DRN-4954709

The complaint

Mrs B and Mr B ('the complainants') say David Jameson Limited ('DJL') unsuitably arranged and advised the surrender of their three Investment Bonds ('IBs') with Aviva, Friends Life ('FL') and Scottish Widows ('SW') in April 2014; and the reinvestment of some of the proceeds (totalling £50,000) in two unsuitable and high-risk Octopus Enterprise Investment Scheme ('EIS') funds in March 2015. [The '*IBs-to-EIS*' complaint]

They have a wider complaint, that includes an allegation about DJL effecting a Discounted Gift Trust ('DGT') investment for them without their consent.

This decision is only about the IBs-to-EIS complaint. Our jurisdiction to address it has been determined over the course of two Ombudsman Jurisdiction Decisions. We considered whether (or not), based on the timing of the complaint, we could deal with all the surrendered IBs. We found that we have jurisdiction to address the complaint in relation to all the surrendered IBs and the EIS reinvestments.

What happened

One of our investigators looked into the complaint. He concluded that it should be upheld. He mainly found as follows –

- Notably, there is no available documentation of the advice (including the fact-finding and suitability assessment leading to advice) given to the complainants to surrender the three IBs and the advice given to them to make the EIS investments. Therefore, DJL failed in its regulatory obligation to provide the complainants with relevant and required suitability reports. The 2013 client agreement it had with them also required its confirmation of reasons for recommendations made to them and of the associated costs. There is no evidence of details in which it did either with regards to the EIS investments.

- They were interested in Inheritance Tax ('IHT') mitigation, and it is true that EIS investments can be used for that purpose, but the circumstances of their case show that their EIS investments were unsuitable.

- EIS funds are inherently complex and high-risk. Correspondence between the parties shows that the complainants' previous investment experience was limited to bonds and Individual Savings Accounts ('ISAs'), so they had no previous experience comparable to the complex and high-risk nature of EIS funds.

- The same correspondence shows the adviser referring to and recommending the plan to make the EIS funds (to mitigate any tax implications from the IBs surrenders). However, DJL provided no background, reasoning and substance for the recommendation, it did not advise on the associated risks (other than referring to the list of risks in the EIS' information document), it did not establish the complainants' attitude towards risks for the specific proposition and it did not explore any alternative IHT mitigation solutions. In other words, no suitability assessment appears to have been conducted. Based on an assessment of their risk profile in 2013, the complainants had a balanced profile. There is no evidence that their profile changed after that, so the high risks in the EIS funds significantly mismatched their risk profile.

- There is also no evidence on the details of how the EIS funds were to be used to mitigate the complainants' IHT liabilities; and the workings of the funds do not appear to have been adequately explained to them.

- Overall, and for these reasons, the advice to invest in the EIS funds was unsuitable for the complainants.

- With regards to the surrendering of the IBs, the Aviva IB was already outside the complainants' estate, and there is a similar lack of evidence of a suitability assessment for this recommendation.

- DJL says it recommended this in 2013. However, a financial report of 20 May 2013 provides nothing that amounts to such a recommendation – it includes generic information about IHT mitigation, products that could potentially achieve that and how certain investments are taxed, but there is nothing in it that provides a suitability assessment leading to a reasoned recommendation. DJL's letter to the complainants of 18 September 2013 refers to the surrenders potentially resulting in a tax liability, but nothing in it refers to the suitability of or reasons for the surrenders. The IBs are also mentioned in its email of 4 October 2013, but, again, there is no indication of what its advice was.

- Overall, and for reasons similar to those related to the EIS investment recommendation, the advice to surrender the IBs was unsuitable for the complainants.

- In the course of responding to the complaint, DJL has set out reasons why both recommendations were suitable for the complainants. However, its submissions have not been persuasive, instead they appear to be an attempt to reconfirm its belief that the recommendations were suitable.

- The complainants should be compensated in a way that aims to put them back in the position they would have been in if neither recommendation had been made/executed.

