DRN-4535675

The complaint

Mr and Mrs H complain they were given unsuitable advice to invest in Enterprise Investment Schemes ("EIS") by St. James's Place Wealth Management Plc ("SJP").

What happened

In 2013 Mr and Mrs H met with their SJP adviser to discuss the upcoming sale of a property, and how they might mitigate any capital gains tax ("CGT") arising from that sale. The adviser recommended they use investments in EIS to mitigate the tax payable. The property was sold in November 2014, and they contacted the adviser to move forward with the investment in early 2015. They were advised to invest just over £110,000 across two EIS portfolios, provided by a third-party company.

By 2021, their portfolios had lost around 75% of their value and Mr and Mrs H complained about the advice. Mr and Mrs H said, in summary:

- The adviser told them it was a "lower risk EIS" so they weren't expecting to lose so much.
- They weren't aware that the EIS would invest in companies that had yet to trade and had no track record of operating.
- They didn't receive the suitability letter sent in 2015.
- Given their ages, and Mr H's health, the investments were unsuitable for their circumstances.
- They felt SJP ought to have done more to work with the EIS portfolio provider to prevent losses.

SJP didn't uphold the complaint, explaining that they thought the advice was suitable as it met Mr and Mrs H's need for income tax, CGT and inheritance tax ("IHT") mitigation. In particular they detailed how much income tax relief and loss relief they thought Mr and Mrs H did or could receive as a result of the investment. However, SJP did offer £250 for the time taken to reply to the complaint. Mr and Mrs H argued that the income and loss tax relief were unavailable to them, which the adviser ought to have been aware of, due to their low incomes. As they remained unhappy with the replies from SJP, Mr and Mrs H asked our service to look into their complaint.

An investigator at our service considered the advice and found that it was suitable. He said that the various documents from 2015 explained the risks to the investment and that Mr and Mrs H had the capacity to take the amount of risk involved here. Mr and Mrs H disagreed, saying that their income and wealth figures had been recorded incorrectly and were significantly less than those set out by the investigator. They also disputed SJP's records of when the meetings took place and who was in attendance at them. They explained that they felt misled by the adviser as they were told the investment was eco-friendly in nature, and this turned out not to be the case.

The investigator said that an eco-friendly EIS would have carried the same risk level and wasn't persuaded to change his opinion. As Mr and Mr H disagreed, the complaint was passed to me for a decision. I issued a provisional decision as follows.

"My provisional decision

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

As SJP were giving advice in 2013 and 2015, they had certain obligations towards Mr and Mrs H. This included making a suitable recommendation, based on Mr and Mrs H's circumstances, objectives, investment experience and attitude to risk. The information supplied by SJP about their recommendation needed to be clear fair and not misleading in order for Mr and Mrs H to make an informed decision.

The conversations between SJP and Mr and Mrs H regarding EIS began in 2013 when they spoke to their adviser about how they'd be able to mitigate CGT. The couple had a pre-existing relationship with their SJP adviser, so in 2013 the adviser was already somewhat familiar with their circumstances, including investment experience and attitude to risk.

There's minimal documentation from 2013, but I do have the fact find completed by the adviser in 2015. This shows that Mr and Mrs H were 82 and 71 respectively, with a joint annual income of £52,000. They held investments in ISAs, share portfolios and bonds. In the suitability letter in 2015 the adviser noted that the rental property was sold for around £240,000, and that Mr and Mrs H told him the CGT payable would be around £20,000.

Mr and Mrs H have disputed the level of income recorded in the fact find, explaining that their income was too low to benefit from the income tax relief available from investing in the EIS portfolios. They've said the recorded income of £52,000 was inflated at around twice their income, and that in reality they paid barely any income tax jointly – and have provided their tax returns from 2014/15 to support this. The minimal income tax they paid was also supported by recollections provided by the adviser during the course of the complaint – he said:

"I also understood that the benefit of Income Tax reclaim was not going to be a huge benefit as they did not pay much Income [tax]"

Based on this, I'm persuaded its likely their income wasn't as high as set out in the fact find, and that the income tax benefits associated with EIS wouldn't have been beneficial to Mr and Mrs H. This means they likely wouldn't have qualified for loss relief either.

