complaint

Mr A complains Pro-Synergy Wealth & Tax Management Ltd gave him unsuitable advice to invest in a Business Premises Renovation Allowance (BPRA) scheme in 2012.

background

In March 2012 Mr A received a circular email from Pro-Synergy with the subject 'BPRA opportunity – Tax reclaim'.

The email explained that there was an 'exclusive investment opportunity'. It said that the developer was funding the initial investment deposits on behalf of Pro-Synergy's clients entering the scheme, and that these interest free loans would be paid back through the tax relief received from HMRC. The email explained that the returns were 'uncapped' and given that the development was to be a city-centre 5 star accommodation, they expected 'the future returns to be extremely good'. The email said that 'both time and subscription allowances are very limited', and Pro-Synergy had already 'taken in several applications for this current BPRA investment' as investors had been keen to 'benefit from the no-money down deposit paid on your behalf by the developer'.

In response to this email Mr A got in touch with Pro-Synergy the following day. The notes of the call are disputed by Mr A, but in short the investment opportunity was briefly touched on and Mr A was encouraged to invest.

In the days following this call Mr A agreed to proceed, and signed a waiver in favour of the developer. This committed Mr A to repaying the loan via the tax relief he would receive from HMRC. He then received a suitability report which outlined, broadly, the recommendation to invest in the LLP. It said that Mr A was a higher rate tax payer, earning over £163,000, and that his current aim was 'tax planning'. It said that risk applied to the investment, and encouraged Mr A to establish for himself whether he was happy to accept the risks.

By accepting Pro-Synergy's recommendation, Mr A would become a member of an LLP that would invest in buying a site requiring development in the UK and develop it into a hotel. This investment would, in theory, not only provide the expected tax relief, but would also yield a regular income. It also explained that there would be a 'loan facility' to the partnership (different to the personal loan provided to Mr A for the initial deposit) which would amount to 55.7%. Essentially this meant that investors would contribute 44.3% of the overall investment, and the rest would be bridged by a company providing credit to the partnership as a whole on a 'non-recourse / non-status basis'.

There was a section called 'risk warnings' which outlined almost two pages worth of risks with the investment. That section started by saying that Mr A should consider the suitability of the investment for himself and in light of his personal circumstances and financial resources.
It listed a number of risk warnings which the report said were not 'intended to be exhaustive' and then referred Mr A to a 'risk warning notice'. This, in short, explained that Mr A was being advised to invest in a non-readily realisable asset.

The report set out a 'taxation risk warning' which explained that the outcome of any investment in BPRA schemes depended on the use of taxation reliefs and allowances, and so investors 'should have obtained advice from their own tax advisers before applying to invest' in the BPRA scheme.

Mr A agreed to invest £100,000 and duly received the tax relief from HMRC of the same amount. He passed this to Pro-Synergy in line with the waiver he had initially signed so that the loan from the developer could be paid off.

Between 2013 and 2016 the partnership encountered difficulties in receiving all the relevant subscriptions from the partners. Of relevance to Mr A, it seemed the developer was no longer willing to provide the initial loan to Pro-Synergy's customers. As a result, lawyers acting for the LLP sent statutory demands to the partners that had outstanding contributions and threatened legal action. At the same time, HMRC began investigating the partnership, and whether or not it actually qualified for BPRA. Mr A also received letters from the partnership and the developer, as it seemed that despite forwarding the £100,000 tax relief he had received to Pro-Synergy, it had kept hold of this money.

In 2016 the LLP went into liquidation and the hotel was sold. HMRC has continued to look into the scheme and is now intending on clawing back all the relief Mr A received and adding interest and penalties. Given his particular circumstances, Mr A has reached an agreement with HMRC to pay back the tax relief. It's likely this will include interest and penalties.

