complaint

Mr A has complained that an investment in a Carbon Trading Limited Liability Partnership scheme (CTP) was mis-sold to him by Archer Bramley Limited.

background

The complaint was investigated by one of our adjudicators who concluded that it should be upheld. Briefly, she said that Mr A would not have invested in the CTP if Archer Bramley had adequately explained its risks.

Archer Bramley did not respond to the adjudicator's conclusions, and so the adjudicator referred the matter to me.

I issued a provisional decision in which I concluded that the CTP carried a higher level of risk and the business's recommendation to Mr A to invest nearly £250,000 entirely funded by borrowings was not suitable for him.

Archer Bramley's representative responded to dispute my provisional findings. It also newly raised some jurisdiction issues. In summary it said:

- The CTP could be a 'trading partnership' and not a collective investment scheme and hence outside our jurisdiction.
- The complaint was not in relation to investment advice but tax advice only. The provision of tax advice is not a regulated activity and therefore the complaint is outside our jurisdiction.
- Even if it is the case that the complaint is one we can consider, the investment was suitable to Mr A's stated risk profile. The documents provided to Mr A stated that the investment was high risk and there is no evidence that he queried it at the time.

Mr A's representative accepted my provisional decision. It later told us that Mr A had already received tax relief of about £180,000 from HMRC.

I issued a second provisional decision to address the points raised by Archer Bramley's representative and to take into account that Mr A had actually received some tax relief from the HMRC.

In summary, I said:

- It can be seen from the available documentation that another entity was responsible for the day-to-day management of the partnerships. And there was no other evidence to indicate that Mr A had day to day control over the management of the CTP. So the CTP in which Mr A invested is a collective investment scheme and hence we can consider the complaint.

- It is evident from the documentation at the time of advice that Archer Bramley was advising Mr A about making an investment, which had tax advantage. I was of the view that the recommendation was made on the basis that CTP would give Mr A an opportunity to make money whilst at the same time provide tax relief. I was satisfied that the business provided investment advice and as such we can consider this complaint.

- As regards the suitability, I said that the business had not shown on what basis it concluded that Mr A's attitude to investment risk was 'high'. I considered that the CTP carried a high level of risk and the advice to Mr A to borrow nearly £250,000 to invest in it exacerbated the risk. Based on available information I was not persuaded that the recommendation was suitable to Mr A given his circumstances and previous investment experience.

Archer Bramley's representative responded to dispute my provisional decision. It continued to maintain that Mr A only received tax advice and not investment advice. It further said that it was not fair or reasonable to require Archer Bramley to provide an undertaking to compensate Mr A for any tax demands or penalties which may arise from HMRC in the future. It said this would impose an onerous and on-going burden.

The adjudicator wrote to Archer Bramley's representative pointing out that as I have already explained, given the circumstances, the proposed approach to compensation is fair and reasonable to both parties. However he suggested that if Archer Bramley wished to put forward an alternative redress proposal, I would consider it before I reach my final conclusions. Archer Bramley's representative did not respond.

Mr A's representative responded to agree with my provisional conclusions.

Whilst the new submissions were being considered by me, Archer Bramley went into liquidation.

However, as I understand it, the business still exists. So I continued to consider Mr A's complaint against the business, which I believe is the right thing to do in the circumstances of this specific case.

Mr A's representative is aware of Archer Bramley's position and it has continued to request that I give my final decision on the case.

I issued a decision in March 2015 specifically addressing the jurisdiction issues raised. I remained of the view that Mr A's complaint is one we can consider and invited both parties to make any final submissions before I decide on the merits of the complaint.

The liquidators of Archer Bramley and Mr A's representative confirmed that they have no further submissions to make.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

I remain of the view that the complaint is one we can consider for the reasons that I had already set out. I also remain of the view that Mr A's complaint should succeed.

The business has not reasonably shown on what basis it concluded that Mr A's attitude to risk was 'high', as stated in its suitability letter. It has provided us with a 'financial planning needs and analysis' document but this was completed two years before this investment. The business also provided us an undated handwritten note showing particulars of Mr A's financial circumstances suggesting that this note was the updated information at the time it

advised Mr A to invest in the CTP. However there is no clear evidence as to when this was completed and whether Mr A had sight of this.

