

The complaint

Mr E has a self-invested personal pension (SIPP) with James Hay Administration Company Ltd (James Hay). Mr E used monies transferred into his James Hay SIPP to purchase shares in Elysian Fuels. Mr E complains, with the help of a representative, that James Hay failed to undertake due diligence in respect of the Elysian Fuels shares, particularly in relation to the structure of the investment and the value of the shares. Mr E says that James Hay's own risk management protocols and internal controls relating to the purchase of unlisted shares were breached. And, that James Hay's actions breached the regulator's Principles for Businesses in numerous ways and failed to comply with its legal and regulatory duties, HM Revenue & Customs (HMRC) requirements and to treat Mr E fairly.

What happened

Mr E's SIPP application form recorded that he was an independent financial adviser (IFA) and had annual earnings of around £100,000. The adviser listed on the form was the business he worked for at the time.

Mr E's James Hay SIPP was subsequently established and a 'Selftrade Execution Only' account was set up.

A share certificate was issued on 16 May 2013 confirming Mr E was the registered holder of 110,000 Elysian Fuels shares.

Mr E signed the paperwork to complete the sale of the Elysian Fuels shares he held in his personal capacity to his James Hay SIPP on 20 May 2013. Amongst other things, Mr E completed a statement for Self-Certified Sophisticated Investors. As part of this Mr E was asked to explain how he became aware of the proposed investment and to confirm he understood that as an unregulated investment Elysian Fuels could not be marketed to retail clients in the UK. In response to this, Mr E said:

"I was introduced to the share investment by my accountant and solicitor, as an IFA, I fully understand that this is an unregulated investment and cannot be marketed to retail clients in the UK."

The stock transfer form was also dated 20 May 2013.

According to the transaction history of the SIPP, monies were paid out for the Elysian Fuels shares that are the subject of this complaint on 25 June 2013. Whereas a letter sent to Mr E's adviser indicates that the transaction took place on 13 June 2013. That transaction is the subject of a separate complaint.

A subsequent share certificate was issued on 8 November 2013 confirming Mr E was the registered holder of an additional 160,000 Elysian Fuel shares.

Mr E signed the paperwork to complete the sale of those Elysian Fuels shares to his SIPP on 14 November 2013. As part of this Mr E signed a declaration which, amongst other things, said:

“You should not invest in unquoted shares if you do not understand or are not comfortable with the extent of your exposure to the risks. You should carefully consider whether such investments are suitable for you in light of your experience, objectives, risk appetite, financial resources and other relevant circumstances.”

And

“I accept that if the investment proceeds on the basis of the information provided by me in this questionnaire and such information is not true, accurate and complete, that this may result in the imposition of an unauthorised payment charge, unauthorised payment surcharge, scheme sanction charge or other tax charge or penalty on my SIPP by HM Revenue & Customs.”

The purchase of these shares is the transaction that is the subject of this complaint.

This arrangement was later challenged by HMRC as an unauthorised payment out of the SIPP and Mr E has ended up being found to owe an unauthorised payment surcharge and interest to HMRC in relation to the transaction that is the subject of this complaint.

Background to this complaint

Unhappy with what had happened Mr E complained to James Hay. James Hay issued its final response to his complaint but Mr E remained unhappy and referred his complaint to this service.

One of our investigators looked into Mr E's complaint and concluded that it should not be upheld.

James Hay responded making further submissions, it said:

- Mr E was an IFA and a director of an advisory firm which advised numerous clients to invest in Elysian Fuels and sell these shares to their SIPPs.
- He had held several positions in the financial advice sector and held a variety of controlled functions including CF1 Director, Investment Adviser and Compliance Oversight.
- He advised clients in relation to Elysian Fuels.
- Mr E, given his background and professional expertise, would most likely or at least should have fully understood how the investment in Elysian Fuels operated and understood the associated risks on the basis that he provided advice to others in a professional capacity about this investment.
- He would have had a good understanding of pension legislation and the circumstances that would make a payment unauthorised, including the tax implications of this.
- Mr E should have been reasonably aware that the release of his pension monies could have been regarded as an 'unauthorised payment' because:
 - The share purchase had been mainly financed by way of a limited recourse loan (which he did not disclose to James Hay at the time); and
 - He then sold the shares to his SIPP for £1 per share which released his pension funds before he had reached the minimum age of 55 when he could legitimately withdraw funds from his pension.