Though they had some experience investing prior to 2013 and 2015, they hadn't held any type of venture capital scheme like an EIS, or any other type of higher risk investment. Prior to 2015 their attitude to risk was recorded as 'medium' – the middle of the five options that SJP used as risk categories. As the adviser had a pre-existing relationship with the couple, there's not a great deal of detail about how their attitude to risk was decided upon in the 2015 paperwork. In the fact find the adviser noted the following about it, which was noted in context of EIS:

"ATR is medium and is unchanged"

However, the suitability letter contradicts this and says:

"You confirmed you are an Upper-Medium Risk investor on our risk spectrum…

Although your stated attitude to risk for this investment is Upper Medium this would appear to differ from your previous ATR based on your investment experience. We discussed this in detail and you have confirmed the reason for the change in ATR is because you appreciated that for your funds to have the opportunity for growth a greater risk was required."

I don't think the suitability letter is correct about the reason for the increase in risk level, as it focuses on the growth opportunities, rather than the tax benefits which everyone agrees is the driving reason for Mr and Mrs H investing in the EIS portfolios. So, I don't find that section of the suitability letter particularly persuasive, as it doesn't give the correct reasons for the change to the risk level.

Its not unheard of that an investor would agree to increase the risk that they are prepared to take in order to benefit from something they wouldn't otherwise receive, for instance tax reliefs, as was the case here. However, I'd expect that any decision to increase the level of risk in this way should be made on the basis of clear, fair and not misleading information. This is especially when the increase in attitude to risk results in an investment into a product that is widely considered to involve significant risk – as is the case with EIS. So, I've considered whether Mr and Mrs H were in a position to make a fully informed decision here, by carefully looking at the way the investment and the risks involved were described. Having done so, I've concluded that the information was presented in a misleading way, for the following reasons:

- *In 2013, following the first discussion about CGT mitigation, the adviser wrote to Mr and Mrs H to summarise the discussion about EIS. We only have the first page of this letter, and it says:*

  "Further to our recent meetings below I provide a breakdown as to the potential advantages of using an EIS scheme to help you realise the cash value of your rental properties for yourselves together with mitigating the CGT and inheritance tax (over 2 years)… I would recommend a lower risk EIS as the savings in CGT, IHT and income tax are what you are trying to achieve."

  Although we only have one page of this letter, given the first line states the adviser was only going to talk about the potential advantages of the EIS, I find it likely that it didn't go on to talk about any downsides - including the risks involved. I don't think it's fair and reasonable to not give a balanced view of this type of investment given its complexity and risk level.

  I'm also concerned by the way the investment was described – specifically the use of the phrase "lower risk". EIS generally involve a significant amount of risk and are more complex than the everyday investments that Mr and Mrs H had experience in previously. I consider describing one as "lower risk" without the context of the wider environment – or the downsides of that type of investment - is misleading to investors who are unfamiliar with this type of less mainstream investment.

- *SJP categorises EIS as an 'upper-medium' level of risk on their risk scale – which is only one step up from medium. Naturally this risk category would have resonated with Mr and Mrs H, as it includes the name of the attitude they already held, of medium. It suggests it's simply the higher end of the amount of risk they were already taking. However, I don't think that categorisation adequately conveys the different style of investment that an EIS was, compared to the sorts of investments they'd previously made.*

SJP sets out its definitions of risk levels and the types of assets these involve, in their Guide to Understanding Risk document. In the definitions of 'high risk', it says:

"you are comfortable with a portfolio that may be highly concentrated and contain high risk and specialist investments, and accept that there may be sharp falls in the value of your investments".

On an everyday reading of this phrase by someone familiar with EIS, this would seem the obvious description for a portfolio containing a substantial EIS style investment, as in the case of Mr and Mrs H. I note that the definition of 'upper-medium' makes no reference to specialised investments or investment in unquoted companies. So, I don't think the risk level referred to, was clear enough to convey the risks involved.

- *In the fact find, the adviser noted:*

  "Their ATRs were discussed and the clients clearly understood that there is no guarantee of growth but their funds would have the opportunity"

  I don't consider this to go far enough to set out the risk of loss. The phrase "no guarantee of growth but [there would be] opportunity" suggests a positive outlook on the success of the investment to at least maintain Mr and Mrs H's capital. Whereas in reality, not only is there "no guarantee of growth" with an EIS, but there's a considerable risk that investors can lose money due to the type of companies being invested in, as they tend to be small, untested companies.

- *I've also considered the suitability letter and can see the first mention of risk in that letter said:*

  "This is a Limited Life EIS which reduces the risk of the investment".

  That the first mention of risk in this letter is an attempt to diminish the risks that the EIS poses, is not a fair way of positioning the information – it gives a more positive outlook to the situation and immediately puts the reader in the mind frame that this is less risky.

