

The complaint

Mr and Mrs P, as trustees and settlors of the AF Trust, have complained about the advice they received from HSBC UK Bank Plc ('HSBC') to take out a flexible trust. They say it wasn't suitable, they weren't made aware of the implications, and errors were made which meant they couldn't administer the funds as intended.

There is also a third trustee who has joined the complaint – Mr P2 – but the trust is being represented by Mr and Mrs P in bringing the complaint.

What happened

In 2002 the Mr and Mrs P received advice from HSBC to put £10,000 into a trust for the benefit of their grandchild. They received further advice in 2003 and carried out the same for another grandchild – the complaint about which is being dealt with separately.

In 2021 Mr and Mrs P wanted to take money out of the trust to help pay university costs for their eldest grandchild. At this time, it was found that the third-party managers of the two underlying investments had recorded the ownership of the assets – the collective investments – in the names of the three trustees rather than recording the assets as being held in trust. HSBC had put the trustees as joint holders and registered the investments as being held in the trust. To put the matter right, the third-party fund managers required sight of the Trust Certificate which Mr and Mrs P had given to HSBC, but HSBC no longer had it.

As a result, Mr and Mrs P were unable to sell the investments as intended and so raised their concerns with HSBC about it not setting up the investments as it should have done in 2002 as well as for the 2004 investments. They were also unhappy about the delays in meeting with HSBC in 2022 to discuss the situation. HSBC treated Mr and Mrs P's concerns as a complaint and issued its final response on 5 September 2023. Mr and Mrs P think was too soon.

In its response it acknowledged that it had caused delays in 2022 since Mr and Mrs P had been in touch. It offered to put the other matters right;

- As the investments were in Mr and Mrs P's (and Mr P2's) own names it reviewed their capital gains tax allowances for the two tax years – 2022/23 and 2023/24 – and found that no tax would have been payable. So, if Mr and Mrs P did decide to sell the investments it offered to refund any capital gains tax that may be payable.
- Once the investments were sold, it agreed to calculate whether there had been any loss when compared to the investments if they had been sold in 2022 as Mr and Mrs P had wanted. It said it would assume £36,000 would have been surrendered on 16 November 2022 and the remainder on 11 April 2023.
- It offered to pay any additional fees to register the AF Trust due to HSBC losing the Trust Certificate and agreed to consider any further fees.
- It also offered £1,000 for the distress and inconvenience cause for the events of 2002 2003 and 2022 onwards – so including the complaint about the 2004 trust.

Mr and Mrs P weren't happy with the offer and couldn't understand the reasons for the dates HSBC had proposed using. But they say they accepted it in order to resolve the problems with the trusts. Mr and Mrs P say they had discovered how complex the trust was and questioned the suitability of the advice they were given in 2002 compared to simpler options. But HSBC didn't address Mr and Mrs P's concerns any further as it was satisfied with its offer.

Dissatisfied with the outcome, Mr and Mrs P brought their complaint to this service. HSBC didn't think the complaint had been made within the time limits that apply but a fellow ombudsman decided it was a complaint this service could look at. One of our investigators then went onto consider the merits of the complaint but didn't think HSBC needed to do anything more. He said;

- Because of the length of time that had passed, there was limited documentation available. He outlined Mr and Mrs P's circumstances at the time of the sale and couldn't find that the £10,000 invested was unaffordable for them.
- The investments made were medium risk which met the investment objective for capital growth. Mr and Mrs P had experience of investing.
- The trust met the objective of allowing the trustees to pass money to their grandchild and retain some control over the money rather than gifting it.
- Even though HSBC said it didn't give tax advice, it did provide information about the tax, and which was sufficient to have made the trustees aware of the tax implications. Even though the trustees may have preferred more detail about the tax position it wasn't something the investigator would have expected HSBC to do as it was a financial adviser and not a tax adviser.
- HSBC could have made different recommendations to Mr and Mrs P, but the investigator's role was only to consider the suitability of the advice that was given.
- While HSBC owed the trustees a duty of care, they were not legal advisers, and the onus was on the trustees to find out any legal implications.
- The investigator considered the trustees would have gone through with the recommendation in any event as it matched their investment objectives and circumstances.
- HSBC had offered redress for any capital gains tax which related to the delays in providing advice plus £1,000 for the distress and inconvenience caused.
- From the information available the investigator thought HSBC had made a recommendation that was suitable for their investment objectives.