- Redress should include compensation for financial loss arising from any lost performance the IBs would have achieved, but for the IBs-to-EIS advice; compensation for any exit penalties, withdrawal fees or tax arising from the surrenders of the IBs; compensation for any additional tax on gains arising after surrender of the IBs and personally paid by the complainants (given that the £50,000 proceeds were all used for the EIS investments); compensation (through an Inter Vivos Policy, with DJL covering associated costs) for the likelihood that, but for the unsuitable advice, the complainants would have put in place a suitable IHT mitigation solution akin to their placement of the Aviva IB in trust; and compensation for the advice fees paid by the complainants.

DJL disputes this outcome. It maintains that the EIS investments were suitable for the complainants at the time of advice. It has highlighted the following –

- The complainants had a good working relationship with their adviser between 2013 and 2018, there is evidence of the gratitude they expressed for his service and at no time during this period did they raise any concerns about that service.

- It is wrong to say they were unaware of, or did not consent to, the surrendering of the IBs. They were aware of, and consented to, the surrenders, and available correspondence confirms this. The adviser's email to them of 13 February 2015 shows that one of the reasons the EIS investments were recommended was to shelter them from the anticipated tax liability arising from the surrenders. This also shows why the recommendation was suitable.

DJL also said –

"*In terms of the EIS, the Adviser also sent details regarding Octopus EISl including Reasons Why, details of the underlying scheme, T & C's and brochure with copies of application forms and of course the cooling off notices confirming our fees and confirming they had the right to change their minds. These documents clearly outlined the pros and cons of taking out such an investment and so we feel this, along with the other evidence on file (such as the email correspondence between the parties) shows that the claimants were clearly aware of the risk level of the EIS product and chose to proceed in full knowledge of this*."

"*As a result of taking out the EIS investments, they received the tax relief and the EIS's also had the benefit of taking the funds out of their estate for IHT …*"

"*An email dated the 25th November 2013 is attached, start of communication between the Adviser and claimants, where you can see they are talking about potential equity release (which they did through another source) and a change in rules and out updated version of IHT planning using PPR Equity Release and BPR spreadsheet. We therefore dispute that alternatives to the EIS were not considered; the evidence shows other options were explored. This correspondence also shows that the claimants had a good understanding of other investment and financial products and so this is also part of why the EIS was considered suitable for them. They were not vulnerable clients and clearly understood the investments*."

"*Another benefit was that any Capital Gains could be rolled into the EIS. So, overall, the EIS was deemed a singular way of resolving lots of potential issues for the claimants, including issues with which they were hugely concerned such as the potential IHT liability*."

"*The claimants only invested £50,000 into the EIS and the remainder of the surrendered funds they retained. Considering the overall value of the surrendered funds from the investment bonds, £50,000 represents only a small proportion of their overall investments*."

The complainants welcomed the investigation outcome. They noted that obtaining an Inter Vivos policy at their ages could be a problem, but said they would look into it, and they requested provisions from our service setting a deadline for the calculation of compensation and requiring an independent verification of the calculations (at DJL's expense) to ensure they are reliable. The complainants also asked for a timely conclusion of their case.

The matter was referred to an 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.

The regulator's *Handbook* includes The Principles for Businesses, which DJL will be familiar with. It also would and should have been familiar with *The Principles* during its advice to the complainants between 2013 and 2015.

Principles 2, 3 and 6 require firms to, respectively and in broad terms, conduct their services with due skill, care and diligence; to make reasonable efforts to manage and control their affairs responsibly and effectively; and to uphold their customers' interests and treat them fairly. Case law – Ouseley J, in R (British Bankers Association) v Financial Services Authority [2011] EWHC 999 (Admin) – confirms that The Principles are ever present requirements that firms must comply with.

Furthermore, the Conduct of Business Sourcebook ('COBS') section of the Handbook contains, at COBS 2.1.1R, the *client's best interests rule* which, as the title suggests, requires firms to uphold their clients' best interests. This essentially and broadly reinforces the requirement in Principle 6 (as summarised above).