One of our investigators looked into the complaint and considered it should be upheld. In summary, she found:

- There was no fact find and no evidence that Pro-Synergy had obtained any of the information that would have been necessary to assess the suitability of the scheme for Mr A. This included establishing what Mr A's attitude to risk was, his investment knowledge and experience, his financial situation including his income and outgoings and his investment objectives.
- The suitability letter which was sent wasn't tailored to Mr A's circumstances.
- Mr A was nearing retirement from his professional activity and there was a recorded need to save towards retirement given his particular circumstances. She didn't consider it likely that he had the capacity to lose the full amount he invested – and the potential for this risk to materialise wasn't raised with him at the time of the advice.
- She didn't consider the risks of the investment, including the interest free loan to the developer, were highlighted sufficiently clearly. So the investigator concluded that the advice was unsuitable.

Pro-Synergy didn't agree with the investigator. It provided detailed comments in response.

It said that in recommending the scheme as suitable, it had conducted 'reasonable due diligence' and had read the Information Memorandum from 2012 and 2013. It also knew about HMRC's policy on BPRA schemes in 2012 and 2013. It said this was important because there was a change in HMRC policy between 2012 and July 2013.
It said that prior to July 2013 'BPRA was widely viewed both by HMRC, tax advisers and IFAs to be a legitimate source of tax relief'. It said that the budget guide for March 2012 confirmed that the relief had been extended for another five years, and there was no suggestion from HMRC or Government prior to July 2013 that such schemes would be challenged.

It said that it was only in the summer of 2013 when HMRC 'published a technical review of the operation of such schemes'. It then 'became apparent that although the Government was aiming to preserve BPRA as an investment incentive, there was a risk of exploitative or

artificial features in some of the schemes HMRC had seen'. It said that this development in policy 'was not something that Pro-Synergy ought to have foreseen'.

Pro-Synergy said that it was important 'when considering what Pro-Synergy ought to have known about the scheme's suitability in 2012 to consider why the scheme failed'. It said that the scheme had in fact been 'partially successful'. It said that even though HMRC had investigated the scheme, 'the inspector appears, prior to the administration, to have been willing to allow 45% of the tax relief claimed' by Mr A. It said its understanding was that 'but for the administration, the complainant may well have retained 'some relief on the investment'. And it said that Mr A would also have received income from his capital investment.

It said that on reviewing the administrator's report, it appeared that 'the scheme failed not because it was fundamentally flawed or a sham', but 'because there was a substantial funding gap'. And it said that this 'funding gap was caused by some of the investors failing to pay in funds pursuant to the 2013 subscription agreement'.

So Pro-Synergy said that it couldn't have reasonably been expected to foresee that there would be a change in HMRC's stance in respect of BRPA schemes, that the main creditor would 'renege on the agreement to fund the investment sum until the relief was obtained' and that 'any funding gap resulting would not be filled and lead [the LLP] to go into administration'. It said that it would be 'unfair' for this service to 'blame Pro-Synergy for the consequences of this chain of events', when there were 'a number of other companies/professionals' who gave advice 'which may have caused or contributed to his loss'.

Pro-Synergy said that the 'overall cause' of Mr A's losses wasn't the decision to invest in the scheme, but the fact that the LLP went into administration. It said that if the LLP hadn't been forced into administration, Mr A would have received some tax benefit from the scheme. And Pro-Synergy said that it appeared that HMRC would have been willing to accept 45% of the claimed expenditure as qualifying for capital allowances, and issued a PPN on that basis. Pro-Synergy said that, in its view, what caused the administration needed to be investigated. It said that it was a third party's refusal to honour a funding agreement on the second subscription and the failure of the investors to put their own funds in to the scheme that caused the partnership to go into administration.

Pro-Synergy also disagreed with the way the investigator had suggested matters be put right. It said that Mr A was now being asked to pay back sums he had received in tax relief, and therefore, 'from a tax perspective, he has been put back in the position that he would have been in had the scheme not been mentioned to him'. It said the complainant may have suffered an investment loss, but this wouldn't have been caused by Pro-Synergy's advice – this would've been caused by the managers of the scheme.

It said that HMRC had not yet issued a closure notice in respect of the scheme and that other investors were intending on appealing HMRC's decision to clawback the tax. It said that it wouldn't be fair and reasonable for Mr A to 'give up the fight' with HMRC in the hope that he would recover the money through this service. It said 'it would clearly be extremely unjust if Pro-Synergy were ordered to make a payment which could then not be recouped in the event that the investors succeed in recovering some of the tax relief with reduced interest'.

