

The complaint

Ms F complains, with the help of a representative, that James Hay Administration Company Ltd (James Hay) failed in its duties in the establishment of her SIPP and in permitting the purchase of Elysian Fuels shares within her newly established SIPP.

What happened

Ms F says that she was approached by an unregulated individual, Mr B, and advised to transfer her pensions to a SIPP and to invest in Elysian Fuels. She says that he made all of the arrangements, including for the financing of the original purchase of the Elysian Fuels shares in her personal capacity.

A SIPP application form signed on 13 November 2013, listed Ms F's occupation as director and her annual income as £50,000. Ms F confirmed she waived her cancellation rights.

An internal anti-money laundering check was completed by James Hay on 22 November 2013, this contains a handwritten note saying: "*need to call for nature of business*" and there is a tick next to this note. Elsewhere it's noted that Ms F confirmed she was a nursery practitioner when called about the nature of her business.

Monies were transferred from Ms F's personal pension plan and her group pension plan into her newly established SIPP in December 2013 and January 2014 respectively.

After the SIPP had been established Ms F sent James Hay instructions to purchase £112,000 Elysian Fuels shares, along with some other paperwork. Including:

- A self-certified sophisticated investor form
- An unquoted share questionnaire
- Elysian Fuels risk warnings (for an earlier tranche of Elysian Fuels shares)
- A share certificate
- A stock transfer form
- A deed of adherence

James Hay has told us that it received this correspondence on 31 March 2014.

The share certificate was for 112,000 shares and certified that Ms F was "*...the registered holder(s) of the above number of Class A Preference Shares of £1 each fully paid in Elysian Fuels No. [number of tranche of shares] subject to the Articles of Association of the Company. Given under the Securities Seal of the Company on this the 6th March 2014*".

On the self-certified sophisticated investor form Ms F confirmed that:

"I am a self-certified sophisticated investor because at least one of the following applies: ...

(b) I have made more than one investment in an unlisted company in the two years prior to the date below (please provide details of all the investments made)..."

The form was signed on 16 March 2014. In connection with the self-certified sophisticated investor form, Ms F provided evidence of investments she had made on a peer-to-peer lending platform. All of the transactions shown were placed on 5 March 2014 and amounted to a total of £60.

The unquoted share questionnaire listed the required documentation for all applications and the additional documentation required depending on the status of the company:

“ALL APPLICATIONS

- 1) *Company Prospectus or Company Brochure*
- 2) *A copy of the Memorandum and Articles of Association*
- 3) *Independent Share Valuation*
- 4) *Director's Statement*
- 5) *Shareholder's Agreement*
- 6) *Subscription Agreement (if applicable)*
- 7) *Ancillary Documentation (if applicable, such as Deed of Adherence, Stock Transfer Form, Shareholder Resolutions, Board minutes relating to the investment)*

ADDITIONAL DOCUMENTATION REQUIRED

Company trading more than 2 years old

- *Copies of last 2 years company accounts*
- *Copy of Financial Adviser recommendation if via a Financial Adviser*
- *Accountant's Letter – see below.*

Company trading less than 2 years but not a start up

- *Copies of all company accounts produced – if no company account available a copy of the Company Business Plan*
- *Copy of Financial Adviser recommendation if via a Financial Adviser*
- *Accountant's Letter – see below.*

Start up Company

- *A copy of the Company Business Plan*
- *Copy of Financial Adviser recommendation or confirmation that the individual is a Financial Adviser registered with the FCA (Direct applications are NOT accepted.)*
- *Accountant's letter – see below.”*

In line with the above in all cases the company's accountant had to reproduce and sign the following statement on the company's headed paper:

“I confirm:

1. *That the business is currently trading or has been established solely for the purpose of a legitimate commercial trading activity*
2. *That the business has to the best of my knowledge never been involved in, or has not been established for, the purpose of pension liberation*

3. *That to the best of my knowledge there is nothing about the company's business activities that could conflict with the shares being held within a SIPP*
4. *That to the best of my knowledge none of the company directors is involved in any activity that could result in either the SIPP member or James Hay Partnership being subject to an unauthorised payment tax charge under the Finance Act 2004."*

The nature of the company's business was described as:

"member of a trading partnership which provides services on the design & build of a Bioethanol Facility in the UK"

It was confirmed that there was a connection between vendor and the SIPP member, in that the vendor was the SIPP member, Ms F. Where there is such a connection/it isn't an unconnected sale, details of the valuer who will provide a valuation of the shares being purchased by the pension scheme needed to be provided. Ms F's form lists Hillier Hopkins LLP and states they are chartered accountants.

Then the form requests *"Vendor's bank details to which purchase funds should be transferred..."* Here, details of a bank account in the name of Wannops LLP, a UK based law firm, are listed.

Amongst other things, the form also confirms the class of share to be purchased as *"ordinary"*. And, that the approximate percentage of Ms F's total pension savings that the investment would represent was 97%. Much of the form appears to have been prepopulated in type with only a handful of questions answered in handwriting. The form lists a prior Elysian Fuels company, which has been corrected to the one in which Ms F invested.

The risk warning declaration also lists the prior Elysian Fuels company as opposed to the proposed investment. This form was signed on 16 March 2014.

A Hillier Hopkins LLP report dated 13 November 2013 is addressed to Future Capital Partners (FCP), the promoters of the investment. In the introductory paragraphs set out the purpose and parameters of the report:

"In accordance with your instructions, we set out below our opinion on the appropriate accounting treatments which would be afforded to entities within the "Elysian Structure". This opinion is based entirely upon our understanding of information and explanations you have given us in connection with the business and activities of the entities concerned as you have described them to us and as set out in this letter.

We understand that you have requested this letter in order to obtain a better and independent understanding of the financial and reporting effects of the activities of the entities and to obtain confirmation of the current rules. Our opinion is specific to the circumstances connected with the contracts and transactions as explained to us and described below and does not necessarily have general application.

This letter is prepared subject to the limitations set out at the end of the letter, and in accordance with our invariable practice, we accept no liability whatsoever to any person who is not our client in respect of the matters which we set out below, or otherwise, to the fullest extent permitted by law.

Where we refer to the “Elysian Structure”, this is not a term which carries meaning other than a description of the arrangements you have described to us for the funding of a project (in this case, the Elysian bio-ethanol project).”

The report, amongst other things, goes on to say:

“The Company will treat its investment in the LLP as a fixed asset investment. It is a long-term investment in an unlisted entity. As stated above, it is a high risk investment whose outcome is uncertain, but in respect of which there is no material difference in the circumstances now compared to those at the date of the investment.

Assuming that the Company reports under UK GAAP, as a fixed asset investment, UK GAAP requires that it is stated at its market value, which, in the case of an investment in a private entity with no ready market for its shares, would normally be at cost, less any necessary provision for impairment of the investment. At each balance sheet date, the Company should review analytically, whether or not there has been any impairment to the value of its asset.

At the point of investment in the LLP, the purpose and application of the investment is known to the Company and perceived by it to be worth the value paid. Impairment will occur if and only if circumstances or information arise that would change perception of the prospects and likelihood of a successful outcome. It is therefore logical that at the date of investment, the company considered the value of the investment to be worth not less than the amount it paid.”

...

Limitations on this report

This opinion does not apply to any Company that may seek a listing on a Stock Exchange. We have not, except where explicitly mentioned in this report, considered the effect of any regulations for financial reporting that may apply if UK GAAP were not adopted, and we are advised that there is currently no intention to report under any other accounting standard.

We base all of our understanding of the transactions and intentions of the of the parties on the information provided to us by the partnership consultants or you, as their agents.