There are also rules in COBS about suitability of advice and the provision of suitable advice, which firms must follow in giving regulated investment advice. The rules, as they were between 2013 and 2015, included the following –

"***COBS 9.2.1 R 01/11/2007***
(1) A firm must take reasonable steps to ensure that a personal recommendation, or a decision to trade, is suitable for its client.
2) When making the personal recommendation or managing his 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 him."

"***COBS 9.2.2 R 01/11/2007***
(1) A firm must obtain from the client such information as is necessary for the firm to understand the essential facts about him and have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of managing:
(a) meets his investment objectives;
(b) is such that he is able financially to bear any related investment risks consistent with his investment objectives; and
(c) is such that he has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio."

"***COBS 9.4.1 R 06/11/2008***
A firm must provide a suitability report to a retail client if the firm makes a personal recommendation to the client and the client:
(1) acquires a holding in, or sells all or part of a holding in:

(a) a regulated collective investment scheme;

(b) an investment trust where the relevant shares have been or are to be acquired through an investment trust savings scheme;

(c) an investment trust where the relevant shares are to be held within an ISA which has been promoted as the means for investing in one or more specific investment trusts …"

"***COBS 9.4.7 R 01/11/2007***
The suitability report must, at least:

(1) specify the client's demands and needs;

(2) explain why the firm has concluded that the recommended transaction is suitable for the client having regard to the information provided by the client; and

(3) explain any possible disadvantages of the transaction for the client."

With regards to COBS 9.4.7R there is also the following guidance –

"***COBS 9.4.8 G 01/11/2007***
A firm should give the client such details as are appropriate according to the complexity of the transaction."

Key elements, related to the suitability (or otherwise) of an investment, are – an investor's objective(s), risk profile and investment experience; affordability, including capacity for loss; evidence on whether (or not) the investor's objective(s), risk profile, experience and capacity for loss were properly determined between the investor and the adviser at the time of advice; evidence on whether (or not) the adviser's recommendation was suitable for the investor's overall profile; and evidence that the advice properly informed the investor about the investment and the effects of its associated risks.

As quoted above, the rules (and guidance) extend to the issuing of suitability reports and the contents of those reports. The investigator found, with reasons, that DJL breached these requirements. I have noted DJL's response to this finding. It essentially argues that, in broad terms, the sum of the contents of different communications between its adviser and the complainants around the times of advice amount to documentation of the basis for its recommendations and documentation of the reasons why the recommendations were suitable.

The investigator's finding addressed the regulatory requirements for a suitability report, but it also addressed the matter of evidence to which DJL is limited, in terms of defending the complaint. In other words, whether (or not) the correspondence at the times of advice amount to the requisite suitability report(s) (and whether (or not) their contents meet the minimum requirements of a suitability report), an important point to note is that the correspondence appears, in the main or in total, to be what DJL has to rely upon as evidence of its advice.

It is undisputed that DJL advised the surrendering of the IBs and the EIS investments. Its present submissions about suitability are no more than that – *present submissions* – so they do not count as evidence of the suitability assessments conducted at the time of advice. If, based on the correspondence that has been disclosed, and if, as the investigator identified, there is a lack of evidence to show any meaningful suitability assessment at the time of advice, it is arguably safe to conclude that no such assessment was conducted – or, at least, no such assessment can be evidenced. This, in turn, supports consideration that the recommendations were not determined, at the time, to be suitable and that they were potentially unsuitable.

I acknowledge that DJL's present submissions can still be considered in deciding whether (or not) the recommendations were suitable, but for the reasons I go into below, despite its submissions, I have not found that they were suitable. I also acknowledge that a finding of *potential* unsuitability – for the reasons given in the above paragraph – is not enough to uphold the complaint, but it can be a reasonable starting consideration. For the reasons I address next, it is my reasonable starting consideration.

I do not deal, any further, with the matter of whether (or not) DJL issued suitability reports in the correct form and with the correct type of contents. The key issue is suitability, so I will focus on this. On balance, and based on available evidence, I am not persuaded that its adviser conducted any meaningful suitability assessments for the IBs surrendered in 2014 and for the EIS investments in 2015. Therefore, they were not properly determined to be suitable at the time and were potentially unsuitable for this reason.

