

## complaint

The executors of Mr G's estate complain that IRP Wealth Planning LLP ("IRP"), an appointed representative Financial Services Advice and Support Limited, gave Mr G unsuitable advice to invest in the BCBA Stage 1 Enterprise Investment Scheme ("the BCBA EIS"). The executors say that the BCBA EIS was only suitable for sophisticated and experienced investors, and that Mr G was elderly, inexperienced, and incapable of understanding the risk that was being taken.

## background

Mr G met with IRP's adviser in September and October 2009. He was a retired widower with no dependents, and in his late seventies. He had recently sold some land for a large sum of money and, as a result, had significant inheritance tax ("IHT") and capital gains tax ("CGT") liabilities. Mr G was not in the best of health – his life expectancy was recorded as being around three years.

IRP recommended that Mr G consider investment in Enterprise Investment Schemes (EIS), as doing so could potentially significantly reduce his tax liabilities. At first, IRP recommended that £940,000 be invested into the Octopus Secure Enterprise Investment Scheme. Later it recommended that £135,000 (the maximum amount allowed) be invested in the BCBA EIS and £805,000 in the Octopus scheme. Mr G accepted the later recommendation and the investments were made in October 2009. Sadly, Mr G died in April 2010.

The executors say that EIS investment was suitable – they accept that was the only realistic way of addressing Mr G's significant tax liability. But they think all of the money should have been put in the Octopus scheme, which they consider to be much lower risk than the BCBA EIS.

Our adjudicator investigated the complaint, and said that he thought it should not be upheld. He said:

- Given Mr G's circumstances at that time, he would have been looking to reduce his tax liabilities and to do so as quickly as he could. That would likely mean that Mr G would have to take a higher risk with his money.
- So it was not unreasonable for IRP to have recommended higher risk EIS investments.
- EIS investments involve higher risks but investors receive very significant tax advantages, such as income tax relief, as well as significant capital gains and inheritance tax advantages.
- IRP had confirmed to Mr G that he was taking a higher risk with his capital. It said:

*"You (Mr G) confirmed that you would now like to invest £135,000 of the original EIS investment, in the BCBA Stage 1 EIS, to have the potential to achieve a greater return with this portion of your funds, although this cannot be guaranteed. The BCBA Stage 1 EIS offers the potential for £1.25 return per £1 invested, compared to the Protected Octopus EIS, which aims to return £1 for £1. Both the artist and company are familiar to you. You understand that this is a **high risk** investment, higher than both the Octopus Protected and AIM EIS and have certified yourself as a high net worth individual".*

The executors did not accept this view. They said, in summary:

- The view misses the point. Any EIS would have achieved Mr G's objectives. Mr G did not need to go into something as risky as the BCBA EIS.
- Mr G would not have fully understood the risk associated with such a sophisticated investment. Understanding it required specialist knowledge of the music industry.
- Mr G was lured into making the investment by the extra return it might offer. They are surprised that IRP thought a 25% return on a small part of the overall investment was worth the significant extra risk.

I issued a provisional decision in August 2015. I provisionally concluded that the complaint should be upheld. My provisional findings were, in summary:

- I agreed that, in the circumstances, EIS investment was, in principle, worth consideration. Mr G had significant tax liabilities and likely had limited time in which to do anything to mitigate them. So EIS investment, which provided significant relevant tax benefits and did so relatively quickly, was probably his best option, if he wanted to reduce those liabilities.
- The nature of EIS investments meant that investment in higher risk shares would be necessary. So Mr G did need to take a fairly significant amount of risk, if he wanted to reduce his tax liabilities. But he did not necessarily need to risk losing all or the majority of the sum he invested. As the executors had pointed out, any EIS would do the job. So something that provided an element of protection, like the Octopus scheme, would have been a good idea.
- It appeared that Mr G was content to accept the first recommendation given by IRP, which was to put all of his money in the Octopus scheme. I had not seen any evidence to show that Mr G was unhappy with the idea of only getting the original amount invested returned to his estate. I had not seen anything to suggest that he asked IRP to look at higher risk alternatives that had the potential to offer a higher return. Instead, consideration of this seems to have been instigated by IRP, who introduced Mr G to the BCBA EIS and encouraged him to invest the maximum possible amount into it.
- The BCBA EIS was a scheme which was launched to fund the release of a DVD of a live performance by a well known rock star. So the outcome was dependent on the success of one specialist DVD release, and also the financial health of some of the parties associated with it, including the promoter (which, in the event, went bust, causing Mr G's estate a significant loss). I understand that Mr G's investment represented around a third of the total amount invested in the scheme. I therefore thought the investment exposed Mr G to a very high level of risk.
- Mr G was wealthy as he had recently sold some land. But it does not seem he had been particularly wealthy before that. He does not appear to have had any experience of dealing with significant amounts of money before. Mr G also had very limited investment experience, was elderly and, as mentioned, was not in the best of health.
- So it was unlikely Mr G would have fully understood all of the risks associated with an investment such as the BCBA EIS. It was an unusual and highly specialised investment,

suited only to sophisticated investors, and I thought it very unlikely that Mr G would have encountered anything remotely like it before.

