

## **The complaint**

Mrs W complains that Regentia Lifestyle Planning Limited (previously Gilruth Associates) provided unsuitable advice to invest in an Enterprise Investment Scheme (EIS).

## **What happened**

In February 2015 Mrs W was advised to invest £160,000 in the Octopus EIS (tranche 18) to mitigate a CGT liability arising from the sale of a property in 2013. The application is dated 8 February 2015 and Octopus sent a welcome letter to her on 10 February 2015.

In September 2021 Mrs W complained to Octopus about its management of the EIS investments as a result of the drop in value of her investment. She thereafter contacted her usual adviser, Mr B, who wasn't employed by Regentia asking for the suitability letter for the Octopus EIS she said he had advised her about.

Mr B informed her that he hadn't provided the advice and that this had instead been provided by Mr S of Regentia and that it would post her a copy of the suitability report. Regentia sent her a copy of a suitability report dated 9 March 2015 with Mr S being the named adviser.

Mrs W then complained to Mr B's firm on the basis she held him responsible for the advice regardless of the suitability letter which she said hadn't previously been provided to her and stating she hadn't met Mr S.

Regentia provided a final response to that letter in which it made the following points:

- Mr B's firm didn't offer EIS at the time and it having been identified that an EIS might be suitable for Mrs W's circumstances there was a joint meeting between her and both Mr B and Mr S.
- Mr S provided the client agreement and terms of business on 8 February 2015.
- The two advisers combined the information they held in order to save her repeating all the initial fact find information.
- The advice was suitable for Mrs W's risk tolerance and her objectives.
- Following the investment Mrs W received tax rebates totalling almost £50,000 and the capital loss can be carried forward to offset future capital gains.

Mrs W referred her complaint to our service and one of our investigators considered it and thought it should be upheld. The investigator awarded redress on the basis that Regentia compare the investment in the Octopus EIS with our usual benchmark for someone who was prepared to take a small amount of risk and also that Regentia pay £200 for the distress and inconvenience caused to Mrs W.

Regentia didn't agree with the opinion of the investigator. It said that the investment in the

EIS was a tax mitigation exercise which Mrs W received the benefit of. It argued that a person's usual attitude to risk may be different accordingly so that whilst an EIS may be above a person's everyday attitude to risk this doesn't make it unsuitable. It said that there was an immediate tax advantage which would have offset the risk and that Mrs W's usual attitude to risk of moderately adventurous isn't a low risk rating so it doesn't seem unreasonable an EIS was recommended and that just because the scheme failed doesn't mean the advice was unsuitable.

Because Regentia didn't agree with the investigator the matter was referred to me for review and decision. I issued a provisional decision also upholding the complaint the findings from which are set out below.

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

*In doing so, I've taken into account relevant law and regulations; relevant regulators' rules guidance and standards; codes of practice; and, where appropriate, what I consider was good industry practice at the relevant time. But I think it's important to note that while I take all those factors into account, in line with our rules, I'm primarily deciding what I consider to be fair and reasonable in all the circumstances of the case.*

*It is for me to decide what weight to give evidence a party relies on and where there is a dispute about the facts my findings are made on a balance of probabilities – what I think is more likely than not.*

*The purpose of my decision isn't to address every point raised and if I don't refer to something it isn't because I've ignored it but because I'm satisfied I don't need to do so to reach what I think is the right outcome. Our rules allow me to do this, and it simply reflects the informal nature of this service as a free alternative to the courts.*

*Having considered the available evidence and arguments of the parties I agree with the conclusion of the investigator that the Octopus EIS wasn't suitable for Mrs W, for the reasons I set out below.*

*It isn't clear what happened around the time Mrs W invested in the Octopus EIS. She has said that she has only ever received advice from her usual adviser, Mr B, and that she only met with him in relation to the EIS investment. He has said that his firm weren't able to recommend the Octopus EIS which is why there was a joint meeting with an adviser from Regentia who was able to advise about the EIS. Regentia repeated this version of events in its final response.*