An early observation is the fact that almost a year passed in between the surrendering of the IBs and the recommendation to reinvest in the EIS. The former happened around April 2014 – there is evidence of correspondence about this at the time and of correspondence about the issues in the Aviva IB being surrendered at the time – and the latter happened 10 months later around February 2015.

This begs the question – why were the IBs surrendered at the time that they were surrendered, under the notion of IHT mitigation, only for their proceeds (as far those proceeds relate to the EIS investment) to remain unused and within the complainants' estate for close to a year before the EIS recommendation is made?

Another question, related to the surrendered IBs, is why the Aviva IB was surrendered given that it was already in trust and already outside the estate. I acknowledge that the parties have addressed this and DJL's position appears to be that this was an oversight. However, such an oversight would be highly unlikely if there was a proper and meaningful suitability assessment for the recommended surrenders. That assessment would have quickly and surely filtered out the Aviva IB because the IHT mitigation consideration did not apply to it.

On balance, I am persuaded that the reason why the surrenders happened so far away from the EIS recommendation, and the reason why the recommendation to surrender the IBs (and the surrenders themselves) did not exclude the Aviva IB, is the same – no meaningful attention was given to assessing suitability of the actions being taken at the time. The complainants have referred to their adviser having the habit of taking steps at his discretion and/or with little or no explanation. It seems such conduct existed in these respects.

The complainants engaged with DJL in early 2013. They confirm that their objective was to explore options for IHT mitigation.

The adviser produced a Financial Services Report ('FSR') for them in May 2013, which addressed a range of subjects. It had a 'Taxation' section and, within it, an IHT sub-section. This sub-section contained generic information about IHT (its core features and rules, gifting, avoidance and some measures that can aid avoidance), but nothing in the form of an assessment of suitability and/or recommendation.

There is evidence of the information disclosed to the adviser by the complainants about their financial assets prior to this FSR, and it confirms the three IBs, cash savings, Stocks & Shares ISAs (mainly in equity funds), Cash ISAs and the equity in their home. A Risk Agreement, signed by the complainants on 25 August 2013, and an attached risk profile document (also signed by the complainants) confirms that they had a 'Balanced' risk profile. As the investigator said, there is no available evidence of this profile being subsequently revised.

Equity release (from the complainants' home) and Business Property Relief ('BPR') appear to have been the initial IHT mitigation considerations by the adviser, followed by the DGT consideration.

The adviser's 18 September 2013 letter confirms the plan to cash in the IBs, but his 4 October 2013 email confirms that the plan was still under consideration at this time. Neither is clear on the specific purpose of surrendering the IBs. The same lack of purpose is illustrated in his letter to the complainants of 29 November 2013, where he says, under the 'Next Meeting' section of the letter, "*We should look at the Bonds, and what we do with those*".

A purpose is mentioned in his 7 February 2014 letter, where he refers to a plan to surrender the IBs and reinvest their proceeds in an EIS in order to "… *shelter any tax liability that might derive from the surrender* …" and, he said, "… *in addition, after two years of ownership, this attracts Business Property Relief (BPR) which provides a 100% exemption from Inheritance Tax under current legislation*". In his email to Mrs B of 28 March 2014 he confirms that the IBs "*are being surrendered*", that the surrenders will "*create a chargeable event that we will shelter by means of EIS*", that the previously stated purpose remained, and that he had "… *delayed the surrender until after the 5th April so that we keep everything inside the same tax year making it more convenient for tax planning and deferring the chargeable event dates*".

There appears to be no evidence of a suitability assessment – as defined in the regulatory requirements quoted above – between the points at which the plan to surrender the IBs (without a declared purpose) was being mooted, the point the plan was given a purpose, and the point the plan was being executed. Available evidence also suggests that the plan was somewhat of a secondary afterthought at the time, ceding ground to the equity release and DGT considerations. The idea of surrendering the IBs was led by the adviser, but for around five months there appears to have been no declared and reasoned purpose behind it. By the time it was executed, whilst there was a declared purpose, there is no evidence that the idea was subjected to a suitability assessment.