Pro-Synergy disagreed with the investigator's use of 8% per year simple interest on the award. It said that if HMRC did charge penalties, it should only be asked to pay those if Mr A had made 'reasonable attempts' to mitigate that loss. It said that the penalties which were charged for late payment of sums were done via 'PPNs' or 'APNs'. It said that 'APNs were introduced in 2014 as a method of collecting tax following a challenge to a scheme/alleged tax avoidance but before a ruling had been made on the scheme by a tribunal'. It said that the 'introduction of APNs was widely criticised' and 'not something that could have been foreseen in 2012 or 2013 and Pro-Synergy should not have to pay the costs of the complainant's failure to comply with the notices and/or his lawyer's attempts to challenge the validity of the notice'.

As agreement couldn't be reached, the case was passed to me to consider.

my findings

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

I've considered and taken into account the detailed comments both parties have provided throughout this complaint. I hope neither party takes it as a discourtesy when I don't reply to every single point that has been raised. The purpose of my decision is to address what I consider to be the key issues in the complaint, and explain my reasons for making the decision that I have.

In Mr A's case, I consider the key issue to be whether the recommendation Pro-Synergy made to Mr A to invest in the BPRA scheme was suitable for him. And in that regard, I'm afraid I don't have much to add to what the investigator has already said.

It's clear to me that Pro-Synergy didn't establish the suitability of the investment for Mr A before it promoted it to him, nor indeed after it spoke to him about it. There's no evidence that a comprehensive fact find was carried out about Mr A to establish his financial circumstances (and by this I mean more than just an assessment of his earnings, but also his existing liquid assets and liabilities), level of investment experience and knowledge, and his objectives for the investment – including the degree to which he was able and willing to take on investment risk.

The suitability letter does say that the advice given was 'based on the financial information that you shared with me when we met'. It says that the letter presents 'our understanding of your current situation, your aims and objectives and this provides the basis for our recommendations'.

Yet, under the section 'current situation', the only issues which appear to have been considered are Mr A's anticipated income of over £160,000, his tax bracket (50% income tax), and the total tax paid to date (as at 31 March 2012) of over £230,000.

Instead of establishing whether the recommendation was affordable, the suitability letter said that Mr A had 'confirmed […] that the proposed investment in the LLP is readily affordable for you and that you have sufficient emergency funds on deposit elsewhere to satisfy any short term financial needs'. I'm not persuaded Pro-Synergy adequately established whether Mr A could in fact afford the investment – particularly in the event of the initial tax relief being clawed back by HMRC. On this point I should say that I don't agree with Pro-Synergy that this wasn't a foreseeable risk. There were a number of reasons why the scheme might fall

foul of relevant rules around BPRA (and some of these are listed below), and a number of reasons why there was a high risk of capital loss – indeed these risks, particularly that tax relief wasn't guaranteed, are listed in the suitability report; so clearly they were foreseeable. The fact is these risks materialising ought to have been considered very carefully in light of Mr A's circumstances and they weren't.

In the section 'aims and objectives', Pro-Synergy establish that Mr A's 'priority' was income tax planning. But in the section 'attitude to risk', the letter doesn't explain what Mr A's attitude to risk is – it simply concludes that 'investment risk does apply in this case', and that Mr A's attention was drawn to the risk warnings at the end of the suitability letter and in the LLP's memorandum. This section should've established how much risk Mr A was able and willing to take, and it should've been used as an opportunity to test his understanding of the investment and whether he was comfortable with it. I'm satisfied that this was absent from the suitability letter because it wasn't in fact discussed or established with him.

In fact, the clearest evidence that Pro-Synergy didn't attempt to establish the suitability of the investment for Mr A (despite making a personal recommendation) is in the section of the letter called 'risk warnings'.

