

## **The complaint**

Mr C complained about the advice he was given by Towergate Financial (West) Limited trading as Towergate Financial ('Towergate') to make an investment in Elysian Fuels. The advice, which also involved Mr C selling the Elysian Fuels shares to a newly established self-invested personal pension ('SIPP'), has become the subject of an HMRC investigation. Mr C believes this will result in tax charges being levied against him.

## **What happened**

Mr C worked as a self-employed financial adviser for Towergate. In 2014, Mr C says he was introduced to the idea of investing in Elysian Fuels by a colleague, who was also an adviser for Towergate. At the time, Mr C had two existing personal pensions with a combined value of around £49,000.

Towergate advised Mr C to purchase 45,000 shares at £1 each in a Limited company associated with Elysian Fuels. To make the investment, Mr C paid £7,470 from his savings and took a limited recourse loan of £39,218. The loan was from a company who were associated with the promoters of the Elysian Fuels scheme, 'F'. Of the £46,688 invested, £1,688 was paid to a Limited Liability Partnership as a capital contribution to the Partnership.

At the same time Mr C was also advised to switch his two personal pensions to a new SIPP with James Hay. On 21 February 2014, James Hay confirmed receipt of funds totalling £47,560.90. Mr C's share purchase was completed on 6 March 2014, and shortly afterwards, James Hay received instruction to transfer the 45,000 shares to the SIPP. In April 2014 James Hay confirmed that £45,000 had been sent to Mr C for the purchase of his shares. Mr C didn't pay any tax on this.

In the following the years the investment in Elysian Fuels ran in to trouble. This resulted in the value of the shares falling and as a consequence, it appeared Mr C no longer needed to pay back the limited recourse loan.

In 2015, Mr C was contacted by HMRC about the transfer of the shares in Elysian Fuels to his SIPP. HMRC said it considered he might not have treated the arrangements correctly for tax purposes and would require further information from him.

Mr C complained to Towergate in April 2017 as he felt he had been poorly advised. Towergate acknowledged the complaint but said it didn't hold any information – it asked Mr C to provide any documents he might have so it could consider the matter further. Mr C didn't respond and in 2020, a new complaint was submitted by a representative on his behalf. Towergate said Mr C had made his complaint too late so, Mr C referred the complaint to this Service.

Prior to the complaint being referred to our Service, HMRC indicated it may conclude the value of the Elysian shares was £0.12 when they were sold to individuals' SIPPs. As I understand it, this valuation has arisen as the result of a challenge being brought by a group of investors. However, this has not been finalised and the matter is still ongoing.

Our Investigator informed Towergate that Mr C had raised his complaint within the relevant time limits – he'd complained to Towergate in 2017, well within six years of the advice having been given. Although she noted Towergate had asked for more information, as no final response was given at the time, Mr C had made his complaint within the relevant time limits. Towergate accepted this.

The Investigator went on to uphold Mr C's complaint. She didn't think the investment in Elysian Fuels was suitable for Mr C – it was too high risk and she didn't think Mr C had the necessary experience to understand or the capacity to withstand the risks involved. She thought Towergate ought to have known that the scheme would attract attention from HMRC and that Mr C releasing money from his pension was likely to be seen as an unauthorised payment. The Investigator recommended Towergate should compare Mr C's position with the position he would've been in now but for the unsuitable advice to invest in Elysian Fuels. She also recommended Towergate should pay Mr C £400 for the trouble and upset caused. The Investigator also recommended that undertakings be drawn up to account for any tax Mr C may have to pay to HMRC in future as a result of the investment being sold to his SIPP.

Towergate didn't agree. It said Mr C was an experienced financial adviser, advising on pensions and investments, so he would've understood the investment and the level of risk associated with it. It also thought Mr C had likely done his own research into the investment arrangements before proceeding. Towergate said its adviser wouldn't have known about the future problems the investment scheme would face and said the issues had largely arisen due to misleading information provided by third parties, which it had no control over.