There is an overall sense that the idea was raised by the adviser, then neglected by him thereafter and up to the point it was executed. So much so that, in addition to the points above, he also failed to notice that the Aviva IB did not need to be part of the plan – because it was already outside the estate (so it did not need IHT mitigation). Instead, he surrendered the Aviva IB too.

This is then compounded by the fact that despite confirmation in early 2014 that the purpose of the surrenders was to reinvest the proceeds in an EIS (to shield gains from the surrenders against tax and then to serve the IHT mitigation objective) and despite the stated plan to do this shortly after 5 April that year (and in light of evidence that the IBs were surrendered around April 2013), no such reinvestment happened for almost another year. Therefore, whereas the stated objective was to surrender the IBs directly in order to apply an IHT mitigation solution to the proceeds, no such solution was applied for almost a year.

This adds to the question as to why the IBs were surrendered when then were. I find that, overall, there appears to have been no reasonable rationale for surrendering the IBs when they were surrendered or, given the inaction that followed, at all.

On balance and for the above reasons, I consider that the adviser's recommendation to surrender the IBs was unsuitable. I have not seen evidence to persuade me that it was done in the complainants' best interests.

The next consideration is the investment in the EIS funds that eventually happened. A preliminary finding is that this too was more likely (than not) inherently unsuitable, because even though it happened in 2015 the basis for it existed in early 2014 and, as I said above, that basis lacked a reasonable rationale and existed without a suitability assessment. I have considered whether (or not) this materially changed during the relevant events between 2014 and 2015, and I have not found that it did.

In his email to Mrs B on 30 September 2014, the adviser referred to the surrendered IBs. He acknowledged and accepted DJL's responsibility for the Aviva IB being wrongly surrendered, and undertook that DJL would ultimately cover any tax liability arising from it. He also said the following about the surrendered IBs – "*They are onshore bonds so they carry a basic rate tax credit … Both of you border on higher tax rate so, as we had always envisaged these monies finding their way into EIS (that gives you tax relief and creates more headroom), if we cannot unwind the Aviva deal, then that seems the solution*" [my emphasis].

Around five months after the IBs had been surrendered, the plan for them still appears to have been loose and the same applies to the supposed EIS solution. At the time of the email this only *seemed* to be the solution, as far as the adviser was concerned, and nothing definitive was provided in terms of suitability and/or implementation (if suitable). Furthermore, as the email acknowledged, the surrender proceeds also appear to have been left exposed to taxation whilst the uncertainty and lack of clarity over a suitable plan continued.

In the adviser's letter to the complainants of 13 January 2015 he refers to a plan to reinvest the surrender proceeds in two EIS funds, but notes that the specific intended funds had closed just as he attempted to do so. As such, he suggested there would be alternatives to pursue within the existing tax year. Then on 13 February 2015 he emailed Mrs B with his recommendation of two available EIS funds in which the reinvestments could happen.

The extent of the recommendation within the email can be summarised as follows – he referred to a minimum investment requirement of £25,000 each (meaning £50,000 in total for the complainants); he *refreshed their memories* on the tax breaks available in the EIS; he suggested the investments should be made without undue delay; and his conclusion included confirmation that, so long as the complainants were "*happy to deal with additional marginal expense*" investing in the two EIS funds *seemed* to him to be the ideal solution and was his recommendation. No suitability assessment – meeting the regulatory requirements as set out above – was presented, and yet again, despite being at the point of recommendation (with the complainants being urged to avoid unduly delaying implementation), the plan only *seemed* to be the solution as far as the adviser was concerned.

He followed up with correspondence to the complainants enclosing information about the Octopus EIS (including its potential tax benefits and its risks), but without an assessment on why it was suitable for them. The information included confirmation that the EIS was high risk (including investment and liquidity risks) – which is unsurprising given that EIS funds tend to be high-risk investments in these respects – that there was a need to hold the funds for at least two years and up to the time of death in order for the qualifying part of the investment to be "*… passed to beneficiaries free of inheritance tax*", that the risks extended to the tax benefits too because it was not possible to get advance assurance from HMRC that an underlying company within the EIS will qualify for BPR, and notice that "*The two-year time frame commences when HMRC deems the investment has become BPR qualifying which may be later than the investment date*".

