

The complaint

Mr B complains that he was given unsuitable investment advice by Aspect Financial Solutions Ltd (“AFS”). He’s represented in bringing his complaint, but for ease of reading, I’ll refer just to Mr B.

What happened

In 2013 AFS recommended Mr B invest £249,000 (made up of a cash sum of £39,840 along with a limited recourse loan for the balance) in an unregulated investment, Elysian Fuels 16 LLP, which involved the purchase of unlisted shares in an Elysian Fuels PLC. £240,000 of Elysian stock was then sold to Mr B’s company as part of a secondary tax planning exercise to reduce his tax bill on the repayment of his directors loan account.

Elysian Fuels subsequently failed, and the tax planning exercise was deemed a tax avoidance scheme by HM Revenue and Customs (“HMRC”), incurring tax liabilities and penalties for Mr B, along with the loss of the cash element of the investment.

In 2020 Mr B complained to AFS that the recommendation had been unsuitable, saying, in brief, that it failed to take proper account of his circumstances and attitude to risk. Further, the adviser had failed to explain the investment and its associated risks.

AFS didn’t uphold the complaint. It was satisfied the advice had been suitable for Mr B. It felt he’d accepted the high level of risk, beyond his normal level, for this particular investment and this had been made clear in the suitability letter issued to him. Further, he’d been certified as a high-net-worth investor by his accountants – the party which had principally been driving the proposition – and the investment had represented less than 10% of his net assets.

The complaint was referred to this service and our investigator felt it should be upheld, primarily on the basis that the Elysian investment as a very high-risk, unregulated scheme and Mr B was not an experienced or high-risk investor. The investigator didn’t feel that the provision of information to Mr B regarding the level of risk absolved AFS of the responsibility to ensure the investment was suitable.

AFS didn’t accept this, so as no agreement could be reached the matter was referred to me to review.

I issued a provisional decision, in which I explained that I’d reached a different conclusion to the investigator. I didn’t think the complaint should be upheld. I said, in part:

“The background set out above represents only a brief summary of the complaint, submissions and arguments made by both parties. I’ve limited it deliberately as I think that, while a great deal of information and comment has been provided so far, which I’ve read and considered in its entirety, the crux of the matter is actually very straightforward. Did AFS act incorrectly or unfairly in advising Mr B such that it should now be held responsible for any loss he incurred because of his participation in the scheme?”

I've used the word 'scheme' here because I think it's important to recognise that this was a not a simple investment recommendation made in isolation. I don't think either Mr B or AFS would disagree that all the parties involved – including Mr B's accountants – were well aware that this went beyond solely making a cash investment of just under £40,000 with the potential for growth. Rather, the primary purpose of the scheme was to reduce Mr B's tax liability.

The suitability letter issued to Mr B by AFS in July 2013 said "You may recall we met and discussed ways in which you may extract cash from the company in a tax efficient manner. We then discussed in more detail the Elysian option and complete (sic) the application process". The letter went on to discuss the potential for the Elysian fuel business itself to be a success, although there were no guarantees, but that in any event "by securing the 'unencumbered' shares and transferring them to your company this in effect has the result of reducing your tax bill on the repayment of your Directors Loan Account".

This type of arrangement was clearly high risk and I accept that AFS had a responsibility to ensure the investment element was suitable for Mr B. In this respect, the fact find completed by AFS categorised his attitude to investment risk as 'realistic to aggressive' and noted his approach to investment as "experienced private investor with good investment knowledge". However, the suitability letter said, "We established that your attitude to risk could realistically be described as Highly Speculative for this particular investment".

In terms of existing investments held by Mr B the detail in the fact find was limited, suggesting only about £40,000 held in National Savings, ISAs and 'other' investments. But I don't think this information in isolation is likely to have accurately reflected Mr B's financial circumstances and likely investment experience. His accountant had certified him as a high-net worth client, and it was noted that he had significant business property assets worth around £500,000 and an investment property worth £250,000.