Nevertheless, the documents indicate that Mr A was aged about 50 at the time of advice, and married, with dependent children. He worked in the retail industry. In addition to an investment property, he had some money in an ISA, and was a home owner with a mortgage. It appears that his investible assets broadly comprised about £200,000 in the bank, £80,000 in other investments. He had about £300,000 in a SIPP invested mainly in property. He also had an investment property valued at about £420,000 with a mortgage of about £300,000. There is no indication that he had any prior exposure to higher risk investments such as the CTP.

Mr A's representative says that Mr A has confirmed that he had never previously engaged 'in any investment of this type' and that his knowledge was limited to the SIPP set up for the property purchase, and some ISAs'. Based on what I have seen, that broadly appears to be the case.

Indeed, when the business forwarded to him the details of how the CTP operated, he told the business in his email of April 2005: "*I have tried to understand this little spreadsheet but failed to do spectacularly*".

So, I am not persuaded from the available information that Mr A could reasonably described as 'high' risk investor or that he was sufficiently experienced to understand the working of the CTP.

On the other hand, the CTP was in a new, effectively untested, business area with the potential to lose substantial sums of money. It carried valuation risk, liquidity risk and being an UCIS, there was lack of FCA regulation. The investment was highly geared by additional borrowings within the partnership. As I understand it, this loan was subsequently paid off but in effect the partners had to give up most of their rights within the partnership as a result. Then there was the risk that the tax benefits may not be realised.

In addition, the money Mr A brought into CTP was itself by way of personal loans arranged by the business. This further increased the leverage risk to Mr A and it does not appear from the available information that the implications of increased risk posed by the borrowings were discussed by the adviser with Mr A.

Also, as I noted earlier, it does not appear that Mr A had any previous experience of investing in UCIS or partnerships of this nature which may have alerted him to risks associated with the investment, including the uncertainty of HMRC approval.

Whilst the offer document refers to the risk factors they are not adequately highlighted in the suitability letter which I consider it should have, given the high risk nature of the scheme.

In any case, Mr A was receiving advice from the business so he was entitled to rely on that advice. Therefore I do not agree that providing information memorandum or risk warnings automatically absolved the adviser from his responsibility to give suitable advice to Mr A.

In summary, I consider that the business has not shown Mr A could reasonably be classified as 'high' risk investor. Based on available information I am not persuaded that

a high risk investment like the CTP was suitable to his circumstances. I therefore remain of the view that the complaint should be upheld.

Mr A's representative has said that but for the Archer Bramley's recommendation Mr A would not have invested in the CTP, and I agree.

Mr A had no prior experience of CTP and it was the business that introduced and recommended the CTP as suitable for Mr A. Further, it was the business that arranged the bridging loan to Mr A so he could invest into CTP. I consider that but for business's recommendation, given his circumstances, Mr A would more likely have taken steps to meet his tax liability than invest in the CTP that had high risk of losing the capital

fair compensation

In assessing what would be fair compensation, my aim is to put the consumer as far as possible in the position he would have been in if he had not been inappropriately advised by the firm. With that in mind, I have considered the following factors.

(i) Mr A's own funds

As I understand it, Mr A did not invest any of his own funds into the investment.

(ii) Mr A's personal loan

Mr A took two personal loans totalling about £250,000 to fund his investment. I consider that but for the business's advice, Mr A would not have invested in the CTP. So it is fair and reasonable that, in principle, the business should repay any outstanding balance on the loan he took with the knowledge and assistance of the business. It should also refund any fees and capital repayments to date made by Mr A in respect of the loans.

(iii) interest on the personal loan

I have considered whether the interest paid by Mr A on his loans should be reimbursed by the business.

In this instance, it is the case that Mr A borrowed £250,000 to invest into the partnership. On the other hand, it appears that he received a total tax relief of about £185,000. If he had not invested in the partnerships, it is most likely he would have had to pay this amount or thereabouts to HMRC at the time. As he did not use his money to fund the partnerships, in effect, he was able to save a cash outflow to the extent of this amount. This cash outflow would have come from his assets or he may have borrowed to pay his tax.

This in turn meant that Mr A is either able to obtain some sort of return from his investible assets (which he would have otherwise used to pay the tax) or save interest on any loan he would have been required to take to pay the tax. It is difficult to know now exactly what the return or interest would have been on the tax saving over time compared to the interest he paid on the loan.