*Mr B would have needed to have concluded Mrs W potentially needed to invest in an EIS in the first place in order to identify that he needed an adviser from Regentia to provide regulated advice about this. So, I think it's more likely, than not, there was some discussion between Mr B and Mrs W about her investing in an EIS. I note in this regard that the final response indicates as much, in that it states that Mrs W's circumstances at the time indicated that an EIS might be suitable and this is why Mr B introduced her to Mr S.*

*However, I am not considering a complaint against Mr B and his firm and just because I am of the view he will have made reference to investing an EIS doesn't mean that Regentia isn't responsible for ensuring the Octopus EIS was suitable for Mrs W. I am satisfied that it is responsible for this, given it accepts as much and the documents provided support this.*

*Those documents are limited but include the application for the Octopus EIS, identifying Regentia as the advising firm with Mr S named as the adviser for the investment. The date of*

*the agreement is 8 February 2015 and the cheque for the investment of £160,000 is also dated 8 February 2015. I have also seen a first draft of a suitability report from Regentia to Mrs W dated 6 March 2015 - as well as a version of this with 'feedback from compliance' and also a final version of the report dated 9 March 2015 incorporating some of the feedback.*

*I would generally give more weight to documents completed around the time of the advice than to what a person said - especially where the events in question are several years ago. However, in this case I am not satisfied that the suitability report provides reliable evidence of what was discussed with Mrs W.*

*I say this primarily because the amount Mrs W invested (£160,000) isn't the amount referred to in either the draft or final versions of the suitability report, which recommends that a total of £176,540 be invested. The suitability report states that this would mean a net investment of £160,000 after deduction of charges.*

*I am mindful that on Regentia's case Mrs W was advised at a meeting on 8 February 2015 with the application for the Octopus EIS being completed that day with Octopus acknowledging receipt on 10 February 2015. So, this isn't a case where there was more than one meeting with things being changed as a result of further discussions.*

*On the evidence provided by Regentia everything took place on 8 February 2015 and if Mrs W had been advised to invest £176,504 but rejected that advice on the basis she only wanted to invest £160,000 I can see no reason why this isn't referred to in the suitability report. The fact no mention is made of this in my view makes it more likely than not that there was never any discussion about investing £176,504 and the only figure ever referred to when she was advised to invest was the £160,000 she actually invested.*

*This casts significant doubt on the contents of the suitability report in my view and because of this I place little if any weight in what the suitability report states where this conflicts with what Mrs W has said.*

*There is no dispute that Mrs W had a capital gain from the sale of a property and she hasn't argued that she wasn't interested in trying to mitigate that liability - which the suitability report identifies as her objective. An EIS does provide CGT deferral relief, allowing for a CGT gain to be deferred until the EIS shares are sold at some point in the future - at which point it might be possible to avoid the liability by selling shares in tranches over more than one year and using the annual CGT allowance.*

*I am not satisfied that Mrs W was given clear, fair, and not misleading information about the Octopus EIS such that she understood how it worked. There are no meeting notes or fact find for the meeting on 8 February 2015 so the only documentary evidence available that indicates what she might have been told at the time of advice is the draft suitability report.*

*I have explained why I don't place any weight on the contents of the draft suitability report when its contents conflict with what Mrs W has said but that doesn't mean that everything within it should be disregarded. With that in mind it is of note that whilst it does refer to the recommendation being made because Mrs W can defer her CGT liability for the 2013 property sale, it then immediately afterwards states:*

*"There will be no capital gains tax to pay on disposal provided the shares are held for three years and income tax relief is granted and not withdrawn on the shares in question."*

*This is misleading, as the CGT liability arising from the sale of the house was still payable after three years if Mrs W sold her shares in the EIS qualifying companies Octopus EIS invested in, as I have already referred to. The report provided no information about this and*