The complainants were also given information about the EIS' underlying investments. Again, no suitability assessment appears to have accompanied this.

In other words, the EIS investment was a high-risk venture for the complainants, with the risks extending, at least in principle, to the IHT relief that the solution was supposed to offer, and the high risks conflicted with their balanced risk profile. Yet the recommendation was made to them without a meaningful suitability assessment, without advice on why it was deemed suitable for them and with, it seems, no more than provision of information about the EIS. Making them aware of such information (including the risks) was not enough. DJL's obligation was to assess suitability of the proposition and recommend it only if it was suitable for the complainants, in their circumstances, and in their best interests. The idea of only providing information to them does not meet this requirement.

There is evidence that the EIS investments were then made around March 2015.

The EIS investments were complex. As the investigator noted, there is no evidence that the complainants had previous investment experience comparable to such investments or experience that made them capable of understanding such investments. The investments were notably beyond their knowledge and experience. They were in an unfamiliar complicated territory – involving, amongst other things, pooled investments in a somewhat niche sector, underlying investments with complex revenue streams that were not only dependent on their relevant market(s) but also potentially dependent on legislation, and a layered structure for fees/charges – and, in order to benefit from potential IHT relief, they were committed up to the time of death. In addition, and importantly, the investment was outside their balanced/medium risk profile, and it had not been subjected to a meaningful suitability assessment despite the adviser having many opportunities over a year (or more) to do that.

Overall, on balance and for all the above reasons, I consider that the recommendation of the EIS investments was unsuitable, and was not in the complainants' best interests.

DJL's reference to the complainants having good relations with the adviser does not make a difference to the conclusions above. Any such good relations do not dilute or defeat the findings above about its responsibilities in relation to giving the complainants suitable advice and about evidence showing, on balance, that it failed to do so. The same applies to its assertion that no complaint was made up to 2018. Furthermore, our jurisdiction, in terms of the timing of the complaint, has already been determined, as I summarised at the outset of this decision. A complaint has been made by the complainants and, for the reasons given above, I uphold it. The proportion of their estate occupied by the EIS investment is irrelevant, the point is the investment was unsuitable.

Putting things right

Fair Compensation

My aim is to put the complainants, as close as possible, into the position they would probably be in if they had not been unsuitably advised by DJL.

They held an IHT mitigation objective at the times of advice, and the Aviva bond had already been placed in a Trust (outside their estate). I have not seen evidence to say the same or similar would not have been a solution applicable to the other two IBs, so I consider that, with suitable advice, they too could have been placed in a Trust arrangement for the same purpose.

I find that, with suitable advice leading up to April 2014 (when DJL's unsuitable advice to surrender the IBs was implemented), the complainants would probably have retained the three IBs (so they would not have been surrendered), the FL and SW IBs would probably have received the same Trust based IHT mitigation treatment that the Aviva IB already had, all three IBs would probably have had the benefit of such treatment from April 2014 onwards and would now (after seven years from 2014) be protected from IHT, and the EIS investments would never have happened.

On the above basis, the complainants must be compensated, by DJL, for any financial loss (including any withdrawal fees and/or penalties) arising from the unsuitably surrendered IBs, any tax liabilities arising from the unsuitably surrendered IBs, the lost opportunity to have had all three IBs under a Trust based IHT mitigation solution since April 2014 (and now protected from IHT), any financial loss arising from performance of the unsuitable EIS investments (minus any tax relief received) and any tax liabilities arising from the unsuitable EIS investment.

In addition, I am satisfied that the complainants did not receive the 'advice' for which the associated advice fees were paid. If the associated advice payment(s) was made outside the amounts invested in the EIS, then they are entitled to a refund. If paid from the amounts invested the calculation of financial loss ordered below should cover that.