As no agreement could be reached, the complaint was referred to me for a final decision on 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'm upholding it for largely the same reasons as the investigator.

Towergate accepts that it advised Mr C to invest in Elysian Fuels via a geared share purchase plan. And the secondary advice was for Mr C to switch his existing pensions to a SIPP and then use those funds to purchase the shares so the shares would be held in the SIPP. So, I've considered whether that advice was suitable, taking into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. This includes the Principles for Business ('PRIN') and the Conduct of Business Sourcebook ('COBS'). And where the evidence is incomplete, inconclusive or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

#### *The applicable rules, regulations and requirements*

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of Towergate's actions here.

PRIN 2: *A firm must conduct its business with due skill, care and diligence.*

PRIN 6: *A firm must pay due regard to the interests of its customers and treat them fairly.*

*PRIN 7: A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.*

*COBS 2.1.1R: A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*

I've also considered the provisions in COBS 9, specifically COBS 9.2.1R, which sets out the obligations on firms in assessing the suitability of investments, and requires firms to obtain the necessary information regarding the consumer's knowledge and experience in the investment field relevant to the advice; their financial situation; and their investment objectives. And COBS 9.2.2R, which requires firms, among other things, to take account of a customer's preferences regarding risk taking, their risk profile and to ensure they are able financially to bear any related investment risks consistent with their investment objectives.

I've also taken account of COBS 4.12, which says that unregulated collective investment schemes (UCIS) should not be promoted to ordinary retail clients. But they can be promoted to high net worth individuals or experienced, sophisticated investors. It isn't clear whether the Elysian Fuels investment was classified as a UCIS, but it shared similar characteristics including the high-risk nature of the investment, being illiquid, subject to counter-party risk and uncertain valuation. So, I think this is a relevant consideration here and I note that James Hay required Mr C to complete a statement confirming he was a self-certified sophisticated investor in order to facilitate the investment in the SIPP. So, it seems that the parties involved were treating the investment as such.

Towergate provided documents to James Hay on 14 March 2014, which included the statement for self-certified sophisticated investors. Mr C signed the declaration to confirm he was a self-certified sophisticated investor on 10 March 2014. In doing so, he had to select which criteria he met, and he ticked the box next to the following statement:

*'I am working, or have worked in the two years prior to the date below, in a professional capacity in the private equity sector, or in the provision of finance for small and medium enterprises (please provide details)'*

Although Mr C was a financial adviser, I haven't seen any evidence to suggest he worked in private equity – he was a financial adviser providing advice to retail customers on investments, pensions and protection but he says mostly on mortgages. It also doesn't appear he provided finance for small and medium enterprises and no further details were provided, which is what the statement required. So, based on what I've seen I don't think Mr C would've met the requirements of being a self-certified sophisticated investor. Although this doesn't necessarily mean that the investment in Elysian Fuels shouldn't have been promoted to Mr C, as other exemptions can be available in law and under COBS to the promotion restriction, it seems to me that Mr C being a self-certified sophisticated investor was an important part of the process of selling the shares to his SIPP. If Towergate hadn't allowed a misleading self-certified sophisticated investor declaration to be made under its duty of care to Mr C, James Hay may not have accepted the purchase of the shares and their transfer into the SIPP.

Irrespective of the conclusions above, I'm satisfied that Towergate advised Mr C to invest in Elysian Fuels. And although there is no suitability letter, I think the advice to switch Mr C's pensions was for the sole purpose of facilitating the purchase of the Elysian Fuels shares into the new SIPP. This enabled Mr C to release £45,000 from his pensions, without paying any tax, and I think was clearly the intended result of the connected advice given to him.

Having promoted the investment to Mr C, Towergate then advised Mr C to invest in it, meaning it was subject to the requirements under COBS I've set out above to provide

suitable advice. And having considered these requirements, I don't think the investment in Elysian Fuels or the connected advice to switch his pensions to a SIPP in order to purchase the shares was suitable for Mr C. I'll explain why.

