

The complaint

Mr L has a self-invested personal pension (SIPP) with James Hay Administration Company Ltd trading as James Hay Partnership. Mr L invested in an arrangement HM Revenue & Customs (HMRC) has since challenged. Mr L's complaint is that James Hay should not have allowed that investment in its SIPPs.

What happened

In 2013 Mr L applied for a SIPP with James Hay. He applied to transfer an existing SIPP with another provider to James Hay with a value of around £57,000. This was described on the application form as the crystallised value and at the time Mr L was over 55 years of age. Mr L had been drawing down payments from his fund from his existing provider which he was entitled to do.

Shortly before this Mr L bought 50,000 shares in a company which was part of an investment arrangement I will refer to as the Scheme. He bought shares at £1 each. This was funded largely by a limited recourse loan which was part of the Scheme.

Shortly after the SIPP was opened Mr L arranged for James Hay to buy the shares from him using the funds in his SIPP. James Hay paid £1 per share meaning over £50,000 was paid out of the SIPP to Mr L.

Mr L's occupation recorded on his SIPP application was independent financial adviser (IFA). Mr L had been a financial adviser for many years. He did not however act for himself in this matter. Mr L was advised on his application by another IFA at a different firm who Mr L knew personally and trusted to give him suitable advice.

Before agreeing to buy the shares James Hay required an "Unquoted Shares Questionnaire" and a "Statement of Self-Certified Sophisticated Investors" to be completed and signed by Mr L.

James Hay bought the shares on behalf of the SIPP at £1 per share meaning over £50,000 was paid out of the pension to Mr L.

This arrangement was later challenged by HMRC as an unauthorised payment out of the SIPP and, as I understand it, Mr L has been in negotiation with HMRC about the amount due and arrangements for payment.

With the help of a Claims management company (CMC) Mr L complained to James Hay that it had bought the shares without first carrying out adequate due diligence checks. It did not uphold his complaint. The CMC then referred Mr L's complaint to the Financial Ombudsman Service.

One of our investigators considered Mr L's complaint. He thought the complaint should not be upheld. He made several points including:

- Mr L is an IFA and had been for many years.
- Mr L was sufficiently experienced and knowledgeable to understand the risks he was taking and was prepared to accept the risk that HMRC might challenge the arrangement.
- In all the circumstances it would not be fair to ask James Hay to pay compensation to Mr L for the consequences of the risks he understood and was prepared to take.

Mr L's CMC does not agree with the investigator. It has made several points including:

- Although Mr L is an IFA, his main professional focus was on mortgages, protection, and insurance. He never advised on anything like the Scheme which was a very niche and esoteric arrangement. Nor had Mr L invested in anything like the Scheme in the past.
- Mr L should be treated by James Hay in the same way as it treats any other client regardless of his professional background. Mr L paid James Hay to do a job and it should be held accountable.
- In an unrelated case against an adviser who advised a client to invest in the Scheme the ombudsman in that case found for the complainant who was a financial adviser. The ombudsman found that the Scheme was unsuitable for that complainant and accepted that he would not have understood the Scheme given its highly specialised nature. This complaint should be upheld for the same reason.
- It makes no sense to say that Mr L would have gone ahead with the Scheme if he had understood the risks especially as he was at retirement age.

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.

The parties to this complaint have provided detailed submissions and I have considered all that has been said and provided. I will not however respond to all the points that have been made, rather I will concentrate on what I consider to be the central issue in this case.

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

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 L, because of his professional knowledge and experience, will have realised the Scheme was unusual and was at risk of challenge from HMRC. Mr L may not have invested in unlisted shares before, or advised others to do so, but he was an IFA able to advise on pensions, even if he says his main focus was mortgage and protection advice, and so will have had a good understanding of relevant taxation issues.

Mr L would have had this knowledge both in general terms, even if that knowledge was not used daily, and he will have refreshed that knowledge and understanding when he started to draw down in his existing SIPP. And again when he discussed his pension arrangements with his IFA in 2013. He will have been aware of the unusual nature of the Scheme even if he did not understand the details. He will have been aware of the possibility of HMRC questioning a scheme involving unusual features such as the Scheme in this case.

Mr L 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 IFA) of the Scheme as a whole – not just the share price – set against his professional understanding of pension, investment, and taxation matters. I accept that Mr L may also have taken into account the fact that James Hay was prepared to allow members of its SIPPs to invest in the Scheme (and previous versions of it). But does that mean that the risk Mr L 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 L's adviser. It did not advise him that taking those risks was suitable for him. Mr L made that decision for himself, in conjunction with his IFA. But in my view, in determining his complaint against James Hay only, that was a decision Mr L was qualified and experienced to reasonably make and it is fair and reasonable that he bears the consequences of that decision. (Whether Mr L's IFA's advice was suitable for Mr L is a different matter and not something I can consider in relation to this complaint against James Hay.)

In my view, in the unusual circumstances of Mr L's case, even if James Hay did not carry out adequate due diligence on the Scheme (and I make no finding on that point), it is not fair and reasonable to require it to pay compensation to Mr L. And so, in the particular circumstances of his case, I do not uphold Mr L's complaint.

My final decision

I do not uphold Mr L's complaint against James Hay Administration Company Ltd.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 22 August 2023.

Philip Roberts
Ombudsman