In that section, Pro-Synergy explains to Mr A that he should 'carefully consider whether such investments are suitable for you in light of your personal circumstances and the financial resources available to you'. When in fact it was Pro-Synergy's role, as a regulated firm providing regulated advice, to establish this. It then listed a series of risk warnings, including:

- The value of the property could fluctuate and investors could lose some or all of their investment.
- Not all the costs and expenses incurred by the LLP will qualify for a tax deduction against the income of the LLP.
- Tax legislation (and therefore the type and amount of relief available) was subject to change.
- If Mr A sold or otherwise disposed of his stake in the LLP within seven years there would be a clawback of the tax relief provided.
- There was no established market which would allow Mr A to easily sell his investment. This also meant that he may not be able to obtain reliable information about 'its value or the extent of the risks to which it is exposed'.
- As a result of the above, the investment was essentially illiquid, so Mr A shouldn't invest in it if he envisaged needing the money in the subsequent seven years.
- It was assumed that 'all investors will have taken appropriate professional advice before seeking to invest'.

There were other risks as well, including problems or delays during the refurbishment, requests for members of the LLP to service the developer's loan should the tenant later become insolvent, and a premature sale of the Property triggering a clawback of the relief allowed by HMRC.

Overall, I've seen insufficient evidence that Mr A was prepared to take this level of risk with his investment, and there's no evidence in the suitability letter that this was established.

In fact, I think it's likely that discussions around the risk of total capital loss or problems with the LLP were not discussed at all with Mr A. I'm persuaded it's likely he was given a misleading impression by the adviser about the risks of this investment, and the initial email supports this. Given that he was not in fact investing any initial capital himself, and the loan

would be repaid via tax relief received from HMRC, I think Mr A was very much led to believe that this opportunity didn't represent any risk of capital loss to him – and that's why he chose to invest. In that regard, I think Mr A's evidence is consistent and persuasive. It shows that Pro-Synergy didn't undertake the appropriate assessment of Mr A's circumstances, and didn't attempt to establish whether or not this investment was suitable for him. Worse, it didn't comprehensively explain the risks associated with the investment – risks which I'm persuaded Mr A was neither willing nor able to take.

I say this because Mr A knew that his income was due to drop significantly, and he has described quite clearly why he wasn't intending on taking a high risk with his money. I think his explanations for this are persuasive, and consistent with the available evidence of his broader financial circumstances at the time. In my view, if he had known this wasn't the low risk opportunity he was likely told it was, and in fact there were a number of reasons which might mean potentially having to pay back the tax relief (or worse, put more money in the partnership), I'm satisfied Mr A wouldn't have invested.

For these reasons, I'm satisfied this investment was unsuitable for Mr A and Pro-Synergy shouldn't have recommended it.

Putting things right

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £150,000, I may recommend the business to pay the balance.

In considering what needs to be done to put matters right for Mr A, my aim is to put Mr A back in the position he would've been had he not received unsuitable advice.

In this case, I'm satisfied that Mr A had no intention of investing his money. And had he not invested, he wouldn't have received any rebate from HMRC (which it is now clawing back), and therefore wouldn't have incurred any penalties or interest. He also wouldn't have suffered the stress and anxiety of being chased for money he didn't have and was unable to pay back – this includes the stress of being chased by the LLP for money which he had already paid over to Pro-Synergy and which it had failed to release without him knowing.

So I think it's fair and reasonable that Pro-Synergy pay Mr A £100,000 and add 8% per year simple interest on any amount he has already repaid to HMRC, as I understand he has not fully repaid the original amount.

In that regard, I also appreciate why Pro-Synergy thinks that our award of 8% interest is too high. I appreciate that deposit rates are significantly lower than this. But it is not meant to reflect the return Mr A would have received from a deposit account. It is meant to compensate Mr A for being deprived of his money for a period of time.
So if Mr A had to pay back HMRC from his own money, when he would never have had to do so but for the unsuitable advice he received and agreed to follow, then he has been unfairly deprived of this money. Paying back this money might have caused financial difficulties, and likely would've had an impact on a range of decisions Mr A has had to make around spending and borrowing at the time.

As it isn't really possible to quantify what this has meant for Mr A, our service uses the 8% per year simple rate in the majority of similar cases. I've considered whether a different approach would be fair here, and I'm not persuaded it would be.

In terms of mitigation of loss, I'm satisfied that the evidence I've seen indicates that HMRC will be clawing back 100% of the relief provided. What is currently not certain is the level of any fees or penalties which might be applied.