With regards to financial loss, compensation for the loss of any increase in the IBs' values after they were surrendered and the performance of the EIS investments (into which £50,000 out of the total surrender proceeds went) are connected, so the same calculation will address both. In this respect, the complainants will need to give DJL information about how the remainder of the total surrender proceeds has been used to date, in order to inform its calculations.

For the calculation of redress for financial loss I have used the three IBs as the performance benchmark, given my finding that they would probably have been retained, but for DJL's unsuitable advice. If information on their performance cannot be obtained or if such information is difficult to apply, I have referred to an alternative benchmark (based on the complainants' balanced profile at the time of advice). The start date(s) for the calculation will be the surrender date(s) for the three IBs and the end date will be the settlement date.

With regards to the lost opportunity, caused by DJL, to have had all three IBs under an IHT mitigation solution since April 2014 (and now protected from IHT), I agree with the investigator's reference to an Inter Vivos policy – in the event that the complainants proceed to pursue an alternative IHT mitigation solution to which such a policy can be applied. This, in broad terms, will be an assurance plan that provides funds to cover IHT arising from a gift that is subject to IHT if/where the donor passes away within seven years of the gift. As the investigator said, the complainants have discretion in this respect and can take advice on it, and I note their response saying it could be difficult but they will look into it.

In any case, I will make provisions for this below, in the event that the complainants pursue it and need their premiums and associated reasonable costs (including the cost of the financial advice and professional arrangement required to put the alternative solution in place) covered – which will be DJL's responsibility to cover.

The complainants are ordered to engage meaningfully and co-operatively with DJL to provide it with all information and documentation, relevant to its calculation of redress and compensation, which it does not already have.

What must DJL do?

To compensate the complainants fairly, DJL must do the following:

- Pay them the total of any and all withdrawal and/or exit fees and/or penalties they incurred in surrendering the three IBs, plus interest on this total, from the date the fees and/or penalties were paid to the date of settlement, at the rate of 8% simple per year.

- Pay them the total of any and all tax liabilities they incurred in surrendering the three

IBs, plus interest on this total, from the date the relevant tax payment(s) was made to the date of settlement, at the rate of 8% simple per year.

- Pay them the total of any and all tax liabilities arising from the unsuitable EIS investments, plus interest on this total, from the date of any relevant tax payment(s) to the date of settlement, at the rate of 8% simple per year.

- If advice fees were paid by the complainants outside of the amounts invested in the EIS, repay the total of those fees to them plus interest on this total, from the date(s) of payment to the date of settlement, at the rate of 8% simple per year. If the redress calculation comparison that I order below shows that no compensation is payable, the difference between the *actual value* and the *fair value* can be offset against the repayment of these fees with interest.

- If the fees were deducted from the amounts invested in the EIS, then the calculations ordered below must be based on the gross amounts invested.

- If the complainants proceed with an IHT mitigation solution using any of the values they receive in compensation/redress and in relation to which an Inter Vivos policy can be applied, DJL must cover their reasonable costs and expenses in doing so. This includes coverage of the reasonable costs of engaging with a financial adviser to advice on and arrange the solution, the total cost of the premiums for the policy (which must be paid up front by DJL to the complainants) and the costs associated with putting the policy in place. The complainants must evidence all of these costs and expenses to DJL before they are compensated for them. If no such pursuit is embarked upon, this provision does not apply.

- Compare the performance of the *Investment* in the table below with the benchmark(s) in the table below. If the actual value is greater than the notional or fair value, no compensation is payable. If the notional or fair value is greater than the actual value, there is a loss and the difference (minus the total value of any tax relief received by the complainants from their EIS investments) is the compensation payable to the complainants.

- Provide details of all calculations to the complainants in a clear and simple format.

Income tax may be payable on any interest paid. If DJL deducts income tax from the interest it should tell the complainants how much has been taken off. It should give them a tax deduction certificate in respect of interest if they ask for one, so they can reclaim the tax on interest from HM Revenue & Customs if appropriate.