We are not expert valuers of Bio Ethanol or other energy projects and we cannot comment on the value of the project nor the level of proceeds which might actually be achieved by any entity once the plant has been completed.

This report is not a valuation of the project, the business, the members’ capital of the LLP, not of the shares in the Company. It may not be used for any purpose other than that stated at the beginning of this letter. It is an explanation of the accounting treatment that we consider will be most appropriate under current accounting standards on the basis of the information and explanations given to us for the purpose of this report.”

A copy of the certificate of incorporation for the relevant Elysian Fuels scheme confirms that it was incorporated on 6 August 2013.

On 2 April 2014, Ms F wrote to the James Hay contact team saying:

"I confirm that the money from the iSIPP is being used for the LLP. Please can you confirm that everything is ahead." [sic]

On 3 April 2014, James Hay wrote to HM Revenue & Customs (HMRC) enclosing the stock transfer form and a check for £560 for stamp duty. The transfer form was duly stamped and returned.

A loan agreement dated 4 April 2014, signed by Ms F (although her signature isn't dated), amongst other things, set out that:

*"I hereby confirm by this letter loan agreement (**Agreement**) that I owe £18,592.00 to you (**Debt**). I further confirm that I will pay the Debt to you on receipt of a written demand from you together with any interest accrued on the principle amount of the Debt as at the date of repayment.*

1. *FACILITY*

Loan Facility – to be drawn on request giving not less than 7 working days notice.

2. *PURPOSE*

To finance the purchase of 112,000 shares by me in Elysian Fuels No. [number of this Elysian Fuels tranche] plc.

3. *TERM*

*The loan shall be available from the 5 April 2014 for a period of up to 2 months (**Term**).*

4. *INTEREST AND ARRANGEMENT*

***Interest and arrangement costs will be charged at £83,402.25.**" [my emphasis]*

And it confirmed the lender's legal costs:

"The lender's legal costs and disbursements of £1,000 plus VAT and £90 disbursements totalling £1,290, will be paid by me on repayment added to the loan facility."

The conditions that had to be met:

- i) The duplicate of the letter duly executed.*
- ii) Due Diligence requested by the Lender from the borrower to comply with all anti money laundering procedures, to comprise confirmation of identity (passport or driving license) and normal residential abode (current utility bill or bank statement).*
- iii) Official confirmation from Future Capital Partners Limited, the Registrar and Promoter of Elysian Fuels, that the purchase transaction for which this loan facility is being provided has been successfully executed and that the ownership of the shares in question has been amended accordingly on their records.*

The applicable law:

"This agreement (and any dispute controversy, proceedings or claim of whatever nature arising out of or in any way relating to this Agreement or any act performed or

claimed to be performed under it) shall be governed by and in accordance with the laws of the British Virgin Islands. The Borrower and Lender irrevocably submit to the exclusive jurisdiction of the Courts of the British Virgin Islands...”

The agreement was addressed to International Financial Placement Limited, who were based in Gibraltar.

On 16 April 2014, James Hay wrote to FCP with the relevant documentation to transfer 112,000 Elysian Fuels shares to the SIPP. Including a Deed of Adherence dated the same date.

The Elysian Fuels Class A Preference Shares were purchased on 29 April 2014.

James Hay wrote to Ms F on the same date confirming that £112,000 had been paid from Ms F's SIPP to a bank account held by Wannops LLP for the purchase of the Elysian Fuels shares. Of this, £27,307.75 was paid to Ms F. It isn't clear what ultimately happened to the remaining £84,692.25 paid from Ms F's SIPP, I note that this is the sum total of the interest and arrangement and legal costs listed in the loan agreement above. Ms F has provided us with a copy of her bank statement, which shows receipt of £27,307.75 from Wannops LLP on 30 April 2014. Wannops LLP has recently confirmed that the balance less its fees were paid on the same date to Exceptional Management Limited its client as lender.

The transaction has since been investigated by HMRC. In a letter to Ms F HMRC said:

Elysian Fuels No. [number for this tranche of Elysian Fuels] PLC

“HMRC also considers that the shares disposed of to the Pension Scheme were worthless. As a result of this the payment your client received from the Pension Scheme is regarded as an ‘unauthorised payment’ from the scheme. Unauthorised payments from Pension Schemes attract a tax charge of 40% under S208 Finance Act (FA) 2004. In addition to this the unauthorised payment may attract a surcharge of 15% under S209 FA2004.”

HMRC made a without prejudice offer to Ms F to settle the unauthorised payment charge of just under £60,000. Ms F hasn't been able to settle the unauthorised payment charge.

Background to the complaint

Ms F complained to James Hay. Unhappy with James Hay's response Ms F referred her complaint to this service. One of our investigators reviewed the complaint and concluded that it should be upheld – in that James Hay shouldn't have accepted the Elysian Fuels investment. But he thought that it should only be liable for the tax consequences of this, given that the investment was initially made without James Hay's knowledge or involvement.

Both parties to the complaint disagreed with the investigator's assessment. They have both made numerous and substantial submissions to us in support of their respective positions. These submissions have been shared as appropriate with the parties to this complaint. I've considered these submissions in their entirety, but I don't think it's necessary to include a detailed summary of the submissions here. I've included brief summaries of the overall submissions made by the respective parties below. As mentioned above, Ms F has a representative operating on her behalf, I've referred to the submissions as being made by Ms F whether these were made by her or by her representative on her behalf.

Ms F's submissions

- Our narrow interpretation of the complaint and the impact of James Hay's failings is incorrect.
- Whilst the assessment acknowledges much of how the scheme operated and what went wrong, it doesn't go far enough to put things right.
- James Hay didn't treat Ms F fairly and reasonably in numerous ways.
- It's James Hay's failings that made the wider scheme possible, but for its acceptance of the Elysian Fuels investment, the liberation scheme couldn't operate and, in turn, Ms F would never have entered into the arrangement.
- The proposed redress doesn't account for a number of costs/losses Ms F has incurred such as costs associated with the SIPP, which was only established for the purpose of holding the Elysian Fuels investment.
- The proposed redress isn't in line with awards made in recent decisions against advisers and doesn't account for the stress that Ms F has suffered.
- Ms F wasn't a higher rate taxpayer – in fact with an income of around £11,000 she was hardly paying any tax at all – and would have been entitled to 25% of funds withdrawn from her pension tax-free, and this wasn't accounted for in the recommended award in this case.
- Ms F says that James Hay's failings included:
 - Accepting the shares at a value of £1.
 - Failure to recognise the regular involvement of Wannops LLP in their clients' SIPP arrangements.
 - Failure to identify the beneficial recipient of the payment of Ms F's pension funds.
 - Failure to recognise the discrepancy between the owner of the Elysian Fuels shares and the party that was being paid to purchase the shares.
 - The incorrect categorisation of Ms F as a sophisticated investor.
 - Permitting Ms F to invest in a start up company despite her being a direct client – which was prohibited by James Hay.
 - Permitting the purchase of Elysian Fuels shares without an accountant's letter or director's statement – which are internal control requirements when dealing with unquoted shares.
 - Failure to obtain an independent valuation of the Elysian Fuels shares.
- The timing and method of payment of compensation shouldn't be at James Hay's discretion. This doesn't provide adequate closure. Ms F has never been in a financial position to settle the unauthorised payment charge with HMRC.
- James Hay should provide an indemnity against being required to reimburse it for any scheme sanction charge levied. Or, pass this cost onto Ms F by other means.
- Ms F says that but for James Hay's failings:
 - Ms F's pension funds couldn't have been used to acquire Elysian Fuels shares.
 - None of her pension funds would have been paid to Wannops LLP in consideration for the shares.
 - She wouldn't be being pursued by HMRC for additional tax and penalties.
 - She would have a pension to draw throughout her retirement, 25% of which she could draw as a tax-free lump sum.
 - She wouldn't have incurred fees for the establishment and ongoing administration of her SIPP.
 - She wouldn't have had to engage the services of a professional representative.
 - She wouldn't have had the stress of not only losing her pension but also being pursued by HMRC for around £60,000.