In order to demonstrate that Towergate had complied with the requirements in COBS, I would've expected the adviser to have completed a fact-find and an attitude to risk assessment and explained his advice in a suitability letter. However, none of these documents are available. In the absence of this information, there is very little for me to go on when considering whether the advice was suitable for Mr C. However, we've asked Mr C about his circumstances, investment experience and risk appetite when the advice was given and I've taken this into account.

At the time of the advice, Mr C was around 38 years old, he was married with two dependent children and had a mortgaged property. He told us that he had £50,000 savings in cash and his only previous investment experience was in Individual Savings Accounts (ISAs). Mr C had two small personal pensions with a combined value of around £49,000. Mr C says he was making contributions to one of his pensions though he doesn't recall how much.

Based on the limited information available, I don't think the investment in Elysian Fuels was suitable for Mr C. The Elysian Fuels investment was a complex, leveraged arrangement which resulted in him being invested in unlisted shares in a single unlisted company, and being exposed to significant tax risks. It was also a relatively newly formed company, and it had no track record of generating profit, so the venture was highly speculative. Although Towergate may consider Mr C only invested £7,470 of his own money, based on what I know about the geared share purchase plan, he'd still be liable to repay the loan of £39,218 at the end of the term, unless the shares increased significantly in value. So the leveraging didn't decrease Mr C's risk, it actually increased it.

Mr C didn't have any experience of investing in schemes of this nature and I don't think he had the capacity to take such a risk with his only pension funds. Towergate's advice to purchase the Elysian Fuels shares and switch them into the SIPP meant Mr C's entire pension fund was invested in a single company within a single asset class with no diversification. I think investing his entire pension in such a high-risk strategy was wholly unsuitable for him. Even though Mr C was relatively young and had time to accumulate further pension funds, I don't think that meant he could risk losing all of his pension, which was a real possibility.

The pension switches and the investment advice led to Mr C releasing £45,000 from his pension before age 55 without him paying any tax. He had paid only £7,470 to make the initial investment. Regardless of the limited recourse nature of the loan, I think there was a significant risk involved with using a loan in this way to access funds from a pension scheme. There were several risk factors that ought to have been immediately apparent to the adviser; the loss of capital, a potential tax bill; potential liability to repay the loan and costs that might have arisen as a consequence. I think Towergate should have been aware of all of this and factored it into its thinking when assessing suitability. Overall, I think Towergate ought to have known that the arrangement could attract scrutiny from HMRC. That again is why I don't think Mr C should have been advised to enter into it.

Towergate insists that as a financial adviser, Mr C would've understood the risks and accepted them. It also believes Mr C would've conducted his own research into the scheme. But there is no suitability letter available or other supporting evidence, so I don't know if or how the risks of the scheme were presented to Mr C. There's also no evidence to substantiate that Mr C did his own research into the scheme. And in the absence of this, I don't think it's reasonable to assume that he did so. I've taken into account that Mr C likely advised customers on pensions and investments, but I haven't seen any evidence to

persuade me that Mr C was familiar with or had advised on investments of this nature before or that he appreciated the specific risks associated with the transaction – Mr C hadn't invested in any similar scheme or UCIS in the past. So, I don't think it's reasonable to say that Mr C would've fully appreciated and accepted the risks of the scheme he was being advised to invest in.

Overall, I've seen nothing to persuade me that despite being a financial adviser, Mr C had the necessary degree of understanding and experience of this type of investment, which was complex and unregulated, such that he was able to make his own decision to proceed with it regardless of the advice he was given. And I don't think he was motivated to do so in any event. Nevertheless, Towergate advised Mr C to make the investment, so making Mr C aware of the risks (if in fact it did so) didn't absolve it from providing suitable advice. And as I've said above, I don't think it was suitable advice for Mr C to invest any of his pension funds in this scheme because of the high-risk nature of it and the tax risks associated with it.