*there is no evidence the adviser clarified with Mrs W that in order for her not to have to pay the CGT liability she would have to dispose of her investment in tranches over a number of years utilising her CGT allowance.*

*In the circumstances I am not satisfied that Mrs W was given clear, fair, and not misleading information about how the Octopus EIS worked and I am not satisfied she would have invested in it if she had been given such information, especially given the charges of £15,000 that she paid in order to make the investment.*

*Moreover, I am not persuaded that it was a suitable recommendation in any event, as I am not satisfied that it was in accordance with her risk appetite or risk capacity.*

*The suitability report identifies Mrs W as a 'moderately adventurous' investor. This is described in the report as someone preferring to invest in "more specialised stock-market linked investments in return for increased capital growth". There is nothing to show how this risk appetite for Mrs W was arrived at and she has made clear in the course of the complaint that she wasn't a moderately adventurous investor. There is also nothing to suggest that the existing investments shown in the suitability report, consisting of ISAs and an investment bond, were invested in more 'specialised' stock-market linked investments.*

*In the circumstances I accept what Mrs W has said about not being a 'moderately adventurous' investor and am not satisfied that Regentia correctly identified her risk appetite. I note it argues that the immediate tax benefit of the investment offset the risk and in its final response to the complaint it said that she had received tax rebates totalling nearly £50,000 following her investment.*

*Mrs W did have an immediate benefit as a result of the Income Tax benefit that investment in an EIS provides. However, she is only identified as a basic rate taxpayer, so this benefit was very limited and wasn't an objective in any case. In short, the argument that she benefitted from tax rebates of nearly £50,000 following investment is wrong in my view. I am not satisfied that the tax benefits did substantially offset the risks of the Octopus EIS investment as Regentia has suggested.*

*Even if I had been satisfied that Mrs W was willing to invest in specialised stock-market linked investments, EIS companies are unquoted. So, a moderately adventurous risk appetite on the face of it doesn't necessarily mean that she was willing to invest in an EIS or that the recommendation to invest £160,000 in the Octopus EIS was suitable advice.*

*I am also not satisfied that it was suitable for Mrs W when her capacity for loss is considered. In this regard, I note that the draft suitability report states:*

*"You have sufficient assets outside of your portfolio and an investment time horizon far enough in the future to withstand small to medium losses without any detrimental effect to your living standards. Your capacity to loss threshold would be no more than 20%"*

*The final suitability report also makes reference to Mrs W being able to stand small to medium losses without detrimentally affecting her living standards - although without reference to such losses being no more than 20%. The Octopus EIS is a high risk investment whereby the whole amount invested is at risk and as such I am not satisfied it was suitable for Mrs W's stated capacity for loss.*

*Moreover, even if I had accepted that investment in the Octopus EIS was in accordance with Mrs W's risk appetite and risk capacity I am not persuade she should have been advised to invest £160,000 into it.*

*In short I am not satisfied that advising Mrs W to put £160,000 all at risk to defer a £40,000 CGT liability where £15,000 of the amount invested was immediately lost to pay the charges in any event was suitable advice.*

*In summary I am upholding this complaint because:*

- *Mrs W wasn't given clear, fair, and not misleading information about the investment in the Octopus EIS and if she had been she wouldn't have invested in it.*
- *She was wrongly categorised as having a moderately adventurous risk appetite.*
- *Even if she did have a moderately adventurous risk appetite this doesn't support the recommendation to invest in a high risk EIS.*
- *The investment wasn't in accordance with Mrs W's risk capacity.*
- *Regardless of any other argument, advising Mrs W to invest £160,000 in a high risk investment - putting the whole amount at risk - to defer a CGT liability of £40,000 when £15,000 was immediately lost in charges wasn't suitable advice."*

I gave both parties the opportunity of responding and providing any further information or arguments they wanted me to consider before making my final decision. Mrs W responded and queried the figure for the fees I had referred to. Regentia responded and said it had carried out a calculation based on the redress methodology set out in my provisional decision. It asked for our confirmation that we were happy for the offer to be made to Mrs W.