- Compensation in this case must account for all of the above in order to fairly put things right for Ms F.
- James Hay's behaviour throughout the course of its defence of this complaint has been in breach of its duties, including under the dispute resolution rules (DISP).
- James Hay confirmed Ms F's employment as a nursery practitioner as part of the application process.
- It did issue risk warnings and disclaimers, but this didn't absolve it from complying with its regulatory obligations.
- It is inconceivable that James Hay wasn't aware of the limited recourse financing. For example, as part of its process where a consumer is acquiring unquoted shares James Hay required sight of the recommendation letters for advised clients.
- The Court of Appeal judgment in *Adams v Options* makes it clear that a SIPP provider may carry responsibility for activities undertaken by unregulated third parties who induced individuals to take out SIPPs with them as direct clients, and that this was the case even where the SIPP provider wasn't aware of the activities of the unregulated third party. Here, an unauthorised party was advising Ms F and making arrangements. This should have been clear to James Hay given the number of direct clients looking to sell Elysian Fuels shares to their newly established SIPPs and asking for the proceeds to be paid to Wannops LLP.
- Ms F entered into the James Hay SIPP contract as a result of things said and done by Mr B acting in breach of the general prohibition, so section 27 is triggered.
- In determining what is fair and reasonable the ombudsman must take into account "relevant law", including *Adams v Options* and *Berkeley Burke*.
- HMRC has issued a scheme sanction charge to James Hay, in its unquoted share questionnaire James Hay provides that clients such as Ms F will be required to reimburse it on demand in such circumstances. James Hay must indemnify Ms F against any such claim.
- Ms F wasn't seeking to withdraw funds from her pension, she was only three years away from pensionable age at which stage she would have been able to withdraw funds from her pension without the risk of penalty. And, but for this scheme, Ms F wouldn't have drawn down her pension as a lump sum.

James Hay submissions

Jurisdiction and regulatory obligations:

- This complaint should be dealt with by the Pension Ombudsman. The complaint is about pension liberation.
- The complaint doesn't fall within the jurisdiction of our service.
- It doesn't relate to regulated activities or activities undertaken by a regulated entity and so doesn't fall within our jurisdiction. The shares were purchased by James Hay Pension Trustees Limited – which isn't a regulated entity and wasn't subject to any regulatory obligations.
- It isn't clear what the nature of the alleged regulatory obligations referenced in the investigator's view are or how they apply in the context of the transaction complained about.
- It didn't provide Ms F with any advice, nor was it authorised to do so.

James Hay's responsibility and knowledge

- Ms F purchased the shares without James Hay's knowledge, it only became aware of this when she instructed it to purchase the shares at the same price she had paid for them.

- James Hay is in no way responsible for investment losses suffered by Ms F.
- There are two approaches to establishing the losses Ms F has suffered in respect of tax 1) to compare the tax which may fall due as a result of the alleged liberation as opposed to the tax that would have fallen due had she withdrawn the funds from her pension after age 55 2) to consider the tax relief Ms F would be entitled to if she were to seek to put herself in the position she would have been in had she not allegedly liberated £112,000 from her SIPP.
- It acted fairly and reasonably in paying monies to Wannops LLP and can't be held responsible for Wannops LLP failure to pay the funds on to Ms F.
- It isn't clear whether the investigator's conclusion that James Hay should have been aware that *"the Elysian Fuels shares were not appropriate to accept"* in Ms F's SIPP relates to the decision to accept Elysian Fuels shares or the value at which they were purchased or both. And, it isn't clear if our conclusion is that James Hay should have rejected the instruction to purchase Elysian Fuels shares or if it was permitted to purchase the shares at a different price.
- It doesn't accept that it erred in respect of any of these interpretations, it fully discharged its duties and complied with its regulatory obligations in respect of due diligence. The due diligence it undertook indicated that the face value of £1 per share was a reasonable price to pay for the shares and it was James Hay's understanding that this is what the customers had paid for the shares.
- Whilst the Financial Conduct Authority (FCA) Dear CEO letter post-dates Ms F's investment, it complied with the guidelines set out in that letter. James Hay undertook sufficient due diligence and understood the nature of the investment.
- The promotional material highlighted the risks and it concluded that the investment had been properly and fairly promoted.
- Elysian Fuels was a genuine investment, not a scam and not linked to fraudulent activity or money laundering. It isn't disputed that consumers obtained title to a genuine investment via share certificates. HMRC's assessment is that it was pension liberation, but this wasn't apparent at the time.
- The mechanism by which pension liberation has (allegedly) occurred is from investors purchasing Elysian Fuels shares at considerably less than their face value (for example, £0.16 rather than £1.00), funding the balance of the initial subscription price with a limited recourse loan which was not disclosed to James Hay, and then quickly selling the shares to their SIPPs at face value of £1.00, thereby liberating funds from their SIPPs.
- James Hay relied on letters/reports from Hillier Hopkins LLP as a source for determining the value of the shares; Hillier Hopkins LLP was an independent source and a reputable entity registered with the Institute of Chartered Accountants in England and Wales (ICAEW). It's unclear what else James Hay could have done as the shares were unquoted shares in a start up company. The price of the shares was confirmed by the company secretary and was the same as that listed on recognised stock exchanges for other tranches of Elysian Fuels shares. The investigator's view doesn't make it clear why James Hay couldn't reasonably rely on this information. The disclaimer wording is standard for this type of report. The report states that under the circumstances unquoted shares are valued at cost.
- It's also unclear how we have reached the conclusion that the shares are valueless. The basis for determining the shares had nil value is HMRC's opinion, which hasn't been tested or upheld in a court or tribunal. In without prejudice offers HMRC has ascribed value to the shares.
- Unquoted shares were (and continue to be) a permissible investment for a SIPP and it fulfilled its duties in respect of the purchase of the Elysian Fuels shares. It is unfair and unreasonable that James Hay be penalised for the complainant's personal tax consequences.

- Numerous investors, including Ms F, made misrepresentations to James Hay as to their high-net-worth investor status. This was an important control that it had put in place due to the high-risk non-standard nature of the investment.
- James Hay reasonably accepted the face-value £1 cost of the share, the limited recourse loan used to facilitate the purchase wasn't disclosed to it and it was reasonable to assume that a high-net-worth individual may have access to sufficient funds to purchase the shares at full cost. So, it was reasonable for James Hay to purchase the shares at £1 and not to realise there was the underlying potential for pension liberation.
- Some tranches of Elysian Fuels shares were registered on recognised stock exchanges.
- Taking into account HMRC's current view and the incurrence of unauthorised payment charges is looking at what happened with the benefit of hindsight. We need to consider what James Hay should have known and concluded at the time.
- The Future Capital Project Finance Ltd unaudited director's report and financial statements for the period ending 29 April 2013 referenced in the investigator's view only became available from Companies House, signed off by auditors and the Board, from 29 April 2014, after the events about which Ms F complains.
- In its letter to this service dated 29 October 2019, James Hay set out in detail the actions it took in June 2013 when it suspended investments into Elysian Fuels after becoming aware of the financing available to investors leading to concerns that shares were being acquired at a discount. It also set out the information it received in response to its enquiries and how this reassured it that the third-party funding didn't amount to a discount. The letter set out that the 'circularity' of the flow of funds wasn't apparent at that time, and so the suspension was lifted in July 2013.
- Even if James Hay had made further enquiries with Ms F, it believes that this wouldn't have revealed the borrowing mechanisms behind the transaction – given the misleading information she provided and under the likely guidance of Mr B – Ms F would have denied that any loans were involved.
- To test this point fairly and reasonably, there should be a hearing of Ms F's evidence. Indeed, Ms F has asserted that Mr B “...*dealt with everything, he probably got a woman on the phone and say it was me* [sic]...”. The fact that Ms F is saying that Mr B would do anything to ensure the investment was made is a critical point.