Some of this was mortgaged, but I think that in itself tells us something about Mr B's circumstances and likely propensity for risk. The fact that, at the age of 67 with it documented that he had retirement planned at only two years away, Mr B was comfortable taking on new borrowing that would go well into that planned retirement suggests to me he was accepting of risk. The fact find shows he'd just taken a new five-year interest-only mortgage on his residential property, which would run well into his proposed retirement.

Although none of this tells us definitively what Mr B understood about the investment, either in terms of how it would work and how risky it was, I nevertheless think it paints a picture of an experienced business owner who was likely to be open to novel approaches to financial planning. I accept that the advice process could have been better documented. A clearer rationale could have been provided and potential alternatives noted. But a failure to fully document the process doesn't in itself render the advice unsuitable.

A consideration of the wider circumstances, which I think must reasonably include noting the involvement of Mr B's accountants and the fact that it seems they were primarily driving the entire scheme, leads me to provisionally conclude that it wouldn't be fair and reasonable to hold AFS responsible for the losses incurred by Mr B.

Clear warnings were provided to him by AFS of the high-risk nature of the investment and while I accept that doing so doesn't negate the need to ensure the suitability of an investment, on balance I don't think a recommendation to commit just under £40,000, which represented less than 10% of Mr B's overall assets, was unsuitable. Not when set against the wider context of Mr B's financial experience and circumstances."

Mr B didn't accept my provisional decision. He said, in brief:

- In respect of the residential mortgage, this wasn't such a clear indicator of him having a higher propensity for risk as I'd indicated. This was primarily because, contrary to what had been noted in the fact find, he'd actually had no intention of retiring within two years of the advice. Rather, he enjoyed working and his business was running successfully, so the new mortgage had been taken with the intention it would be repaid using dividends from the business, which would clearly involve him continuing to work for at least the five-year term of the mortgage.
- It was not the case that his accountants had been the driving force behind the investment. They'd never previously suggested anything similar, and it had instead been the adviser who drove the proposal. The accountants had not provided any sort of tax assessment or recommendation. The adviser had been involved from the start, presented the proposal to Mr B, completed all the relevant documentation, and drove the process.

AFS also provided some additional comments, emphasising several its previous points around the information provided in the suitability letter issued to Mr B and the accountants' involvement, all of which I've considered in my further review of the matter.

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, I've not been persuaded to depart from the conclusion I reached in my provisional decision. I still think the complaint should not be upheld for the reasons given in my provisional decision.

I've noted the further information provided about Mr B's circumstances, specifically his retirement plans, but I don't feel this clarification leads to a conclusion that he was more risk averse. On the contrary, I think it shows that Mr B was still very much engaged with his business and, as such, likely to be open to ways of improving his tax planning, even where potential plans involved an increased element of risk. He was clearly comfortable taking an interest-only mortgage running into his 70s, the repayment of which was dependent upon the continued efficiency and success of his business.

But that said, I should stress that my view that the complaint shouldn't be upheld isn't based solely upon conclusions drawn from a consideration of specifics of Mr B's financial circumstances, such as the mortgage situation.

Having carefully reviewed all the documentary evidence, I remain satisfied, on balance, that the implementation of the 'scheme', as I referred to it in my provisional decision, was something Mr B was closely involved with in conjunction with other parties – his accountants and the adviser. And, given his business background, he's likely to have understood and been willing to accept the risks involved, which as noted were very clearly set out for him in the suitability letter.

I note that Mr B has said that his accountants were categorically not the driving force behind the investment. But the documentary evidence, against which I must balance his recollections, indicates their involvement – for example, by way of the completion of the high-net-worth statement and summary of Mr B's assets for the investment application. And the suitability letter referenced their involvement and provision of information, which I appreciate Mr B now disputes, but which doesn't appear to have been questioned or challenged at the time.

I accept that the involvement of the accountants, to whatever degree was actually the case, wouldn't entirely absolve AFS of responsibility for the advice. But taking account of all the wider circumstances, I nevertheless find I'm unable to conclude that it would be fair and reasonable to hold AFS responsible for the losses incurred by Mr B as a result of his involvement with the scheme.

My final decision

For the reasons given, my final decision is that I don't uphold the complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 7 December 2023.

James Harris
Ombudsman