  A limited life EIS is one with an exit strategy – so one where there are plans in place to successfully allow withdrawals from the investment. SJP has confirmed this isn't a correct description of the EIS sold here, so it's clearly misleading. Although the letter goes on to set out that there is a higher risk profile here, I don't think the statements about the risks would have had as much impact as they otherwise might have, due to the initial positioning of it involving lower risk.

- *The suitability letter also mentions liquidity risks involved – but again I don't think it talks about these in a clear, fair and not misleading way. For instance, it says:*

  "the funds will potentially be out of your estate, with accessibility, for the foreseeable future…

  We discussed how the funds for this investment will invest in unlisted companies and due to the restrictions imposed on the secondary market; the sale of the investment may be delayed…

  Investments made… are in unquoted companies, which are not as liquid as companies on the London Stock Exchange. You should be prepared to leave your *money invested for at least three years from the date of investment or start of trade, whichever is later. We will not be able to arrange liquidity from your investment during the three year period and the total elapsed time between sending your application in and the earliest targeted exit point is likely to be around four years.*

Overall, this suggests there will be liquidity after three to four years – though there are difficulties mentioned, altogether it gives the impression that accessing the money will be possible. However, that is rarely the case with this type of investment. When read altogether I'm satisfied it suggests there will be an amount left in the investment, which will be accessible – rather than explaining that if there is any value to the investment, there might (or will), be problems accessing it. Those two ways of phrasing the information covey a very different picture of the potential liquidity of the investment.

- *Along with the suitability letter, SJP sent an appendix setting out the reasons for recommending this particular EIS. This said, on the first page:*

  "An EIS is a high-risk investment. Investors' capital is at risk and they should understand the risks outlined in detail below…

  [This] EIS targets capital preservation by investing in companies that are considered capable of delivering predictable returns."

  There are four lines of text in between those two statements. Though the first sets out the high-risk nature of the investment, this is immediately contradicted by saying that the companies chosen are "considered capable of delivering predictable returns". I consider that a person who has only previously invested in mainstream investments, would be reassured by the latter sentence. Essentially, it negates the risk warning, and makes it seem like a lower risk, more predictable investment, which it wasn't.

I can see the EIS declaration, which Mr and Mrs H signed, did state the level of risk involved here as:

"investing in smaller companies represents a much higher risk than investing in larger, well established companied listed on, say, the FTSE All Share Index… the fact that EIS companies are not listed on an exchange means they are inherently illiquid, and you may be unable to sell them at the point you wish to… the high risk nature of EIS means you could get back less than was originally invested. While tax reliefs exist to limit any such loss, they remain only suitable for clients who can afford to lose money."

As I've set out above, Mr and Mrs H were not going to benefit from loss relief because of the fact they weren't going to claim income tax relief. So the main tax relief that would limit any loss was the CGT and IHT mitigation.

Given the volume of statements I've detailed that set out this investment as being lower risk, which I'm satisfied negate the higher-risk nature of this investment, I think the declaration was outweighed by the overall presentation of the risk by the adviser. I think Mr and Mrs H would naturally have relied on the various other information they were given, to inform their understanding of the risk involved here. They had no experience in this type of investment and so would have been heavily reliant on the information provided by the adviser who they trusted due to the pre-existing relationship.

I'm persuaded its likely Mr and Mrs H would have dismissed the declaration and its warnings as something that was simply a general warning. This is especially because the declaration *was generic and didn't relate to the specific EIS they'd been advised to invest in. So compared with the specific information about the particular EIS that they'd been provided with by their trusted adviser, I think it's reasonable that they'd have placed more reliance on the latter rather than the warnings in the declaration.*

I understand that some of the risks involved EIS are set out in the key features document produced by the EIS portfolio provider. When considering what was discussed about risk here, I'm more inclined to concentrate on the documents written by the adviser directly as these are designed to summarise and reflect the discussions held between the parties.

For the reasons set out above, I'm satisfied the decision to increase the risk they were taking was made on the basis of unclear, unfair and misleading information about the risks involved. So, I've considered what they'd have done differently had they been given clear fair and not misleading information and to do this I've weighed up the tax benefits against the risk involved.

As mentioned above, I've found that they wouldn't have qualified for income tax or loss relief, so this would have lessened the potential benefit of this arrangement. There's no evidence that SJP ever clearly and deliberately weighed the benefits of investing and mitigating tax with all of its risks, against the cost of simply paying what was owed, and having the peace of mind that their investment wasn't in something that was riskier than they had the tolerance for. I'll explain further.