Redress and further information sought:

- James Hay accepts that the calculation of redress must be limited to “*additional tax*” if the complaint is upheld.
- Ms F hasn't paid any tax on the sale of Elysian Fuel shares to her SIPP, it isn't clear that she is under any obligation to make a payment for any tax now sought given the amount of time that's lapsed.
- James Hay agrees that it shouldn't have to make any redress payment to a complainant, such as Ms F, who hasn't made any payment to HMRC. It also considers that it shouldn't have to make any payment where the complainant has no obligation to pay HMRC or where the complainant hasn't paid any properly due and owing tax in full to HMRC.

Our investigator explained that he wasn't minded to change his position based on the submissions made and explained why. Because agreement couldn't be reached, this case was passed to me for review.

I sent my provisional decision to the parties to the complaint explaining why I thought Ms F's complaint should be upheld. The parties to the complaint entered into settlement

negotiations but were ultimately unable to reach an agreement. Both parties made further submissions in response to my provisional decision.

James Hay's submissions

James Hay has made a number of submissions in response to my provisional decision. I've read and considered these in full in conjunction with its previous submissions. Here I've included a high-level summary of what I consider to be the key points.

Monies paid to Wannops

- The findings reached holding James Hay responsible for the funds paid to Wannops LLP are wrong in fact and at law.
- The monies which weren't paid to Ms F were used to repay the loan she had entered into to fund the purchase of the Elysian Fuels shares in her personal capacity. The cause of this loss therefore was said loan agreement entered into before James Hay's involvement. And, the monies were used in any event for the benefit of Ms F, to award capital and investment losses would overcompensate her.
- More information needs to be gathered about the arrangements made at the time and why Ms F instructed monies be paid to Wannops LLP, and if she expected to receive more money than she did, why was this not raised at the time.
- If James Hay had refused to make the payment Ms F would have been in breach of her obligations under the loan agreement (of which it was unaware) and it would have been in breach of a formal written instruction.
- The correct analysis of the situation is that the monies wouldn't had been transferred to Wannops LLP but for the loan agreement. The connection between the loan and transfer to Wannops LLP is key as this is what lead to Ms F giving an amount from her pension. This is the causally relevant event and not James Hay payment to Wannops LLP.
- Any loss of monies that it's claimed should have been paid to Ms F and not to Wannops LLP or another third party is too far removed from the acts or omissions of James Hay – the act of paying Wannops LLP in accordance with Ms F's instruction in the course of her investment in Elysian Fuels.
- *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20 (MBS) is relevant caselaw in light of which it considers it can't be fair and reasonable to say that it fell to James Hay to ensure Wannops LLP's appropriate dealing with money held within its client account. And, set out the test in relation to the scope of a professional's duty of care and held that it should be determined by the purpose of the duty of care.
- The provisional findings fail to comply with DISP 3.6.4R having not taken into account all relevant law and further, having gone beyond our service's own rules in purporting to extend the scope of Berkeley Burke and omitting to explain why I departed from the relevant law and Berkeley Burke.

Breach of trust

- More information should be obtained and shared with it about what happened with Wannops LLP and what happened with the monies paid to it from Ms F's SIPP.
- If it were to transpire that there was a relationship between Wannops LLP and Ms F, and Wannops LLP did not use the funds in the client account in accordance with instructions or for the benefit of the Complainant, then Wannops LLP may have acted in breach of trust.

Due Diligence Obligations

- It's wrong that Berkeley Burke has been relied on and little to weight has been placed on High Court and Court of Appeal judgments in *Adams v Options SIPP UK LLP* [[2020] EWHC 1229 (Ch)] and *Adams v Options UK Personal Pensions LLP* [[2021] EWCA Civ 474] (Adams).
- The provisional decision further extends the obligations on SIPP providers as contained within the Berkeley Burke judgment. In that it suggests it was incumbent upon James Hay to examine where Ms F's money would be invested.
- James Hay obligations didn't and couldn't have included ensuring any aspect of how the investment operated.
- Common law does not impose obligations to ensure an outcome (in the absence of a specific agreement to that effect). Common law obligations, particularly in relation to matters which involve or depend on third parties, are to take reasonable care to secure an outcome, which James Hay did (including through the due diligence it conducted).
- Some tranches of Elysian Fuels shares were listed on recognised stock exchanges with a valuation of £1 per share which matched the price paid by investors upon their personal share purchase. Reliance was reasonably placed on all of those factors in determining that a valuation of £1 per share for the purchase by investors' SIPPs was reasonable and that there were no compelling reasons to have attributed any other valuation to the shares or to have refused to purchase at the same. There were no material differences between tranches of Elysian Fuels shares such that the valuation of the listed shares was reasonably relevant to all Elysian Fuels shares.

Calculation of redress

- The benchmark used doesn't reflect the circumstances in this complaint – given what Ms F has said about how she spent the money it is highly unlikely she would have considered an investment opportunity that would have provided her a return in line with the index.
- A fair and reasonable comparator to calculate Ms F's loss would be the lower discount rates, as detailed in Final Guidance GF17/9. The Financial Ombudsman Service has previously adopted this position.
- It's not reasonable for the redress methodology to be based on the assumption that Ms F will be a basic rate taxpayer in retirement. Accurate information must be obtained about this.
- An interest rate of 8% is too high, the applicable interest rate should at most be 2.5% above base rate.

What Wannops LLP has told us:

"Wannops received £112,000 from a James Hay Santander bank account on 30 April 2014. Wannops acted for its client Exceptional Management Limited as lender. I have asked for the client file to be retrieved from storage and will contact you again regarding any correspondence with James Hay..."

"On 30 April 2014, Wannops sent to Ms F £27,307.75. The records do not record the bank account details to which the funds were transferred. The balance less Wannops fees of £1,290 of £83,402.25 was sent on the same date to Exceptional Management Limited."

And Wannops LLP recently told James Hay:

"...Wannops did not act for any of your clients named in [James Hay's] letter nor, of course, for the avoidance of doubt, did it act for James Hay. Wannops was instructed in relation to the drafting of loan agreements for the lender Exceptional Management Limited. Wannops received funds from a Santander account from James Hay on the instructions of the borrowers to facilitate the repayment of the loans..."

Ms F's submissions

Ms F agrees with the decision in principle. She has provided some additional comments in relation to the redress methodology set out in the decision and James Hay's submissions. In summary, she said that:

- Given everything that's happened, she feels very strongly that no element of the compensation should be left at the discretion of James Hay. Specifically, the undertaking shouldn't allow it to decide whether payment is made to Ms F or HMRC direct.
- The decision should clarify if interest on the unauthorised payment charge forms part of the compensation due.
- James Hay should be directed to provide an indemnity against it pursuing Ms F in relation to the scheme sanction charge it paid in relation to Elysian Fuels.