### **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.

Neither party has provided any information that would lead me to change the findings in my provisional decision which, for the avoidance of doubt, form part of the findings in this final decision. In short I uphold this complaint for the following reasons:

- Mrs W wasn't provided with clear, fair, and not misleading information about the Octopus EIS.
- Mrs W wouldn't have invested in the Octopus EIS if she had been provided with clear, fair, and not misleading information.
- Mrs W's risk appetite wasn't 'moderately adventurous' as identified by the adviser.
- Even if Mrs W had been a moderately adventurous investor this didn't necessarily indicate that the Octopus EIS was suitable for her risk appetite
- The investment wasn't suitable based on Mrs W's capacity for loss.
- Even if it was accepted that the Octopus EIS was suitable for Mrs W's risk appetite and risk capacity she shouldn't have been advised to invest in it given she lost £15,000 to charges immediately and was only deferring a CGT liability of £40,000.

I have considered Mrs W query about the fees. I am satisfied on the information I have seen that the figure I referred to in my provisional decision is right but in any event the redress I have awarded means that the calculation Regentia have to carry out is based on the total

amount she invested of £160,000 so the level of fees isn't important.

I note that Regentia asked for confirmation that we were happy with the offer it had calculated based on the award set out in my provisional decision. It is for Regentia to calculate the redress based on the methodology I have set out. I am therefore not going to comment on the figure it has put forward.

## Putting things right

### Fair compensation

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

I think Mrs W would have invested differently. I note that she says that if she hadn't invested in the Octopus EIS she would have retained some of her money in savings and invested some in a low risk investment. However, as it is not possible to say *precisely* what she would have done, I am satisfied that what I have set out below is fair and reasonable given Mrs W's circumstances at the time.

### What should Regentia do?

To compensate Mrs W fairly, Regentia must:

- Compare the performance of Mrs W's investment with that of the benchmark shown below and pay the difference between the actual value of the investment and the fair value. If the actual value is greater than the fair value no compensation will be payable.
- Regentia should also add any interest set out below to the compensation payable.

Income tax may be payable on any interest awarded.

Investment name	Status	Benchmark	From ("start date")	To ("end date")
Octopus EIS	Still exists but illiquid	For half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	Date of investment	Date of settlement

### Actual value

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

If at the end date the investment 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 Mrs W agrees to Regentia taking ownership of the investment if it wishes to. If it is not possible for Regentia to take ownership, then it may request an undertaking from Mrs W - to be drawn up at Regentia's expense - that she repays to Regentia any amount she may receive from the investment in future.

Regentia may add to the actual value any tax reliefs Mrs W received by virtue of making the investment and can ask her for evidence in respect of such reliefs.

### ***Fair value***

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

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, Regentia should use the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

Any withdrawal, income or other distributions paid out of the Octopus EIS to Mrs W should be deducted from the fair value calculation from the date it was actually paid so it ceases to accrue any return in the calculation from that point on.

### **Why is this remedy suitable?**

I have chosen this method of compensation because:

- Mrs W wanted Capital growth with a small risk to her capital.
- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to her capital.
- 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.
- I consider that Mrs W's risk profile was in between, in the sense that she was prepared to take a small level of risk to attain her investment objectives. So, the 50/50 combination would reasonably put Mrs W into that position. It does not mean that Mrs W would have invested 50% of her money in a fixed rate bond and 50% in some kind of index tracker fund. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mrs W could have obtained from investments suited to her objective and risk attitude.

I am also satisfied that Mrs W suffered distress and inconvenience as a result of the significant losses she suffered as a result of unsuitable advice and Regentia should pay £200 for this.

### **My final decision**

I uphold this complaint for the reasons I have set out above. Regentia Lifestyle Planning Limited has to calculate redress as I have set out above and pay this to Mrs W.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs W to accept or reject my decision before 26 July 2024.

Philip Gibbons  
**Ombudsman**