Mr and Mrs P didn't agree with the investigator and made the following points;

- There had been no mention that there were legal requirements for a trust and now they knew more they questioned the advice to take use a trust vehicle. They wouldn't have known they needed to seek legal advice.
- They had no complaints about the financial advice given. They provided a copy of the suitability letter from 2002.
- They had spent hundreds of hours trying to resolve the issue.
- They weren't experienced investors – the investments came about as a result of inheritances.
- Mr P's dyslexia made it difficult for him to deal with 'legalities' and 'form filling.'

Mr and Mrs P's response didn't change the investigator's view, so their complaint has been passed to me in my role as ombudsman for a decision.

What I've decided – and why

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

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

I'm aware I've set out the background to this complaint in less detail than the parties and I've done so using my own words. I'm not going to respond to every point made by the parties involved. No discourtesy is intended by this. Instead, I've focused on what I find are the key issues here. Our rules allow me to take this approach. It simply reflects the informal nature of our service as a free alternative to the courts. If there's something I haven't mentioned, it isn't because I've ignored it. I haven't. I'm satisfied I don't need to comment on every individual argument to be able to reach what I think is the right outcome.

There is limited documentation from the time of the sale, but I don't find this surprising as it took place over 20 years ago and businesses aren't obliged to keep documentation indefinitely. When the testimony or evidence I do have is contradictory, I have to base my decision on the balance of probabilities after considering all the circumstances of the complaint and what I think most likely happened.

My understanding of the background to this complaint is that Mr and Mrs P had a meeting with an HSBC adviser at their home in 2002 as they wanted to discuss how best to gift money to their grandchild. As a result of that meeting, they proceeded with the trust and completed and returned the trust deed to HSBC on 14 October 2002. I understand the trust deed should have been returned to Mr and Mrs P by HSBC, but it wasn't and has been lost by HSBC.

Despite that loss, HSBC has been able to confirm that the investment set up for the benefit of Mr and Mrs P's grandson should have been placed in trust. But it has been unable to provide a replacement trust deed as it stopped using them in 2006 and Mr and Mrs P have been trying to put that right.

However, I have considered whether the advice to invest for the benefit of Mr and Mrs P's grandchild via a trust was suitable. I should first say, Mr and Mrs P are of the opinion there were other more suitable options available to them. No doubt there were different ways in which Mr and Mrs P could have invested at the time, but my role isn't to consider what those other options were. My role is to consider whether the advice they were given was suitable taking into account the circumstances and investment objectives at the time.

Mr and Mrs P's circumstances and investment objectives

Mr and Mrs P have been able to provide a copy of the suitability letter of 20 August 2002 and while there isn't any other information available from the time of the 2002 sale HSBC has been able to provide the 'Personal Financial Planning Review' it completed for the subsequent recommendation it gave Mr and Mrs P in 2003. I don't think it's unreasonable for me to assume there would have been a similar review for the 2002 sale and to apply the information given in the 2003 document to the sale in 2002. I've been given no reason to think Mr and Mrs P's circumstances had significantly changed during the year.

Mr and Mrs P were 61 and 62 years of age and retired at the time of the advice and had two independent children. They owned their home valued at £200,000 and Mr P had investments totalling £186,200 and Mrs P's investments were valued at £159,600. I understand the investments had come about because of inheritance. The funds were invested in shares, insurance bonds, PEPs, cash ISAs and cash. Mr and Mrs P had a joint net monthly income of £1,500 and net monthly disposable income of £500.

Mr P has explained that he has dyslexia and Mrs P has always filled in forms etc for him, but he can't recall whether he made HSBC aware of this at the time of the sale.