Ms F also made submissions in response to James Hay's submissions refuting its position.

Because agreement couldn't be reached, this case was passed back to me for a further decision.

What I've found – and why jurisdiction

We can't consider all complaints brought to this service. Before we can consider something, we need to check, by reference to the FCA DISP Rules and the legislation from which those rules are derived, whether the complaint is one we have the power to look at and whether it's a complaint we *should* consider.

Our jurisdiction to consider this complaint

This complaint relates to the due diligence undertaken by James Hay as administrator of Ms F's SIPP. James Hay (the respondent firm) is a regulated business, and the complaint relates to the regulated activity of establishing and operating a personal pension scheme. The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 at Section 52 provides that:

"Establishing etc. a pension scheme

52. The following are specified kinds of activity—

- (a) establishing, operating or winding up a stakeholder pension scheme;*
- (b) establishing, operating or winding up a personal pension scheme."*

Having concluded that this complaint is one we *can* consider, I've gone on to consider whether this is a complaint we *should* consider.

James Hay has also argued that this complaint should be dealt with by the Pension Ombudsman. Where a complaint falls within our jurisdiction it's at our discretion whether or not we're best placed to deal with the complaint.

We have been dealing with complaints about due diligence undertaken by SIPP providers and SIPP providers' duties in establishing SIPPs and accepting/permitting particular investments for a number of years. We have significant experience in dealing with such complaints and I think we're well placed to deal with Ms F's complaint. And, in any case, this complaint falls within our compulsory jurisdiction and Ms F has asked our service to look into her complaint.

Overall, I'm satisfied that this is a complaint we can and should consider, so I've gone on to consider the merits of Ms F's complaint.

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.

I've reconsidered all the available evidence and arguments, including all of the submissions I received in response to my provisional decision. Having done so, my findings remain as set out in my provisional decision, so I've largely repeated these below, expanding on some points in response to the more recent submissions made.

As I explained in my provisional decision, the parties to this complaint have provided detailed submissions to support their position and now in response to my provisional decision. 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.

It's my role to fairly and reasonably decide if the business has done anything wrong in respect of the individual circumstances of the complaint made and – if I find that the business has done something wrong – award compensation for any material loss or distress and inconvenience suffered by the complainant as a result of this.

Relevant considerations

Having carefully reconsidered all of the evidence, I'm still of the view that the relevant considerations in this case are those that I previously set out in my provisional decision. As such, and while taking into account all of the submissions that have been made, I've largely repeated what I said about this point in my provisional decision.

I've carefully taken account of the relevant considerations to decide what is fair and reasonable in the circumstances of this complaint.

When considering what is fair and reasonable in the circumstances, I need to take account of relevant law and regulations, regulator's rules, guidance and standards, codes of practice and, where appropriate, what I consider to have been good industry practice at the relevant time. Ultimately, I'm required to make a decision that I consider to be fair and reasonable in *all* the circumstances of the case.

In my view, the FCA's Principles for Businesses are of particular relevance. The Principles for Businesses, which are set out in the FCA's Handbook "*are a general statement of the*

fundamental obligations of firms under the regulatory system” (PRIN 1.1.2G – as at the relevant date). Principles 2, 3 and 6 are of particular relevance here, in my view.

Ouseley J in *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin) held that it would be a breach of statutory duty if I were to reach a view on a complaint without taking the Principles into account in deciding what is fair and reasonable in all the circumstances of a case. And, Jacobs J adopted a similar approach to the application of the Principles in *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878). I’m therefore satisfied that the Principles are a relevant consideration that I must take into account when deciding this complaint.

The Berkeley Burke judgment also considers section 228 of FSMA and the approach an ombudsman is to take when deciding a complaint. The judgment of Jacobs J upheld the lawfulness of the approach taken by the ombudsman in that complaint, which I’ve described above, and included the Principles and good industry practice at the relevant time as relevant considerations that were required to be taken into account.

On 18 May 2020, the High Court handed down its judgment in the case of *Adams v Options SIPP* [2020] EWHC 1229 (Ch). Mr Adams subsequently appealed the decision of the High Court and, on 1 April 2021, the Court of Appeal handed down its judgment in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474. I’ve taken account of *both* of these judgments when making this decision on Ms F’s case.

I note that the Principles for Businesses didn’t form part of Mr Adams’ pleadings in his initial case against Options SIPP. And, HHJ Dight didn’t consider the application of the Principles to SIPP operators in his judgment. The Court of Appeal also gave no consideration to the application of the Principles to SIPP operators. So, neither of the judgments say anything about how the Principles apply to an ombudsman’s consideration of a complaint. But, to be clear, I don’t say this means Adams isn’t a relevant consideration at all. As noted above, I’ve taken account of both judgments when making this decision on Ms F’s case.

I acknowledge that COBS 2.1.1R (A firm must act honestly, fairly and professionally in accordance with the best interests of its client) overlaps with certain of the Principles, and that this rule was considered by HHJ Dight in the High Court case. Mr Adams pleaded that Options SIPP owed him a duty to comply with COBS 2.1.1R, a breach of which, he argued, was actionable pursuant to section 138(D) of FSMA (“the COBS claim”). HHJ Dight rejected this claim and found that Options SIPP had complied with the best interests rule on the facts of Mr Adams’ case.

The Court of Appeal rejected Mr Adams’ appeal against HHJ Dight’s dismissal of the COBS claim on the basis that Mr Adams was seeking to advance a case that was radically different to that found in his initial pleadings. The Court found that this part of Mr Adams’ appeal did not so much represent a challenge to the grounds on which HHJ Dight had dismissed the COBS claim, but rather was an attempt to put forward an entirely new case.

I note that in *Adams v Options SIPP*, HHJ Dight found that the factual context of a case would inform the extent of the duty imposed by COBS 2.1.1R.

In my view there are also significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams (summarised in paragraph 120 of the Court of Appeal judgment) and the issues in Ms F’s complaint. In particular, as HHJ Dight noted, he wasn’t asked to consider the question of due diligence *before* Options SIPP agreed to accept the store pods investment into its SIPP.

So, I've considered COBS 2.1.1R – alongside the remainder of the relevant considerations, and within the factual context of Ms F's case, including James Hay's role in the transaction.

I think it is important to emphasise here that I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And, in doing that, I'm required to take into account relevant considerations which include: law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. This is a clear and relevant point of difference between this complaint and the judgments in *Adams v Options SIPP*. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

I also want to emphasise here that I do not say that James Hay was under any obligation to advise Ms F on the SIPP and/or the underlying investments. Refusing to accept an application or not permitting an investment isn't the same thing as advising Ms F on the merits of investing in/using her pension to purchase Elysian Fuels shares and/or transferring to the SIPP.

The regulatory publications

The FCA (and its predecessor, the FSA) has issued a number of publications which remind SIPP operators of their obligations and which set out how they might achieve the outcomes envisaged by the Principles, namely:

- The 2009 and 2012 thematic review reports.
- The October 2013 finalised SIPP operator guidance.
- The July 2014 "Dear CEO" letter.

These reports provide a *reminder* that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it is treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications which set out the regulators expectations of what SIPP operators should be doing also go some way to indicate what I consider amounts to good industry practice, and I am, therefore, satisfied it is appropriate to take them into account.

That doesn't mean that in considering what's fair and reasonable, I'll only consider James Hay's actions with these documents in mind. The reports, "Dear CEO" letter and guidance gave non-exhaustive examples of good practice. They didn't say the suggestions given were the limit of what a SIPP operator should do. As the annex to the "Dear CEO" letter notes, what should be done to meet regulatory obligations will depend on the circumstances.