I appreciate why Pro-Synergy considers it reasonable for Mr A to challenge HMRC's payment notices. But given the circumstances, I don't agree that it would be fair or reasonable to expect Mr A to do so. There's no indication that such a challenge would be successful (indeed the evidence suggests that is unlikely given the way HMRC may well view the initial personal loan provided to Mr A), and doing so would almost certainly involve additional time and costs for Mr A which he may not get back.

Mr A has also incurred a number of additional costs. Bearing in mind the particular and personal and exceptional circumstances of Mr A's case, I'm satisfied these costs were reasonably incurred. And I'm satisfied that Mr A wouldn't have incurred these costs if it hadn't been for Pro-Synergy's unsuitable advice.

Mr A's circumstances have required significant negotiation with HMRC to avoid potentially disastrous consequences – and he has naturally resorted to the services of a professional for this work. Part of this was due to his role as a 'nominated partner', which happened without his knowledge. My understanding is that he became a 'nominated partner' on a default alphabetical basis following the resignation of the LLP's administrators. In turn this meant a much greater degree of responsibility, for which he was ill prepared given his lack of understanding and knowledge of the scheme. In order to discharge his obligations towards HMRC, he has had to resort to professional advice, both from an accounting perspective and to help cover the initial legal costs he incurred from a relevant professional association which he was a member of. These costs amount to:

- £4,400 plus VAT of £880 for the accountancy services he received.
- £5,280 for the professional association's initial contribution to his costs, which was provided on the understanding that he would make a payment should his complaint be successful.

Mr A has also required the help of a professional in advising and preparing his case for this service. It's unusual for our service to award these. But given the exceptional and personal circumstances of Mr A's case, I'm satisfied that these costs were reasonably incurred. I agree with the investigator's assessment in that regard. The evidence I've seen shows that these costs amounted to £2,000 plus VAT of £400.

And it's clear that Pro-Synergy's unsuitable advice has caused Mr A trouble and upset, but I don't agree with the investigator's recommendation of £250 – I think it's clear Mr A has been caused a significant degree of stress and inconvenience, for which I think £500 is fair and reasonable compensation.

my final decision

My decision is that Pro-Synergy Wealth & Tax Management Ltd must pay Mr A the compensation I've outlined up to a maximum of £150,000 plus any interest I've said is payable:

- Pay Mr A £100,000 – that's the amount of tax relief Mr A received from HMRC (which he then transferred to Pro-Synergy) at the time of his investment, and which HMRC are now clawing back. If he has paid back any of this amount to HMRC already, Pro-Synergy must add 8% per year simple to such a sum from the time he paid it until the date of settlement.
- Pay charges or interest, if any, which HMRC has already levied on the clawback, and which Mr A has already paid. It should 8% per year simple interest to such sums from the time he paid them until the date of settlement.
- Give an undertaking to pay any future charges or interest HMRC applies within one month of being provided with the invoices by Mr A.
- Pay Mr A £4,400 plus VAT of £880 for advice given and negotiating with HMRC
- Pay Mr A £5,280 for the professional association's initial contribution to his costs.
- Pay Mr A £2,000 plus VAT of £400 for advising on and preparing the case for our service.
- If Mr A has already paid these invoices, Pro-Synergy should also add 8% per year simple on interest on these sums from the date of payment to the date of settlement.
- Pay Mr A £500 for the trouble and upset the matter has caused him.

Where a sum is payable, Pro-Synergy Wealth & Tax Management Ltd must pay this within 28 days of when we tell it Mr A accepts the decision.

In this case, as HMRC hasn't yet quantified charges and interest, I don't know if the compensation due to Mr A (not including any interest I've said is payable) will exceed £150,000. If it does, I recommend that Pro-Synergy Wealth & Tax Management Ltd pay Mr A the balance.

This recommendation is not part of my determination or award. It does not bind Pro-Synergy Wealth & Tax Management Ltd. It is unlikely that Mr A can accept my decision and go to court to ask for the balance. Mr A may want to consider getting independent legal advice before deciding whether to accept this decision

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 12 July 2019.

Alessandro Pulzone
ombudsman