Mr and Mrs P's attitude to risk and the advice

The 20 August 2002 suitability letter said;

'You provided me with details of your financial affairs and confirmed that you have a cautious attitude to investment risk. Based on that information I have considered the most appropriate way to meeting your objective of investing £10,000 on behalf of your grandson...for potential long term growth.'

While its clear Mr and Mrs P both had some – even if it was limited – investment experience, but without any further point-of-sale documents, it's difficult to know what was discussed about risk and subsequently agreed between Mr and Mrs P and their adviser. So, I can't know what was discussed about risk but it's clear from the 2003 Review document that Mr and Mrs P did have some investment experience – even if limited to selling shares – and so a cautious attitude to risk doesn't seem out of place.

I say this because whilst we don't have a copy of an assessment or questionnaire from around the time the recommendation was made, I think this is more likely to be because of the passage of time rather than HSBC's failure to appropriately determine Mr and Mrs P's attitude to risk. The reference in the letter to a cautious attitude to risk and Mr and Mrs P's previous investment experience – even limited – satisfies me it's likely HSBC made an assessment here. And as Mr and Mrs P went on to accept the recommendation and have told us they have no complaint about the financial advice given, I'm not persuaded they had concerns about their risk rating.

Mr and Mrs P wanted ethical investments, and two funds were recommended as their respective investment objectives were for 'long term capital appreciation' and 'long term growth.' While I can't know the two funds risk rating at the time of the sale, they did match Mr and Mrs P's investment objective of long-term growth and I haven't seen anything to suggest they didn't also match Mr and Mrs P's attitude to risk.

The funds invested into were collective investment vehicles – open ended investment companies ('OEICs'). Collective investments would have provided a level of diversification that Mr and Mrs P would otherwise not have been able to obtain with the £10,000 they were investing so from the information I do have, I don't find the investments themselves were unsuitable.

The trust

Mr and Mrs P have complained about the advice they received to use a flexible trust as a vehicle for gifting money to their grandchild. They say the use of a trust was 'presented as a very simple procedure with a light legal touch.' They were told additional grandchildren could be added and there was no mention of the need for solicitors or legal forms. They say they were also told taking money out of the trust was very straightforward but have since been advised that professional involvement is always recommended including when all funds were

distributed, and the trust wound up. Trusts also have a lower capital gains tax ('CGT') annual exemption allowance which Mr and Mrs P say is lower 'than other allowances' which I take to mean their personal CGT allowances.

A flexible trust allowed Mr and Mrs P to adapt to the changing circumstances or needs of their grandchild if they had wanted to. And my understanding is they could have added or removed beneficiaries if they had wanted to. The amount invested would fully fall outside of Mr and Mrs P's estate for inheritance tax purposes provided they lived for a further seven years which didn't seem unlikely at the time bearing in mind their ages. So, Mr and Mrs P still retained control over the capital and the flexible trust allowed them to decide as and when to give it to their grandchild.

I accept there were tax implications in taking the trust that are different than for an individual and Mr and Mrs P (and one of their sons) were taking on the role of trustee which has its own duties and implications. But I don't find the recommendation of the use of a flexible trust, in and itself, to have been unsuitable bearing in mind what Mr and Mrs P were trying to achieve. And as I have already said, I can only consider the advice they were given, and not what alternative options could have been available to them at the time.

I can see from the August 2002 suitability letter that it provided details about a flexible trust as well as information about income tax, capital gains tax and inheritance tax. But this was information and not advice – HSBC weren't in the position to provide tax advice – its role was primarily limited to that of financial adviser. So, I'm satisfied the tax implications were laid out and Mr and Mrs P could have sought further advice elsewhere about this if they had wanted to.

And while Mr and Mrs P may argue that the business should have advised them to take legal advice at the time, and it may have been advisable for it to have done so, but as I have no reason to think this would have led to them not going ahead with the recommendation, I don't think this is something I need to make a finding on.

