

The complaint

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

What happened

In 2013 Mr W had an existing SIPP with James Hay. Mr W 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 Mr W bought the Scheme shares Mr W arranged for James Hay to buy the shares with funds in his SIPP. James Hay paid £1 per share meaning over £50,000 was paid out of the SIPP to Mr W.

Mr W had carried out a similar transaction before when he invested in an earlier version of the Scheme. That matter is subject to a separate complaint.

Both arrangements were later challenged by HMRC as an unauthorised payment out of the SIPP and, as I understand it, Mr W has agreed a settlement with HMRC.

With the help of a Claims Management Company (CMC), Mr W complained to James Hay that it had bought the shares in the Scheme without first carrying out adequate due diligence checks. It did not uphold his complaint. The CMC then referred his complaint to the Financial Ombudsman Service.

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

- Mr W is an IFA with his own IFA firm, and he was authorised to advise on pension transfers.
- Mr W would or should have done his own appropriate checks on the Scheme. He will have understood how it operated and the risks involved.
- As an adviser able to advise on pension transfers Mr W would have had a good understanding of pensions legislation and the circumstances that might mean a payment from a SIPP was not authorised.
- Mr W was or ought to have been aware that the Scheme might be investigated by HMRC.
- In all the circumstances it would not be fair to ask James Hay to pay compensation to Mr W for the decisions he made and was fully able to understand.

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

- Mr W was introduced to the investment by its promotor, and he thought it was a good investment with potential for good returns.
- Although Mr W is an IFA he never advised on anything like the Scheme. When advising his clients, he adopted a much more “vanilla” approach.
- In an unrelated case against an adviser who advised a client to invest in the Scheme (or one of its predecessor Schemes) the ombudsman in that case found for the complainant who was a financial adviser. The ombudsman found that the Scheme in that case 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.

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. And as mentioned, as I understand it, Mr W has reached a settlement with HMRC.

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

Mr W will have been aware of the unusual nature of the Scheme even if he did not understand all the details of it. He will have been aware of the possibility of HMRC questioning a scheme involving unusual features such as the Scheme in this case.

Mr W 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 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 W may also have taken into account the fact that James Hay was prepared to allow members of its SIPP to invest in the Scheme (and previous versions of it). But does that mean that the risk Mr W 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 W's adviser. It did not advise him that taking those risks was suitable for him. Mr W made that decision for himself. But in my view that was a decision Mr W was qualified and experienced to reasonably make and it is fair and reasonable that he bears the consequences of that decision.

In my view, in the unusual circumstances of Mr W'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 W. And so, in the particular circumstances of his case, I do not uphold Mr W's complaint.

My final decision

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

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

Philip Roberts
Ombudsman