- If James Hay had refused to accept Mr E's application, he was sufficiently experienced and knowledgeable to have found a way to make the transaction happen anyway. And, would likely be in the same position as he now is.

Mr E disagreed and his representatives made further submissions on his behalf. Briefly, they said:

- The extent of James Hay's role:
 - James Hay's role was key, most IFAs who recommended secondary planning recommended James Hay, advisers placed reliance on the due diligence James Hay had completed over a number of years and its assurances that the Elysian Fuels investment was permitted in its schemes.
 - James Hay provided credibility to the Elysian Fuels scheme and ensured the process was as straight forward as possible for advisers. It is reasonable to put faith in professional entities that have controls and regulatory requirements to protect the interests of the customer.
 - These transactions wouldn't have gone ahead but for James Hay's involvement and that is a view shared by each of the advisers and investors who dealt with James Hay and Elysian Fuels.
 - James Hay notified IFAs, such as the firm Mr E worked for, that it had completed the necessary due diligence to authorise releases of Elysian Fuels, giving advisers confidence to recommend the Elysian Fuels investment to their clients.
 - Each Elysian Fuels investor had two regulated entities confirm that the Elysian Fuels shares were worth £1.
 - Mr E was treated as an advised client for the purposes of authorising the Elysian Fuels transaction. And, James Hay continues to treat him as such.
- The Financial Ombudsman Service is, in other cases, saying James Hay failed to carry out sufficient checks on the Elysian Fuels scheme. And saying James Hay should compensate other consumers, any reduction in this liability would be of financial benefit to James Hay.
- Mr E wasn't treated any differently to other investors and James Hay's processes weren't amended in light of his background and he shouldn't now be treated differently to other investors.
- Mr E reasonably relied on the due diligence James Hay had undertaken, that it confirmed that the investment was acceptable to be held in a pension and on the fact that two regulated entities confirmed that the value of the Elysian Fuels stock was £1.
- Mr E didn't undertake any due diligence when making the decision to invest personally and wasn't required to do so. He wasn't aware that the shares weren't worth £1 and categorically wouldn't have proceeded with the transaction had he known.
- It wouldn't have made sense for Mr E to have proceeded had he known the transaction would be viewed as an unauthorised payment, he wouldn't have proceeded if he had known this to be the case.
- James Hay is a large and reputable SIPP operator. It held itself out as having carried out due diligence on, and as being expert on, the Elysian Fuels scheme. Mr E was entitled to trust it.
- It is also wrong to say Mr E would have gone ahead with the Elysian Fuels scheme investment, or something similar, if James Hay had refused his application. He only made the investment because James Hay approved it.

Because agreement couldn't be reached, this case was passed to me for review. I sent my provisional decision to the parties to this complaint, explaining why I didn't think it should be

upheld. I said that I would consider anything either party wanted to add. Mr E disagreed with my decision and made further submissions, in summary, he said:

- He wasn't aware that the sale of the Elysian Fuels shares to his SIPP would be considered an unauthorised payment.
- James Hay's due diligence and involvement in the scheme over a number of years provided him with comfort that this was a bona fide transaction.
- It wouldn't make sense for him to intentionally take part in a transaction that would result in significant tax penalties, in his clients losing substantial sums of money and potentially put his business and livelihood at risk.
- Mr E was in a unique position as an adviser that recommended his clients invest in the Elysian Fuels scheme and we've found that given his specific background he ought to have been aware of the tax risks involved. However, it has been found that James Hay undertook insufficient due diligence when permitting transactions in Elysian Fuels shares within its SIPPs. And, given James Hay's role in connection with the Elysian Fuels scheme to advisers and that Mr E wouldn't have been aware of this scheme but for its involvement, it isn't fair and reasonable that he rather than James Hay should suffer these losses.

James Hay didn't make any further submissions at this stage.

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, my findings remain as set out in my provisional decision. I've largely repeated these below.

As I explained in my provisional decision, the parties to this complaint have provided detailed submissions to support their position and I'm grateful to them for taking the time to do so. I've considered these submissions in their entirety. However, I trust that they will not take the fact that my decision focuses on what I consider to be the central issues as a discourtesy. The purpose of this decision is not to address every point raised in detail, but to set out my findings, on what I consider to be the *main points*, and reasons for reaching them.

