

I appreciate that in the suitability letter, the adviser wrote that Mrs B had told them that Mr B's estate had been awarded by the court to his children after they took her to court, so she was not entitled to use the residual basic nil rate band. It also said Mr B died in 1976. Mr and Mrs B2 say they disputed this paragraph and verbally told the adviser it was incorrect.

On balance, I think its likely that they did correct the adviser, as it would have been important to the situation. Mr B passed away in 1975 – which I note they had already told the adviser by email in November – it's natural that Mrs B would want to ensure the adviser had paid attention to that detail, as 1976 was written in the letter. The information about the court case was wrong also – it was Mrs B who had applied to court rather than the other way round – and she had done so several years after his death. I'm not persuaded that they would have simply let this incorrect information remain without comment. Mr and Mrs B2 remember the adviser saying not to worry, as he had checked probate and it was correct that they couldn't use Mr B's basic nil rate band.

I'm not convinced that SJP were told by Mrs B that the court case meant she couldn't use Mr B's basic nil rate band. I'm persuaded that this is a conclusion that the SJP adviser came to by themselves, after speaking to the tax experts at SJP. This is because of the notes the adviser made about it and the fact he did so prior to looking at the probate document. That document clearly shows the amount of Mr B's estate was £5,000. Even if that were entirely

awarded to his children in the court case, I don't see how that would impact the way his nil rate band operated.

I understand this is a less that straightforward situation, given the time since Mr B had died in 1975, and because the adviser didn't completely understand the ramifications of the court case. I'm not surprised to see that the adviser spoke to SJP's specialist tax department over this, which led to including Mr B's residential nil rate band in the allowance for Mrs B. It would have been fine if the adviser didn't know enough about HMRC's probate process to draw proper conclusions and advise on the amount of Mr B's available basic nil rate band. Inheritance tax itself can be a complex area, and it can be hard to know with certainty what HMRC would want included in the taxable estate, in advance. But if that was the case, they ought to have made that clear and I'm not persuaded they did.

The fact find shows the adviser considered the payments Mrs B was making to pay school fees for her grandchild wouldn't be considered gifts (other than how they utilised her annual gift allowance of £3,000). However, there was no documented discussion at the sale of whether the school fees would be considered gifts or simply normal expenditure, that shows the adviser was led by Mrs B on this. The adviser simply recorded them as gifts, and it wasn't until Mrs B passed away that Mr and Mrs B2 found they did not count as gifts.

As the adviser was holding themselves out as giving advice on the amount of IHT that would be payable, I consider that this ought to have been an area of further documented discussion. Regular payments like this are a complex area and it can be difficult to know if HMRC will consider them as gifts. I note the current guidance on the HMRC website is relatively clear that these would not be considered gifts – but it wasn't as clear in 2020 (based on the information available on the website https://wayback-api.archive.org/).

Though it wasn't as clear in 2020, I'm satisfied there was enough information on the HMRC website to allow SJP to reasonably understand this was an uncertain area, and ought to have presented it as such. But they didn't - they presented it as a certainty that the school fees would be considered gifts and I find that to be an unfair representation of the situation.

So overall, I'm convinced the adviser didn't properly consider the amount of nil rate band that Mrs B had available. This wouldn't have been a problem if the adviser had fully documented the reasons for the conclusion and set out the areas they were sure of and those they weren't – but they didn't do that. I consider it to be unreasonable that the adviser didn't clearly explain that they were unsure of the basis of their calculation, so that Mrs B could make an informed choice about the amount of caution she wished to take in her inheritance tax planning.

The calculation the adviser carried out concluded that the IHT liability was £154,952, and their recommendations could reduce the bill to £14,952. This assumed that all the school fees paid since 2015 would be considered gifts, and so would use up part of Mrs B's basic nil rate band (above her £3,000 per year gift allowance). It also assumed none of Mr B's basic nil rate band would be available. So effectively, £154,952 was the highest amount of tax Mrs B's executors could possibly need to pay to HMRC.

I consider that the adviser ought to have explained this was the cautious approach in writing, and to give a balanced view, they ought to have set out that there were other ways of considering the amount of potential tax due. For instance, the opposite approach would have included the school fees as normal expenditure, so the gift allowance could be used elsewhere, and would have assumed two thirds of Mr B's basic nil rate band was available. By my calculation, this would have still meant IHT would be payable, of around £46,000.

There is a significant difference between the two calculations and it's even possible that they would have reached a middle ground of a likely amount of IHT, had the adviser fully set out all the different ways HMRC might consider the situation. Had this been set out Mrs B would have had a clear picture to choose what she would have considered the best option, bearing in mind how much risk she wanted to take with her IHT bill. It's clear she wasn't taking a completely cautious approach to this, as she didn't fully mitigate the amount of IHT that would be due.

Mrs B had agreed to take a very high level of risk in order to mitigate what was previously considered a large tax bill, which was much higher than her normal attitude to risk. I'm not convinced she'd have taken the same step, had she been aware that the bill could potentially be much less than the £154,952 quoted by the adviser.

It's possible that Mrs B would have still invested some of her money in the inheritance tax schemes – but I think its likely that it would have been much less than she actually did. I'm also satisfied it's not possible to know, on the balance of probabilities how much she likely would have invested, given the potential options about the amount, as set out above. What I am satisfied of however, is that the advice was not presented in a fair and reasonable way, as it wasn't fully explained, so it follows that I find that it wasn't suitable advice.

I've set out below how SJP should put things right. Mr and Mrs B2 will note that this does not include an award for any fees they've incurred in taking professional advice regarding the outcome of this complaint. This is because we are an informal service – legal advice is not necessary when bringing a complaint to us. My understanding is that they didn't incur any additional fees in administering the estate as a result of the advice SJP gave, as they'd employed professional services for the administration, regardless of this issue.

I can see that SJP offered £750 for any distress and inconvenience caused to Mr and Mrs B2 in bringing the complaint and a delay of a few months in responding to the complaint. I'm satisfied that this is more than sufficient for the inconvenience it has been offered for, and so I couldn't say it's an unfair amount.

Katie Haywood
Ombudsman