In determining this complaint, I need to consider whether, in accepting Ms F's SIPP application and permitting her subsequent investment in Elysian Fuels shares via her SIPP, James Hay complied with its regulatory obligations as set out by the Principles to act with due skill, care and diligence, to take reasonable care to organise its business affairs responsibly and effectively, to pay due regard to the interests of its customers, to treat them fairly, and to act honestly, fairly and professionally. And, in doing that, I'm looking to the rules and the publications listed above to provide an indication of what James Hay could have done to comply with its regulatory obligations and duties.

Taking account of the factual context of this case, it's my view that in order for James Hay to meet its regulatory obligations, (under the Principles and COBS 2.1.1R), it should have undertaken sufficient due diligence checks to consider whether to accept or reject particular

applications for investments, in this case Elysian Fuels, with its regulatory obligations in mind.

I also want to reemphasise here that I do not say that James Hay was under any obligation to advise Ms F on the SIPP and/or the underlying investment in Elysian Fuels. Refusing to accept an application or permit an investment is not the same thing as advising Ms F on the merits of investing and/or switching to the SIPP.

The due diligence carried out by James Hay on the Elysian Fuels – and what it should have done

James Hay did undertake some due diligence in relation to the Elysian Fuels scheme more broadly and the individual tranches of the Elysian Fuels shares. It also had bespoke processes in place for the purchase of unquoted shares via its SIPPs.

Taking everything into account, I'm satisfied that it should – as a minimum – have:

- Identified the Elysian Fuels investment as a high-risk, speculative and non-standard investment, so it should've carried out thorough due diligence on it.
- Examined where Ms F's money would be invested.
- Considered whether the investment was suitable for a personal pension scheme.
- Made sure the investment was genuine – in other words, not a scam or linked to fraudulent activity.
- Made sure the investment worked as claimed.
- Ensured that the investment could be independently valued, both at the point of purchase and subsequently.
- Ensured Ms F's SIPP wouldn't become a vehicle for a high-risk and speculative investment.

On a general note, I think James Hay should have been alive to the fact that the purpose of Ms F's pension was to provide her with an income in retirement and that there was no clear secondary market for the shares.

Some preliminary issues

Elysian Fuels presented as a complex investment proposition, much of this was however, in my view, surface level and I don't think it would have taken a lot to see past this. In other words, I think it's most likely that due diligence in line with James Hay's regulatory obligations would have unearthed significant concerns, some of which I've set out in more detail below.

The promotional material and reports provided go into a high level of detail about the bioethanol market, regulations and policies and include some detail about the business plans of Vireol. But they provide very little detail on how funds raised through the partnerships would be used and the services that would be provided by them.

I think there were numerous concerning elements to the Elysian Fuels scheme, within this decision I've focused on what I consider to be the key issues. Within the anomalous features

section, I briefly consider some of the other concerning features of these investments/this scheme, which I think would have been discoverable to James Hay. To be clear, I haven't interrogated every aspect of or anomalous feature of Elysian Fuels or the application process followed in this instance.

HMRC's findings

HMRC has found that Elysian Fuels operated as a tax avoidance scheme and that the shares were likely worthless. It also found that monies released from pension schemes for the purchase of Elysian Fuels shares amounted to unauthorised payments and has pursued the individuals who released monies from their pensions in this manner for unauthorised payment charges.

We've been provided with redacted correspondence from HMRC in which it said:

"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 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 initial view is the shares had no value when the transaction took place."

In a letter to Ms F HMRC said:

"HMRC also considers that the shares disposed of to the Pension Scheme were worthless. As a result of this the payment your client received from the Pension Scheme is regarded as an 'unauthorised payment' from the scheme. Unauthorised payments from Pension Schemes attract a tax charge of 40% under S208 Finance Act (FA) 2004. In addition to this the unauthorised payment may attract a surcharge of 15% under S209 FA2004."

HMRC made a without prejudice offer to Ms F to settle the unauthorised payment charge of just under £60,000. It's my understanding that Ms F hasn't been in a position to settle this.

The share price

There's no evidence that an independent valuation was ever obtained in relation to any of the tranches of Elysian Fuels shares. James Hay's own internal processes indicate that this was a requirement for the purchase of unquoted shares, particularly where the sale was a connected one, as in this case.

The shares were sold to the SIPP at the same price that Ms F purportedly bought them a short time beforehand.

Some weight was placed on Hillier Hopkins LLP's report commissioned by FCP. This was report was clear that:

"In accordance with your instructions, we set out below our opinion on the appropriate accounting treatments which would be afforded to entities within the "Elysian Structure". This opinion is based entirely upon our understanding of information and explanations you have given us in connection with the business and activities of the entities concerned as you have described them to us and as set out in this letter.

We understand that you have requested this letter in order to obtain a better and independent understanding of the financial and reporting effects of the activities of the entities and to obtain confirmation of the current rules. Our opinion is specific to the circumstances connected with the contracts and transactions as explained to us and described below, and does not necessarily have general application.

This letter is prepared subject to the limitations set out at the end of the letter, and in accordance with our invariable practice, we accept no liability whatsoever to any person who is not our client in respect of the matters which we set out below, or otherwise, to the fullest extent permitted by law."

And

"We base all of our understanding of the transactions and intentions of the of the parties on the information provided to us by the partnership consultants or you, as their agents.

We are not expert valuers of Bio Ethanol or other energy projects and we cannot comment on the value of the project nor the level of proceeds which might actually be achieved by any entity once the plant has been completed.

*This report is **not a valuation of the project, the business, the members' capital of the LLP, nor of the shares in the Company.** It may not be used for any purpose other than that stated at the beginning of this letter. It is an explanation of the accounting treatment that we consider will be most appropriate under current accounting standards on the basis of the information and explanations given to us for the purpose of this report."* [my emphasis]

I don't think it was reasonable to rely on this as an independent valuation of the shares. The report was commissioned by the promoters of the investment (was only for their use), was based solely on information provided by them or the partnership consultants and was very clear that it was *not* a valuation of the shares.

James Hay also appears to have been satisfied with purchasing the shares on the basis that they were being purchased *at cost*. In accordance with Ms F's submissions, she didn't put any money towards the purchase of the shares, nor did she have the funds to purchase them.

I think that insisting on the provision of an independent valuation prior to permitting the purchase of the shares, would have been a reasonable step for James Hay to take under the circumstances. Thus, ensuring that the price at which the shares were being purchased was fair and that the shares could in fact be independently valued, in line with its regulatory obligations. If an independent valuation had been obtained via a reputable and experienced party, I think this most likely would have led to the discovery that the value at which the shares were being sold, wasn't a true reflection of the actual value of the shares.

Whilst I acknowledge that it may have been challenging to obtain an independent valuation under the circumstances, I don't think this meant that it was fair and reasonable to accept lesser evidence instead. Indeed, if an independent valuation couldn't be obtained then I think that James Hay ought to have concluded that it wasn't safe to permit the purchase of these shares via its SIPPs, particularly in light of what I think it should have been aware of in respect of the financing arrangements, which I've discussed below.

The financing arrangements

James Hay became aware of the financing arrangements available in connection with the purchase of Elysian Fuels shares by mid-2013 at the latest. A significant amount of time before Ms F's business was accepted and the subsequent purchase of the shares went ahead.

It's clear that James Hay did have some concerns when it initially became aware of the financing arrangements, as it briefly suspended its acceptance of Elysian Fuels shares. It subsequently lifted the suspension.