I say this because I am of the view it is only the subsequent errors that have occurred that have caused Mr and Mrs P to focus on this aspect about the mis-sale of the trust. I think that if everything had worked as it should have done, their complaint about the need for accountants or legal advice – which must have been difficult for Mr P bearing in mind his dyslexia – would have arisen. And I've seen nothing to suggest that by taking legal advice Mr and Mrs P would have been advised against agreeing to the trust or them deciding not to go ahead with it.

However, I've looked at the errors in more detail, the impact of them and whether HSBC's offer to put the matters right is fair and reasonable.

The errors made and their resolution

Subsequent to the trust being set up and the monies invested, its clear errors occurred which only became apparent when Mr and Mrs P looked to help their grandchild with university costs in 2021/2022. Those errors were;

- The trust deed not being returned to Mr and Mrs P and subsequently being lost by HSBC.

HSBC has accepted its errors and offered to pay any additional fees incurred in registering the trust.

- The failure to register the collective investments as being in trust with the underlying

fund managers and the assets being registered into the names of the three trustees.

Mr and Mrs P have told us that they have been able to change the designation with the fund manager of one of the investments – Premier Miton – but not the other – Janus Henderson. But the trust is registered with HMRC as being a trust. They are looking to sell the investments but have had to resubmit documents because original bank details weren't accepted by one of the investment managers. Once sold, the trust will then be wound up.

- The capital gains tax implications of the incorrect registration.

When HSBC responded to the complaint in September 2023 it said that if the trustees had received the advice/information they had requested needed they would have been able to sell the investments in the trust without incurring any CGT liability, so HSBC has offered to put that right if CGT is incurred.

Mr and Mrs P are concerned that the offer made by HSBC – to cover any future CGT liabilities – isn't sufficiently prescriptive. However, as stated above, Mr and Mrs P have confirmed they are looking to sell the investments shortly and wind up the trust. I understand Mr and Mrs P have been in touch with HMRC about the CGT position and who would be liable for the payment and were told it was likely to be from the three trustees but as yet haven't received final confirmation so when the investments are sold their accountant will submit a tax return to HMRC.

HSBC has confirmed it is willing to pay the CGT and to make such a payment it would need to see the HMRC submission, invoice and proof of payment. I don't find this offer to be unfair or unreasonable. HSBC has acknowledged it made an error and is willing to put that right subject to evidence of payment to HMRC. So, I don't agree with Mr and Mrs P that the offer isn't sufficiently prescriptive.

Clearly it can't be known until the investments are sold and the CGT liability is known and by whom it is payable that HSBC can be any more prescriptive.

There is the potential that a loss could be incurred when compared to when Mr and Mrs P intended on selling the investments and HSBC has offered to put this right. Mr and Mrs P have said it was their intention to sell the investments in 2021 when their grandchild went to university, but that HSBC decided to compensate them only from when it acknowledged its errors in 2022. Mr and Mrs P say they accepted the offer of compensation and as HSBC will be paying the CGT liability and any loss, over and above the significant inconvenience Mr and Mrs P have been caused, I can't see they will be out of pocket because of this.

So, for comparison purposes, HSBC has provided dates for the two financial years over which the investments were to be sold. It said it would assume a sale date in the 2022/23 tax year of 16 November 2022. HSBC has said the 16 November 2022 was chosen as on 27 October 2022 Mr and Mrs P emailed HSBC requesting a meeting with their financial adviser. There was a delay in Mr and Mrs P receiving the requested advice and so 16 November 2022 was chosen as a reasonable date to assume they would have received the advice and started liquidating the investments if it had been decided that was the best way forward.

Mr and Mrs P have said they don't understand the logic of the chosen dates but haven't provided any alternative. Part of Mr and Mrs P's complaint is that there was a delay in them being provided with advice about what action to take but HSBC's assumption of three weeks from the date of the request, assuming advice was given in a timely way and that Mr and Mrs P then decided to act on that advice, doesn't seem unreasonable to me. And as I haven't been given anything to show another more suitable date, I don't find that what HSBC has suggested to be unfair.