Where the evidence is incomplete, inconclusive, or contradictory (as some of it is here), I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances.

The Elysian Fuels scheme in this case was an unusual arrangement. It involved buying shares largely with a limited recourse loan and then selling those shares to a SIPP so that funds were paid out of the pension scheme to the investor. This is, as I've said, an unusual arrangement and on closer inspection HMRC was not happy with it. It found that the payment was an unauthorised payment and imposed a surcharge and interest.

There are numerous examples of investment schemes that are set up to make use of tax concessions which push, with varying amounts of aggression, at the boundaries of the purpose of the concession. Sometimes people invest in those schemes without understanding there is a risk that HMRC might challenge the scheme. Sometimes people invest in those schemes understanding and accepting the risk HMRC might challenge the scheme. And over recent years, as seen for example with film partnerships, HMRC has been more and more active in challenging the schemes it thinks are tax avoidance schemes.

We've been provided with redacted correspondence from HMRC in which it said in relation to the Elysian Fuels scheme that:

"Elysian Fuels is an undisclosed mass marketed multi use tax avoidance scheme which HMRC considers one of the main purposes of the arrangements was to secure a tax advantage. You have entered into a scheme where the tax benefit exceeds the potential return from the underlying business plan. You did not pay a cash contribution of the purported £1 per share and the loan finance was provided on uncommercial terms in addition the loan finance was never in your control being paid directly to the special purpose vehicle. The funding of the whole scheme is of a circular nature and the funds were never available for the underlying purpose.

The promoter of the scheme has recently confirmed that no formal valuation of the shares was carried out and did not consider any third parties had sufficient information or access to documentation to carry out independent valuations. There was a valuation of the underlying business assets which were owned by another entity but neither the Elysian Fuels LLP nor the Special Purpose Vehicle funding company owned any tangible assets. This is a complex valuation issue and HMRC's initial view is the shares had no value when the transaction took place."

If an investor chooses to invest in a scheme understanding and accepting the risk HMRC might challenge their scheme and might impose tax consequences upon them, is it fair and reasonable for such an investor to complain later if HMRC does challenge and does impose those consequences? That is, in effect, the issue here because, like the investigator, I consider that Mr E, because of his own professional expertise, will have realised the Elysian Fuels scheme was unusual and was at risk of challenge from HMRC. Mr E was an IFA at the time of the transaction and the business he worked for had advised a number of its clients to invest in Elysian Fuels. I consider that Mr E will have had a good understanding of taxation matters, and of the possibility of HMRC questioning a scheme involving unusual features such as the Elysian Fuels scheme in this case.

Mr E will have done a number of things when he was weighing up the risks involved. And that will have, or should have, included his own assessment (made in conjunction with his financial advisers if they were advising him on the matter and not just arranging it on his instructions) of the Elysian Fuels scheme as a whole – not just the share price – set against his professional understanding of taxation matters. I accept that he may also have taken into account the fact that James Hay was prepared to allow members of its SIPP's to invest in the Elysian Fuels scheme (or previous versions of it). But does that mean that the risk Mr E knew, or should have known, he was taking should fairly and reasonably transfer to James Hay? In my view it does not.

James Hay was not Mr E's adviser. It did not advise him that taking those risks was suitable for him. Mr E made that decision for himself, or in conjunction with his advisers. But in my view, in determining his complaint against James Hay only, that was a decision Mr E was qualified and experienced to reasonably make for himself (either by himself or in conjunction with his financial advisers), and it is fair and reasonable that he bears the consequences of that decision.

I understand that Mr E feels strongly that it is not fair and reasonable that he bears the consequences of the transaction that is the subject of this complaint going ahead and not James Hay, given its role in the transaction. However, I remain of the view that, in the unusual circumstances of Mr E's case, even if James Hay did not carry out adequate due diligence on the Elysian Fuels scheme (and I make no finding on that point), it is not fair and reasonable to require it to pay compensation to Mr E. And so, in the particular circumstances of his case, I do not uphold Mr E's complaint.

My final decision

My final decision is that I do not uphold Mr E's complaint against James Hay Administration Company Ltd and I make no award.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr E to accept or reject my decision before 20 October 2023.

Nicola Curnow
Ombudsman