I've considered whether Mr C would've gone on to invest in Elysian Fuels in any event, even if he had been given clear advice against it. While Mr C was a financial adviser, as I've said above, Mr C didn't have any experience of investing in a scheme of this nature. And while he may have understood that the scheme carried a higher risk than a regulated investment, he was risking his only pension here. So, I don't think Mr C would have acted contrary to the advice he was given if Towergate had made it clear it wasn't suitable for him and that he was exposing himself to significant risks – I don't think he could afford to take such a risk with his only pensions.

I'm also satisfied that Mr C wasn't seeking out non-standard investments - the investment in Elysian Fuels was proposed to him by the adviser, he hadn't previously been interested in investing in it. I also haven't seen evidence to demonstrate Mr C was unhappy with his existing arrangements; but if he wanted to achieve higher growth, he could've instead looked into internal fund switches instead. And if he was seeking consolidation of the two pensions he didn't need to open a SIPP, he simply could've switched one pension into the other. So, on balance, I think Mr C wouldn't have invested in Elysian Fuels if he'd been advised against it and so the switch of his existing pensions wouldn't have occurred.

Towergate may argue that Mr C has not suffered any loss here, as he is unlikely to have to repay the loan and he received £45,000 from the SIPP – Mr C says he spent some of this on home improvements but still has around £20,000 left in cash. However, I think Mr C has most likely suffered a loss as he paid £7,470 of his own money to make the investment which he is unlikely to recover as the scheme has failed. He has also lost the benefit of investment growth on his existing pensions.

Lastly, it seems likely that Mr C will be required to pay a tax charge to HMRC as a consequence of the advice he received from Towergate. In 2015, Mr C was contacted by HMRC. It advised him it was looking into his self-assessment tax return for the tax year ending April 2014. HMRC told Mr C it understood he may have transferred the shares in Elysian Fuels to another entity in return for cash without making entries on his tax return in relation to this. HMRC said it considered he might not have treated the arrangements correctly for tax purposes and would require further information from him to complete the investigation.

Mr C hasn't received further correspondence from HMRC about the matter since then. But I'm aware that HMRC's stance on the matter is being directly challenged by a number of investors, so it isn't surprising that it has paused taking action to recover tax owed at present. But as it stands, Mr C has a reasonably held expectation that HMRC will levy a significant tax demand on him once its investigation has concluded. I've seen evidence in relation to other affected customers in the same position as Mr C, who have been asked to

pay unauthorised payment charges as a result of releasing pension funds in this way. So, I think Mr C will likely be required to pay extra tax to HMRC in connection with him releasing £45,000 from his SIPP, which Towergate advised him to do.

I think it's fair that Towergate compensates Mr C for the future tax charge, as well as his other losses. I say this because I don't think Mr C would've made the investment in Elysian Fuels or switched his existing pensions but for Towergate's unsuitable advice.

### **Putting things right**

My aim is that Mr C should be put as closely as possible into the position he would probably now be in if he had been given suitable advice. I think Mr C would have remained invested in his existing personal pensions.

I consider fair redress is to calculate and compare the notional position Mr C would've been in if he had not been given the advice to switch his pensions and make the investment in Elysian Fuels with the actual position he is in now.

In calculating Mr C's actual position now, I propose that the value of the money he released from his pension is the amount to be used, with no adjustment to bring that value up to date. The reason I say this is because Mr C, rather than investing that money elsewhere, spent it on home improvements and kept the remainder in cash. Therefore, I don't think it is appropriate to bring the value of that money up to date.

### **What should Towergate do?**

Towergate should calculate the following values on the date of my final decision:

Notional position = A + B

A = Value of Mr C's two existing personal pensions if they had remained where they were.

B = Value of Mr C's initial contribution of £7,470 to Elysian Fuels, which he would have retained if he hadn't invested in the scheme.

Actual position = D + E + F

D = Value of SIPP with James Hay at the date of calculation.

- As the investment held in the pension is illiquid (meaning it cannot be readily sold on the open market), it may be difficult to find the actual value of the investment. So, I think it is reasonable to assume the investment has no current value and there is no prospect of any future return. I say this because the business failed several years ago. So it is fair to make no allowance for a current or future value. For this reason, the actual value should be assumed to be nil to arrive at fair compensation.