- Given that Mr G's overriding objective was to preserve the value of his estate by reducing the tax liabilities on it, I did not think he should have been exposed to more risk than was necessary. I also did not think he would have agreed to make an investment if he thought he might lose all or the majority of the money invested in it.
- IRP, in its 22 October 2009 recommendation letter, said Mr G's attitude to investment risk was "fairly adventurous". It was not clear where this fitted into the five categories of risk listed and defined earlier in the letter – no, low, medium, medium to high and high. But I did not think, by common definition, that "fairly adventurous" was an accurate way of describing the risk associated with the BCBA EIS.
- When describing the risk associated with the Octopus scheme IRP said:

*"The Octopus product is low risk for this type of product and they have a good reputation in the business. (Mr G) understands that this is deemed a high risk product and if it does what it is supposed to it will only return the gross capital invested. He is happy to proceed on this basis."*

- Bearing in mind that Mr G had limited investment experience and appears to have had no experience of higher risk investments I thought this was unlikely to have given him a full appreciation of the risks associated with EIS investment generally.
- IRP later said that BCBA EIS was higher risk than the Octopus scheme and "more speculative". And, after Mr G had agreed to make the investment, IRP sent an "addendum" to its original advice letter on 26 October 2009 which said:

*"You (Mr G) confirmed that you would now like to invest £135,000 of the original EIS investment, in the BCBA Stage 1 EIS, to have the potential to achieve a greater return with this portion of your funds, although this cannot be guaranteed. The BCBA Stage 1 EIS offers the potential for £1.25 return per gross £1 invested, compared to the Protected Octopus EIS, which aims to return £1 for £1. Both the artist and company are familiar to you. You understand that this is a high risk investment, higher than both the Octopus Protected and AIM EIS and have certified yourself as a high net worth individual."*

- Although this showed Mr G was told the investment was "high" risk, it did not explain to an adequate extent what the consequences of this might be or how the risks differed to those associated with the Octopus scheme, which Mr G had been told was "supposed to return the capital invested". The focus appears to have been on the upside and I can't see where Mr G was told directly that he could lose some or all of the money he invested, how the BCBA EIS was suited to his "fairly adventurous" attitude to risk, or his overriding objective of preserving the value of his estate.
- Overall, I thought the investment was not consistent with Mr G's objectives, or suitable for his circumstances, and that it was unlikely he fully understood all the risks associated with it. The advice IRP gave was therefore, in my view, unsuitable.
- Had IRP not recommended the BCBA EIS I thought it likely that Mr G would have accepted its original recommendation. And the executors accept that recommendation was suitable. So, to put things right, Financial Services Advice and Support Limited

should put Mr G's estate in the position which it would be, had all the money been put in the Octopus investment.

IRP did not accept my provisional findings. It said, in summary:

- Good industry practice is that any sizeable investment should be diversified between a number of different funds as a method of reducing the concentration risk that comes with investing in a single fund.
- It was perverse that in upholding the complaint, I was effectively advocating the placement of Mr G's investment of £940,000 into one single fund.
- It is accepted practice when making an investment of such magnitude that where the majority of the investment is provided with an element of protection, a small amount may be exposed to higher risk. The proportion exposed to a higher risk was less than 15% of the overall investment. Mr G was prepared to accept a sudden loss of up to 20% of his portfolio before considering whether he needed to take any action.
- Mr G's more "mainstream" investments included exposure to Egypt, China and Russia.
- I said Mr G had a very limited investment experience. It accepted this conclusion but would add that it is unclear what relevance it is to the case when I appear to accept that Mr G would have fully understood the nature of the Octopus EIS. Any EIS is a highly specialised investment. Mr G's concern was simply to mitigate as much tax as possible, in as short a time period as possible, whilst also trying to preserve the capital and the two EIS plans were recommended to do just that.
- IRP's adviser did not actively encourage Mr G to invest in the BCBA EIS, but responded to Mr G's enquiries. It was Mr G who wanted to include an investment in the BCBA EIS, which did not form part of the adviser's original recommendations.
- In his meetings with IRP's adviser Mr G had requested whether there were other investments tax mitigating investments which would offer a better return. IRP's adviser reported back to Mr G after having attended a promotional meeting regarding the BCBA EIS to provide him with further information about it.
- At no time did IRP's adviser encourage Mr G to change his objectives of mitigating his inheritance tax (IHT) liabilities to seek a greater return on his investment. Mr G decided to take the additional risk with the proportion of his funds as he liked the idea of a greater return.
- Whilst Mr G's untimely death meant that the IHT planning failed, the adviser's recommendations did succeed in saving the beneficiaries of Mr G's estate around £171,000 in capital gains tax (CGT).
- An important point that also needs to be mentioned is that after Mr G's death, there was a cash value attributable to his share of the EIS. The Trustees could have withdrawn this capital from the EIS reducing the loss that transpired, however they elected to leave it in and the current position prevails.