I haven't seen any evidence that Ms F was asked how she purchased the Elysian Fuels shares or, otherwise, if she had utilised financing to purchase the shares in her personal capacity. I think this would have been a reasonable step for James Hay to take under the circumstances and given what it knew or ought reasonably to have known about the financing arrangements.

We know that consumers could utilise financing to fund 86% of the purchase price of the shares. It appears that Ms F took advantage of such funding. As I understand it the remaining 14% was typically self-funded. In this case, we have seen loan documentation signed by Ms F for the purchase of £112,000 Elysian Fuels shares. I think this was for the 14% not funded by the FCP financing, albeit that it seems to have post-dated the purchase of the shares. The amount due for arrangement and interest and legal costs on the loan was the same as the amount Ms F didn't receive from the monies released from her pension.

It seems likely that the FCP financing was *in effect* illusory. With no funds actually changing hands.

James Hay has suggested that Ms F may not have provided accurate information if queried, given that some of the forms she signed appear to have included inaccurate information. I think there is a significant difference between signing forms which included details which weren't accurate and lying when questioned about something. I think it's most likely that Ms F would have told the truth if questioned about how the shares were purchased. I think this is supported by the fact that when asked about her profession, Ms F appears to have given accurate information. I note that James Hay didn't query the apparent discrepancy between the details on the form submitted to it and the information provided by Ms F over the phone in relation to her occupation and this should have been a concern under the circumstances.

So, I think it's more likely than not that if James Hay had made appropriate enquiries about the purchase of the shares, Ms F would have, to the best of her ability, told the truth. I say this because it's clear from Ms F's submissions that she is unclear about some of the details. However, I don't think this impacts the conclusion that James Hay ought reasonably to have reached. Whether through a conversation or correspondence with Ms F, if James Hay established how the purchase came about – including the lending involved – or, instead, if Ms F was simply unable to provide an adequate explanation as to how she purchased the shares, acting in line with its regulatory obligations and Ms F's best interests, James Hay's

conclusion should have been the same. That it should not proceed with the purchase of the shares.

More generally, if James Hay had concerns about pension liberation being a potential factor with these investments it should have stopped accepting the investments. It should also have reasonably identified that non-disclosure and a degree of misinformation were likely to be factors in the event of pension liberation being undertaken. So, simply asking for reassurance that pension liberation wasn't taking place wasn't sufficient. Or as seems to have been the case in practice, relying on *pro-active* disclosure of any lending arrangements in place. If James Hay chose to continue to accept the investment (which I'm not persuaded it should have done), one step that could have been available to it, would be to insist on the provision of evidence of how the shares were purchased.

To be clear, I don't think that James Hay had to be certain that pension liberation was taking place. I think it becoming aware that there was a significant risk that pension liberation was taking place and, in turn, that there was a substantial risk of consumer detriment should have been sufficient for it to conclude that it shouldn't fairly and reasonably be accepting this investment.

Also, I think it is important to highlight here that our consideration of whether James Hay acted fairly and reasonably in permitting investments via its SIPP in Elysian Fuels shares is not limited to assessing whether James Hay should have been aware of the risk of pension liberation and/or breach of HMRC rules.

I think that what James Hay should have discovered in relation to the share price – whether that be that the share value was inaccurate or that it could not be independently valued – and the financing arrangements in place was sufficient for it to conclude that it would not be safe or in its customer's (and in this case Ms F's) best interests to proceed with the purchase of Elysian Fuels shares. Had it reached this conclusion, I think this would have put a stop to the transaction and that Ms F's pension would have remained intact.

Anomalous features

Volumes of business

By the time Ms F applied to sell her Elysian Fuels shares to her SIPP it is my understanding that James Hay had accepted hundreds of investments via its SIPP in Elysian Fuels shares. From what we know about this business, this involved individuals investing the vast majority of their pensions in unquoted shares in a single entity. This is *highly* unusual business.

Whilst I accept that this wasn't a high proportion of James Hay's overall business, I think this should reasonably have been viewed as high volumes of business of this nature.

James Hay did not and could not provide financial advice and wasn't responsible for assessing the suitability of SIPP or the underlying investments for individuals. It was however, responsible for the quality of the business it was accepting.

Investing the majority of one's pension in unquoted shares, is highly unlikely to be suitable for the vast majority of retail consumers. Therefore, given the volumes of introductions, James Hay should have been alert to the fact that there was a significant risk that it was facilitating unsuitable business – and, in turn, that there was a significant risk of consumer detriment.

Circulatory nature of the funding

James Hay should have identified Elysian Fuels as a very high-risk investment proposition – and it appears to have done so – making it important for it to take care to meet its obligations in undertaking due diligence on the investment itself. I think this reasonably included ensuring that the investment operated as claimed.

In response to our investigator's view James Hay said that:

“The Future Capital Project Finance Ltd unaudited director's report and financial statements for the period ending 29 April 2013 referenced in the investigator's view only became available from Companies House signed off by auditors and the Board from 29 April 2014 after the events about which Ms F complains.”

Whilst it may be the case that this information wasn't available in the public forum at the time, this doesn't mean that that information couldn't have been obtained from the business.

And I think it's more likely than not that a proper interrogation of how the business operated would have uncovered that the funds invested weren't being utilised as intended in line with the promotional material.

Incomplete internal processes in relation to Ms F's connected sale of the unquoted shares

I think James Hay correctly identified that permitting investment in unquoted shares carried significant risks. And, in connection with this, it put in place internal processes that had to be followed based on the paperwork we've seen, in particular the unquoted share questionnaire. In the normal course of things James Hay expected:

- Depending on stage of the business:

“Company trading more than 2 years old

- *Copies of last 2 years company accounts*
- *Copy of Financial Adviser recommendation if via a Financial Adviser*
- *Accountant's Letter – see below.*

Company trading less than 2 years but not a start up

- *Copies of all company accounts produced – if no company account available a copy of the Company Business Plan*
- *Copy of Financial Adviser recommendation if via a Financial Adviser*
- *Accountant's Letter – see below.*

Start up Company

- *A copy of the Company Business Plan*
 - *Copy of Financial Adviser recommendation or confirmation that the individual is a Financial Adviser registered with the FCA (Direct applications are NOT accepted.)*
 - *Accountant's letter – see below.”*
- An independent share valuation.
 - A signed declaration from an accountant stating that:

“I confirm:

1. *That the business is currently trading or has been established solely for the purpose of a legitimate commercial trading activity*
2. *That the business has to the best of my knowledge never been involved in, or has not been established for, the purpose of pension liberation*
3. *That to the best of my knowledge there is nothing about the company's business activities that could conflict with the shares being held within a SIPP*
4. *That to the best of my knowledge none of the company directors is involved in any activity that could result in either the SIPP member or James Hay Partnership being subject to an unauthorised payment tax charge under the Finance Act 2004."*

The above highlights that one of the risks James Hay identified in relation to such transactions was the risk of pension liberation.

I think that the above were sensible measures for James Hay to have in place.

Much of the information that it appears James Hay typically required to proceed with a transaction of this type wasn't provided in this case. It isn't clear why the transaction was allowed to go ahead under the circumstances. Or, why the failure to provide this information wasn't queried.

Ms F's classification as a sophisticated investor and the evidence provided in support of this

One of the internal checklists completed by James Hay for direct clients, where a high net worth or sophisticated investor form had been completed, asks if evidence had been provided to support the information in the form before proceeding. This is ticked on the form for Ms F, along with a handwritten note saying this had been approved.