Investment	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
The total of the gross surrender values of the three IBs	The total of £50,000, out of the total of the gross surrender values of the three IBs, was retained until March 2015 when it was invested in the Octopus EIS; the complainants must dislose to DJL, with evidence, how the remainder has been used from the start	Performance of the three IBs; or alternative benchmark stated below.	The IB surrender dates	Date of settlement	Not Applicable

	date to the end date.					

actual value

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

If at the end date the investment, or any part of it, 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 the complainants agree to DJL taking ownership of the illiquid investment if it wishes to. If it is not possible for DJL to take ownership, then it may request an undertaking from the complainants – to be drawn at its expense – that they repay to it any amount they may receive from the illiquid investment in future.

notional [fair] Value

This is the value of the investment, based on the performance of the three IBs, had they remained in place until the end date. DJL should obtain information from the IB providers in order to calculate this value. It must disclose the information it receives, and the resulting calculations, to the complainants, and if there are costs involved in this process it must undertake such costs.

Any withdrawal from the investment (including consumption of any uninvested part of the remainder surrender proceeds) should be deducted from the notional/fair value calculation at the point it actually happened so it ceases to accrue any return in the calculation from that point on. If there is a large number of them, to keep calculations simpler, I will accept if DJL totals all of them and deducts that figure at the end to determine the notional/fair value.

If DJL is unable to accurately calculate a notional/fair value based on the performance of the three IBs it must determine a fair value using this alternative benchmark (and applying the same adjustments stated above) – the FTSE UK Private Investors Income Total Return Index.

If any existing wrapper is only in place 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 set out above how this might be achieved by DJL taking over the illiquid investment. However, I do not know if that will be possible or how long that will take. Furthermore, third parties are involved, and we do not have the power to tell them what to do. If DJL is unable to purchase the illiquid investment, to provide certainty to all parties I think it is fair that it pays the complainants 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?

- If DJL is unable to accurately calculate a notional/fair value based on the performance of the three IBs, then I consider that the measure below is appropriate.

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

- I consider that the complainants' balanced risk profile can be reflected in this benchmark, in the sense that they were prepared to take some risk to achieve higher growth. It does not mean that they would have invested in some kind of index tracker investment. Rather, I consider this a reasonable benchmark that broadly reflects the sort of return they could have obtained from investments, based on their balanced risk profile, that can be compared with the three IBs.

I note the complainants' request for a form of independent verification of DJL's redress/compensation calculations, and for a time limit for completing the calculations and making payment. The provisions above for disclosure of all the calculations should allow them to conduct their own verification (or, if they wish, to take advice for that purpose). DJL is expected to conclude settlement within 28 days of being informed that the complainants have accepted this decision.

compensation limit

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, £160,000, £170,000, £190,000, £195,000, £350,000, £355,000, £375,000, £415,000 or £430,000 (depending on when the complaint event occurred and when the complaint was referred to us) plus any interest that I consider appropriate. If fair compensation exceeds the compensation limit the respondent firm may be asked to pay the balance. Payment of such balance is not part of my determination or award. It is not binding on the respondent firm and it is unlikely that a complainant can accept my decision and go to court to ask for such balance. A complainant may therefore want to consider getting independent legal advice in this respect before deciding whether to accept the decision.

In the complainants' case, their complaint event occurred before 1 April 2019 and the complaint was referred to us after 1 April 2022 but before 1 April 2023, so the applicable compensation limit would be £170,000.

decision and award

I uphold the complaint on the grounds stated above. Fair compensation should be calculated as I have also stated above. My decision is that DJL should pay the complainants the total amount produced by that calculation, up to the relevant maximum.

recommendation

If the amount produced by the calculation of fair compensation is more than the relevant maximum, I recommend that DJL pays the complainants the balance. This recommendation is not part of my determination or award. DJL does not have to do what I recommend.

My final decision

For the reasons given above, I uphold Mrs B and Mr B's complaint, and I order David Jameson Limited to calculate and pay them compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B and Mr B to accept or reject my decision before 21 January 2025.

Roy Kuku
Ombudsman