In the circumstances, I consider it simple and fair to ignore the return / interest on both sides *to the extent* the loan is offset by tax relief received. Any interest Mr A paid in relation to the excess should be reimbursed to him.

(iv) interest amount already reimbursed by the business

I note that the business reimbursed some interest paid by Mr A on his loan. So it is entitled to deduct this payment from the compensation amount.

(v) current value of Mr A's investment

The current value of Mr A's investment is effectively the current net value of his partnership interests.

As regards the loan taken by the partnership, Mr A's representative says that the partners sold 51% of their holding to another entity, which Mr A's representative says was a subsidiary of the lender. It appears that, in return, the partnership loan was written off. Mr A's representative says that the remaining 49% retained by Mr A has no intrinsic value. On the other hand, I have seen submissions that appear to suggest that the partnership acquired 49% shareholding in the other entity and in return had its debt written off, but the entity failed soon after. Either way, it appears that the partnership loan has been written off.

As regards the underlying investments, it seems there is a dispute as to what these are actually made of (see below), and in any case, it appears that the investments are currently illiquid.

Overall, it does not appear that Mr A's remaining holding in the partnership, however held, currently has any intrinsic value.

Therefore, for the purposes of calculating Mr A's loss to date, the current value of the investment should be assumed to be nil.

(vi) potential future liabilities and benefits from the partnership

I understand that a partner's liability (and benefits) ceases from the point when the partner leaves the partnership, but in addition, the Finance Act 2004 introduced measures that resulted in an exit charge being a possibility when an individual leaves a partnership.

Ideally therefore, the parties could establish from the partnerships the extent of any overall partnership indebtedness that would be attributable to Mr A, should he choose to retire now from the partnership, which the firm should make good. However, it seems that there are several issues in this case that could make such a calculation difficult. For example:

- As I understand it, HMRC has filed criminal charges against certain directors of the Managing partner, and some others. I have also seen submissions that a steering committee of the investors (into the partnership) could – following the outcome of the criminal case – file a second, civil case against the defendants. However Mr A's representative say that, should a civil case ensue, it might not be concluded for several years.

  Given this, it is clearly not possible for me to know now with any reasonable degree of certainty whether the partnership would be in a position to resume its business and / or whether the investors would be able get any return out of the partnership in future.

- Mr A's representative also says that HMRC could regard the sale of 51% partnership rights as capital gain and there could be potential tax liabilities arising out of it. Again, there is uncertainty as to whether this would happen.

Overall, it is possible that, in future, Mr A could obtain some benefits by way of some return from the partnerships. But he could also incur some additional liabilities. It is not at all clear what the amounts involved would be. Having said that, I cannot rule out the possibility that none of this could ever materialise, and indeed this appears more likely, based on current information available to me.

Our role is to help settle individual disputes between consumers and businesses providing financial services – fairly, reasonably, quickly and informally. Determining fair compensation is not an exact science. What I am aiming to do is to arrive at a fair and reasonable outcome that would put the consumer, as far as possible, in the position he would have been in if he had not been inappropriately advised by the firm.

In this instance, I consider it reasonable to assume, given the circumstances of the case as I see it, that Mr A is unlikely to receive significant benefit or suffer substantial liability from the investment in future. Therefore I have decided not to make any allowance with regard to potential future liabilities and returns in arriving at what I consider to be fair compensation.

(vii) tax relief

As I consider that Mr A would not have invested in the partnerships but for the business's advice, it follows that he would not have also received this tax relief / tax credit.

The current position is that Mr A was able to get partial tax relief and as I understand it, has not as yet repaid this amount to HMRC.

On the other hand, I acknowledge Mr A's representative's submission about the likelihood of HMRC clawing back some or all of the tax relief resulting in a financial loss in future to Mr A. I also note that HMRC has already not allowed some tax relief he had claimed.

In the circumstances and after careful consideration, I consider that a fair and reasonable approach in this case is as follows:

1. Archer Bramley should carry out the initial loss calculation as I set out below. Mr A should provide the business with all necessary documentation in order for it to be able to carry out the calculation.

2. If the calculation produces a loss to date (which I consider likely) it should pay that amount to Mr A now. If the calculation produces a gain to Mr A, then that amount should be deducted from the total fair compensation eventually payable.