None of the paperwork clearly set out the monetary benefits of the EIS for CHT and IHT in detail, other than the suitability letter stating that Mr and Mrs H had told the adviser they anticipated a CGT bill in the region of £20,000. When asked by our service, SJP has said the IHT savings due to this investment to Mr and Mrs H's estate, would have been roughly £44,000. So, the options were to either:

- *Pay around £20,000 in CGT in 2015 and keep £90,000 to save or invest. They could potentially mitigate the IHT their estate would pay in other ways such as gifting, or simply be more comfortable having their estate not benefit from the reduction in IHT; or*
- *Put £110,000 in the EIS to delay and potentially avoid paying £20,000 CGT. Their estate could potentially benefit by paying £44,000 less IHT. However, the risk involved would be significant and they could lose most or even all of their investment.*

I can't imagine that Mr and Mrs H would have risked losing much or all of the £110,000, even for the IHT benefits, had they truly understood the risk involved. I'm satisfied that they didn't have the attitude towards risk to take the level of risk involved here, and instead I think they would have simply paid the tax.

So, I'm persuaded that SJP should put Mr and Mrs H as close to the position they'd be in now, had the investment not been made. I've set out below how the return on the investment ought to be calculated, assuming that Mr and Mrs H would have instead invested this money at a level of risk they were comfortable with.

I consider it reasonable that Mr and Mrs H shouldn't have had to pay for advice that I've found to be unsuitable. I can see from the application form that a fee was paid for this advice, and I think that ought to be refunded, with interest (as set out below). This is particularly because I know they've now instructed new advisers and have had to pay those advisers to help with this situation.

SJP has offered £250 for the inconvenience caused by how long it took them to reply to the complaint. For completeness, I think that offer is fair."

I then set out how SJP should calculate the amount Mr and Mrs H's money would be worth now, if they'd invested differently, based on the return from the FTSE UK Private Investors Income Total Return Index.

Both SJP and Mr and Mrs H confirmed they accepted my provisional findings.

What I've decided – and why

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

Having done so, in light of the acceptance from the parties, I've reached the same conclusions as in my provisional decision, for the same reasons, and make them final.

Fair compensation

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

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

What must SJP do?

To compensate Mr and Mrs H fairly, SJP must:

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

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

- Repay the adviser's fees together with simple interest at 8% a year, from the date the fees were paid to the date of the settlement. If the above comparison shows that no compensation is payable, the difference between the *actual value* and the *fair value* can be offset against the fees with interest.

- Pay £250 for the inconvenience caused by the late reply to the complaint.

Income tax may be payable on any interest awarded.

Portfolio name	Status	Benchmark	From ("start date")	To ("end date")	Additional interest
EIS Portfolios	Some liquid/some illiquid	FTSE UK Private Investors Income Total Return Index	Date of investment	Date of my final decision	8% simple per year from final decision to settlement (if not settled within 28 days of the business receiving the

					complainant's acceptance)

Actual value

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

If at the end date any asset 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 Mr and Mrs H agree to SJP taking ownership of the illiquid assets, if it wishes to. If it is not possible for SJP to take ownership, then it may request an undertaking from Mr and Mrs H that they repay to SJP any amount they may receive from the portfolio in future.

Fair value

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

Any withdrawal from the EIS should be deducted from the fair value calculation at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. If there is a large number of regular payments, to keep calculations simpler, I'll accept if SJP totals all those payments and deducts that figure at the end to determine the fair value instead of deducting periodically.

I don't believe Mr and Mrs H received any tax rebates as a result of this investment – but if they did, those should be treated in the same manner as withdrawals for the purpose of this calculation.

Ongoing product fees

If the EIS Portfolios only continue to exist because of illiquid assets, there may be fees payable for continuing to keep the portfolio. If there are fees, then in order for the EIS Portfolios to be closed and further fees that are charged to be prevented, those assets need to be removed. I've set out above how this might be achieved by SJP taking over the illiquid assets, or this is something that Mr and Mrs H can discuss with the provider directly. But I don't know how long that will take.

Third parties are involved and we don't have the power to tell them what to do. If SJP is unable to purchase the illiquid assets, to provide certainty to all parties I think it's fair that it pays Mr and Mrs H 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 EIS Portfolios to be closed.

Why is this remedy suitable?

I have decided on this method of compensation because:

- Mr and Mrs H's investment aim for other investments taken out prior to the advice in 2015 was capital growth and they were willing to accept some investment risk.

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

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

My final decision

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

St. James's Place Wealth Management Plc should provide details of its calculation to Mr and Mrs H in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H and Mrs H to accept or reject my decision before 31 January 2024.

Katie Haywood
Ombudsman