## **my findings**

I've reconsidered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I have not been persuaded to depart from my provisional findings.

I remain of the view it is likely that the BCBA EIS was recommended to Mr G by IRP. In my provisional decision I said I had not seen any evidence to show Mr G was unhappy with the Octopus recommendation. That remains the case. Mr G was elderly, in poor health, and had limited investment experience. I think it very unlikely that he selected an investment in a highly specialised EIS scheme involving a DVD release by a rock star of his own volition.

I also remain of the view that it is likely Mr G would have accepted IRP's advice to put the full investment amount in the Octopus scheme, had it not been for IRP's advisor having recommended the investment in the BCBA EIS.

IRP has said, in its response, that it is good practice to diversify between a number of different "funds". But we are not dealing with a number of different "funds" – a portfolio was not being constructed, and Mr G was not investing in traditional investment funds. Mr G was investing in EIS qualifying companies in the hope of mitigating his and his estate's significant tax liabilities.

I do not think that putting £135,000 of Mr G's money into around of the third of the available shares in a small specialist EIS was suitable for him. This did not reduce Mr G's risk through diversification – it increased it.

And, even if Mr G did have an appetite for some additional risk, I do not think buying around of the third of the available shares in a small specialist scheme was suitable for him. The available evidence shows Mr G had significant assets and his sole objective was to reduce tax liabilities. He should not have been advised to take more risk than was necessary to try to achieve this.

Mr G did have some unit trusts that invested in emerging markets. But these were holdings which had a value of a few thousand pounds each, in a portfolio with an overall value of around £30,000. So I do not think these can be compared to the investment BCBA EIS, a specialist investment with multiple risks and the possibility of a total capital loss. I remain of the view that it is unlikely Mr G would have had a full appreciation of the risks associated with the BCBA EIS.

Overall, my view remains that the investment was not consistent with Mr G's objectives, or suitable for his circumstances, and that it is unlikely he fully understood all the risks associated with it. The advice IFS gave was therefore unsuitable.

IRP has pointed out that the BCBA EIS had a cash value in 2010, when Mr G died. But that cash value was significantly less than Mr G invested. So it would not be reasonable to say, in hindsight, the estate should have sold the investment and mitigated its loss. In any event, although there was a "cash value" attached to the shares, there is no evidence that there was any market in the investment. Given the loss that had been suffered and the large part of the scheme owed by the estate, it seems unlikely that there would have been a market. So I also remain of the view that IRP is responsible for the loss the estate has suffered.

## **fair compensation**

Had IRP not recommended the BCBA EIS I think it likely that Mr G would have accepted its original recommendation. And the executors accept that recommendation was suitable. So, to put things right, Financial Services Advice and Support Limited should put Mr G's estate in the position which it would be, had all the money been put in the Octopus investment.

To do this, Financial Services Advice and Support Limited should compare the return an additional £135,000 investment in the Octopus scheme would have paid to any return received from the BCBA EIS. It should pay the difference to Mr G's estate.

The representative of Mr G's estate has confirmed that the BCBA EIS did not pay any return to the estate. He has also confirmed that the Octopus investment has made a partial pay out of its return, with a further payment to follow in the future.

So Financial Services Advice and Support Limited should now pay Mr G's estate the payout it would have received so far from the Octopus investment had an additional £135,000 been put into it, plus interest at 8% simple from the date that payout would have been made.

Financial Services Advice and Support Limited should also undertake to pay Mr G's estate any further amount that would have been paid had an additional £135,000 been put into the Octopus investment, at the time any further payment is made from the Octopus investment.

The representative of Mr G's estate has confirmed that the estate has made a £10,800 tax saving from the BCBA EIS i.e. that £10,800 less IHT was paid as a result of the BCBA EIS investment being made. So £10,800 should be taken from the payment due now, before any interest is added.

I remain of the view that it should be assumed that CGT deferral benefit from both investments was equal. Both investments had the same tax treatment, so would have deferred the CGT that Mr G owed. So no allowance needs to be made for any CGT "saving".

### **my final decision**

For the reasons given, I uphold the complaint. Financial Services Advice and Support Limited should calculate and pay compensation as described above.

Under the rules of the Financial Ombudsman Service, I'm required to ask the executors of Mr G's estate to accept or reject my decision before 30 December 2015.

John Pattinson  
**ombudsman**