3. Archer Bramley should provide an undertaking to Mr A (in accordance with what I set out in more detail in my 'final decision' section below) to compensate him if HMRC reclaims the tax relief in full or in part.

my final decision

For the reasons I have given, my final decision is to uphold Mr A's complaint. I consider that the full fair compensation – which is made of initial loss and prospective loss – should be calculated as follows:

Initial loss:

Archer Bramley should calculate 'E' or 'F' where:

A = Loan taken by Mr A *less* the tax relief received.

B = Interest paid by the consumer on (A) from the date of loan to date.

Mr A took two loans which he settled at two different times. It should be assumed that (A) was part of the loan with higher interest at the outset. That means any return on tax savings is broadly offset against the interest on the loan that had lower interest rate. I consider that this not only keeps things simple but also fair.

The interest rate subsequent to the point when the loan was merged into Mr A's mortgage should be the interest he paid on his mortgage amount.

C = any fees paid by Mr A in connection with the loans.

D = interest reimbursed by the business to Mr A as explained in section (iv) of 'fair compensation' section.

If A + B + C - D is positive, this represents the financial loss suffered by the consumer to date. Archer Bramley Limited should pay that amount to Mr A. I will refer to this amount as 'E'.

Archer Bramley Limited should also pay simple interest on 'E' at 8% per year from the date of this decision if 'E' is not paid within 28 days of the business being notified of the acceptance.

Please note that 'E' is subject to the maximum award as I have set out below.

If A + B + C - D is negative, this means Mr A has made a financial gain to date. In that case no payment is due from Archer Bramley Limited now. I will refer to this gain as 'F'. This amount should be deducted from the total fair compensation eventually payable.

Prospective loss:

Archer Bramley Limited should provide an undertaking to Mr A to compensate him for any

future loss that arises from repayment of the tax relief. The scope of that undertaking should be as follows:

1. If HMRC demands a repayment of the tax relief in question or issues a 'Notice to Pay' to Mr A and he makes the relevant payment, at that point Archer Bramley should pay the amount of the repayment to Mr A less any amount under 'F' above.

2. The above payment should include any interest and penalties that are charged by HMRC on the tax relief.

If the business does not pay this amount within 28 days of it being notified of Mr A's payment to HMRC with adequate evidence of it, then it should also pay interest on that amount, at 8% simple per year. The interest will be payable from the date it was notified of the payment to the date of settlement. Income tax may be payable on this interest.

Archer Bramley Limited shall provide a draft of the undertaking to Mr A for consideration and agreement within a reasonable timescale. Once finalised, the undertaking would form a contract between Archer Bramley Limited and Mr A and the ombudsman service will not be privy to that contract.

Mr A should note that the ombudsman service will not be in a position to resolve any future disputes that may arise from Archer Bramley Limited's failure to comply with the undertaking. Mr A may have to initiate private legal proceedings to enforce the undertaking if need be.

In reaching his decision, Mr A and his representative should also bear in mind that Archer Bramley is currently in liquidation.

In return, Mr A should give an undertaking that:

- If at a later date, following HMRC settlement, he receives any refund from HMRC and if that sum together with the compensation already paid by the business exceeds the full fair compensation, then he will repay the excess to Archer Bramley.

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £100,000 (where the complaint was referred to this service before 1 January 2012, as in this case).

The total compensation payable, including any future payment under the undertaking but excluding interest, is subject to this maximum limit on compensation.

If I consider that fair compensation exceeds £100,000, I may recommend the business to pay the balance.

determination and award: For the reasons given, I uphold Mr A's complaint about Archer Bramley Limited. The fair compensation should be calculated as set out above.

My decision is that Archer Bramley Limited should pay Mr A the amount produced by that calculation – up to a maximum of £100,000 plus any interest as set out.

recommendation: If the amount produced by this calculation exceeds £100,000, I recommend that Archer Bramley Limited pays Mr A the balance plus any interest as set out. This recommendation is not part of my determination or award. It does not bind Archer Bramley Limited. 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. And as I mentioned earlier, Mr A and his representative should bear in mind that Archer Bramley is currently in liquidation.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr A to accept or reject my decision before 8 June 2015.

Raj Varadarajan
ombudsman