And for the 2023/24 sale, HSBC thought the remainder of the investments could have been sold on 11 April 2024. Again, Mr and Mrs P couldn't understand the logic but when selling OEICs the trade is made with the fund manager and not on exchange. So usually, this means forward pricing is used – a trade is placed with the fund manager on day one, and the valuation point is established on day two. This means, the first day of the tax year in 2023 fell on a Thursday which is when the trade could have been placed, followed by a four day bank holiday so the valuation price would have established on Tuesday 11 April 2023 so I can understand HSBC's logic here and I don't find it unreasonable.

- The cost of correcting the errors – use of an accountant and need for legal advice and the distress and inconvenience caused.

Mr and Mrs P are also concerned that HSBC hasn't been prescriptive in its payment of any legal or accountancy costs they may incur. They say for the invoices they have forwarded to HSBC have been paid in full. My understanding is that HSBC has so far paid a total of £1,517.15, being £660 for legal costs and £857.15 for legal costs. I asked HSBC about this, and it confirmed the amount it had so far paid and that it 'will continue to assess other invoices as when they are received to check their relevance.' As HSBC has so far honoured its offer of paying for any related fees, I have no reason to think it won't in the future. And like the CGT position, any costs incurred from now, can't be known until they are actually incurred so I can't see how HSBC can be currently more prescriptive.

I fully appreciate the complete frustration felt by the trustees. They thought they had set up the facility to financially help their grandchild as they grew older and there was some flexibility in them doing so. But when they came to disperse the funds, the errors were discovered, and which were compounded by the delays in getting answers from HSBC. And Mr and Mrs P have said that as P2 had sought professional advice, HSBC should offer payment to him to reflect the distress he had been caused. HSBC offered a total of £1,000 for the distress and inconvenience caused for this trust's complaint and the later trust and it said its offer for the distress and inconvenience caused was for all the trustees.

£1,000 is the sort of award I would make where there has been serious disruption, and the impact has been over a length of time. And its clear that Mr and Mrs P plus the third trustee have been significantly inconvenienced by the errors. But while I appreciate Mr and Mrs P think a higher amount is warranted the amount HSBC has offered is, in my opinion, a fair reflection of the trouble they have been put to and in line with what I would award under similar circumstances.

Mr and Mrs P are unhappy that HSBC issued its final response to their complaint while they were in negotiations about how to put errors right. But HSBC has a regulatory obligation to consider an expression of dissatisfaction by a customer as a complaint. And once in receipt of a complaint it has a regulatory obligation to provide a final response to the complaint and give referral rights to this service within eight weeks. It seems to me that HSBC were trying to resolve the matter but ultimately it had to provide a final response for the purposes of resolution. So, while I appreciate Mr and Mrs P consider the final response was issued too soon, HSBC acted as it should have done when issuing it.

Taking all the above into account, I don't think HSBC needs to do anything more than it has currently offered. I don't find the advice given to set up the trust was unsuitable. HSBC has recognised it did cause errors. It has already offered to pay and CGT liability that arise and any loss that may be incurred between the actual sale dates and the intended sale dates. I don't find the assumed dates over the two tax years to be unreasonable. While I appreciate Mr and Mrs P would like HSBC to be more prescriptive in how it will put the matter right, but the amounts involved are unknown and it has so far honoured its offer of paying relevant

costs. So, I'm satisfied that its intention is to 'ensure there is no financial detriment ... due to the delays and errors on HSBC's part.' And I also think the offer of £1,000 for the distress and inconvenience caused to the trustees to be fair and reasonable in the circumstances of the complaint.

It follows that I don't uphold the trustees' complaint. I appreciate they will be disappointed with the outcome. It's clear they understandably feel strongly about it, and I'd like to thank them for the time and effort they have spent in bringing it. But I hope I have been able to explain how and why I have reached my decision.

My final decision

For the reasons given, I don't uphold the trustees' complaint about HSBC UK Bank Plc.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P and Mrs P as Trustees of the AF Trust to accept or reject my decision before 15 August 2025.

Catherine Langley
Ombudsman