E = Value of any interest Mr C holds in the Limited Liability Partnership. I consider this likely to be nil and I do not think there is any reasonable prospect of his interest in it having any value in the future.

F = Value of the money released from the James Hay SIPP from the sale of the Elysian shares to the SIPP (value to be used is the amount released with no allowance for interest/growth as explained above).

If the notional position is greater than the actual position, then Mr C has suffered a loss

equal to the difference.

If there is a loss, Towergate should pay into Mr C's pension plan to increase its value by the total amount of the compensation. The amount paid should allow for the effect of charges and any available tax relief.

Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

If Towergate is unable to pay the total amount into Mr C's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore, the total amount should be reduced to notionally allow for any income tax that would otherwise have been paid.

The notional allowance should be calculated using Mr C's actual or expected marginal rate of tax at his selected retirement age – likely to be 20%. However, if Mr C would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation.

Towergate should provide details of its calculations to Mr C in a clear and simple format.

In addition to the above, Towergate should pay Mr C £400 for the trouble caused to him and the worry of having HMRC involved with the scrutiny of his pension.

### **SIPP fees**

If Towergate had given suitable advice Mr C wouldn't have the SIPP with James Hay. So, the SIPP only exists because of the investments. In order for the SIPP to be closed and further SIPP fees to be prevented, the investments need to be removed from the SIPP. However, this is unlikely to be achievable. Third parties are involved, and we don't have the power to tell them what to do.

So, if the investment can't be removed, to provide certainty to all parties, I think it's fair that Towergate should pay Mr C an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees). This should provide a reasonable period for the parties to arrange for the SIPP to be closed.

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

I've chosen this method of compensation because:

- Mr C wanted Capital growth and was willing to accept some investment risk.
- If the previous pension providers are unable to calculate a notional value, then I consider the measure below is appropriate.
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.
- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Mr C's circumstances and likely risk attitude.

## **Further information**

Any additional sum paid into the current pension should be added to the notional value calculation from the point in time when it was actually paid in.

Any withdrawals made from the current pension should be deducted from the notional value in A so they cease to accrue any return in the calculation. To keep calculations simpler, I'll accept if Towergate totals all those payments and deducts that figure at the end instead of deducting periodically.

## **Undertakings**

Towergate should undertake to pay (if necessary) any extra amount (above the tax Mr C would've been expected to pay if he had kept his existing arrangements) owed by Mr C after HMRC concludes its investigation into the sale of the Elysian Fuels shares to his SIPP. To be clear, this includes any interest applied by HMRC up to the date of my final decision.

Mr C may receive a notice of assessment from HMRC asking him to pay an amount on account before HMRC's investigations conclude. If that happens, Mr C should provide evidence of this to Towergate, and Towergate should then pay to Mr C or HMRC the amount Mr C has been asked to pay HMRC. If the amount is paid to Mr C he should undertake to pay it to HMRC.

If an amount is paid on account Mr C should provide Towergate with an undertaking to pay to it any amount of refund he receives, following the conclusion of HMRC's investigations, in the event HMRC concludes less tax is due than what was paid on account. And Towergate should undertake to pay Mr C or HMRC any additional amount due in the event that following the conclusion of HMRC's investigations, HMRC concludes Mr C needs to pay more tax than he has paid on account.

The undertakings must allow for any tax and charges that would be incurred on drawing the receipt from the pension plan. Towergate will need to meet any costs in drawing up the undertakings.



## **My final decision**

For the reasons set out above, I uphold the complaint. I consider that fair compensation should be calculated as set out above and provided to Mr C in settlement of the complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 30 December 2022.

Mr C should also be aware that by accepting my final decision, it could affect his legal rights should any liabilities arise in respect of the limited recourse loan he used to purchase the shares or otherwise. So, Mr C may want to consider getting independent legal advice before deciding whether to accept my final decision.

Hannah Wise  
**Ombudsman**