The evidence provided in support of Ms F's sophisticated investor form was three £20 loans made via a peer-to-peer lending site. I think an objective assessment of this should have led to the conclusion that this was insufficient at best. And, at worst, given the timing of the loans, an attempt to get Ms F's application to meet the minimum criteria. In either event this should have led to further interrogation/investigation on this point.

Common Directorships

Companies House entries show the same directors involved in not only FCP, Elysian Fuels Ltd and the numerous Elysian Fuels partnerships but also Vireol and Ebury Engineering.

Most notably Mr L was a director of every entity involved. Mr L had not long before been questioned by a government select committee in connection with running tax avoidance schemes for a report called *tax avoidance: tackling marketed avoidance schemes*. At that point Mr L had run a very significant number of investment schemes many of which had been investigated by HMRC.

The involvement of the same individuals in connected businesses involved in a joint venture isn't necessarily a sign of wrongdoing but, again, I think it should have led James Hay to understand the importance of properly understanding how the investment would operate. Particularly in light of the individuals involved in this instance.

TWM Pension Trust/Dalriada Trustees Limited (Dalriada)

Dalriada was appointed by the Pensions Regulator as independent trustee of the TWM Pension Trust on 13 June 2013. Dalriada was appointed because the Pensions Regulator was concerned that the Scheme was being used for pension liberation.

The vast majority of the Scheme's funds, approximately £2,700,000, were paid to Castle Trust, a company registered in Gibraltar. Dalriada has said that its understanding is that these funds were then invested in Elysian Fuels No 27 PLC.

The announcement of the appointment of Dalriada was around nine months before Ms F's investment in Elysian Fuels. This isn't something that James Hay would necessarily have become aware of as matter of course, however, it is something that *may* have come to its attention if it had regularly been reviewing whether there was any adverse information in the public domain about Elysian Fuels. Which is one of a number of actions that it could reasonably have undertaken to ensure that it was meeting its regulatory obligations.

As previously mentioned, in this decision I've focused on the concerns that I think James Hay should have had and the conclusions it should have reached in relation to the share price and financing arrangements in place. I've briefly set out the above anomalous features to highlight some of the other concerning features with this investment/the processes followed and, in turn, the importance of James Hay undertaking sufficient due diligence in respect of the Elysian Fuels shares.

What should James Hay have concluded, had it undertaken sufficient due diligence?

James Hay may consider that carrying out the kind of assessment that would be required to establish and interrogate such factors as I've discussed and carry out appropriate due diligence, imposes on to it requirements over and above its responsibilities as a SIPP provider. But I'm satisfied these are the kind of things James Hay needed to do when accepting Ms F's proposed investment to meet its regulatory obligations and was in line with good practice at the time under the circumstances. And, I don't think that this amounts to a conclusion that James Hay should have assessed the suitability of the Elysian Fuels investment for Ms F's SIPP in light of her individual circumstances.

James Hay does appear to have understood the importance of due diligence and I accept that James Hay, as I've mentioned, did do some due diligence in relation to Elysian Fuels. But that due diligence didn't adequately address the points I've set out above. So, based on the evidence I've seen to date, I'm satisfied that James Hay didn't carry out sufficient due diligence to satisfy its reasonable responsibilities as a SIPP provider.

James Hay had also put in place processes for the purchase of unquoted shares, unfortunately these appear not to have been followed in this instance.

To be clear, I reiterate, I'm not making a finding that James Hay should have assessed the suitability of the Elysian Fuels investment for Ms F's SIPP. I accept James Hay had no obligation to – nor was it permitted to – give advice to Ms F, or to ensure otherwise the suitability of an investment for her.

At the point the purchase of the Elysian Fuels shares was arranged James Hay would have been aware that Ms F was investing the vast majority of her pension fund with it in an unregulated, esoteric and high-risk investment which might be difficult to sell. I acknowledge that James Hay wouldn't be aware whether that was the entirety of Ms F's pension savings because she may have had other benefits elsewhere (although I note that within the paperwork Ms F completed at point of sale, she confirmed that the approximate percentage of her total pension savings that the investment would represent was 97%). But it was an indicator of the kind of risk to which Ms F was being exposed. These were 'red flags', so to

speak, which should have caused James Hay significant concern as to whether or not to allow Ms F to purchase the investment via her SIPP.

I'm satisfied James Hay could have identified the concerns I've mentioned, and ought to have drawn the conclusions I've set out, based on what was known and could have been discovered at the time.

James Hay ought to have identified significant concerns in relation to the investment, and this ought to have led it to conclude it shouldn't accept the Elysian Fuels investment. It ought to have realised there was a high risk of detriment to Ms F.

In conclusion

After considering these points, I don't regard it as fair and reasonable to conclude that James Hay acted with due skill, care and diligence, or treated Ms F fairly by permitting the purchase of the shares in Elysian Fuels. James Hay didn't meet its regulatory obligations or the standards of good practice at the time, and it allowed Ms F's pension fund to be put at significant risk as a result.

Did James Hay act fairly and reasonably in proceeding with Ms F's instructions?

My remit is, of course, to make a decision on what I think is fair and reasonable in all the circumstances. Having identified some of the significant concerns in relation to the investment that I've detailed above, it's my view that the fair and reasonable thing to do would have been for James Hay to refuse to permit the purchase of the Elysian Fuels shares via Ms F's SIPP. On balance, I think this most likely would have put a stop to the transaction.

I think James Hay refusing to permit the purchase of the Elysian Fuels shares would have likely meant that Ms F would have acted very differently. And I don't believe it would be fair or reasonable to assume that another SIPP operator would have allowed the purchase of the shares, had James Hay not permitted it. So, I don't think it would be fair and reasonable to say that James Hay shouldn't compensate Ms F for her loss on the basis of speculation that another SIPP operator would have made the same mistakes as I've found James Hay did. I think it's fair instead to assume that another SIPP provider would have complied with its regulatory obligations and good industry practice, and therefore would not have allowed the investment/purchase of the shares.

It's possible that it could be argued that other parties have contributed to Ms F's losses and so it's not fair to hold James Hay fully responsible. However, the complaint against James Hay is the complaint I'm considering here. And for the reasons I've set out earlier in this decision, I consider that James Hay has failed to comply with its own distinct regulatory obligations under the Principles. In my opinion it's fair and reasonable in the circumstances of this case to hold James Hay accountable for its own failure to comply with the relevant regulatory obligations and to treat Ms F fairly.

I've concluded Ms F wouldn't have purchased the shares via her SIPP but for James Hay's failure to carry out sufficient due diligence. So, in these circumstances, I'm satisfied it's fair to hold it responsible for the losses suffered by Ms F as a result of its failings in so far as they stem from the purchase of the shares by the SIPP. I'm not asking James Hay to account for losses that go beyond the consequences of its failings.

I'm satisfied that James Hay should have put a stop to the transaction and that the purchase of the shares via Ms F's SIPP wouldn't have gone ahead if it had treated Ms F fairly and reasonably.

I've carefully considered causation, contributory negligence, and apportionment of damages. And in the circumstances here, I'm still satisfied it's fair for James Hay to compensate Ms F for the full measure of her losses that stem from the purchase of the shares via her SIPP. In addition to the financial losses Ms F has suffered I think the loss of her pension, which had been of a significant value, as well as being pursued for an unauthorised payment charge which she says she can't pay, will have caused her a very significant amount of worry and distress and I think that James Hay should compensate her for this as well.

Having reached these conclusions, I've gone on to consider the impact of what I've found to be James Hay's failings, taking into account the sequence of events set out below.

The sequence of events

Based on what we've been told, Ms F was initially introduced to the idea of investing in Elysian Fuels by an unregulated individual, Mr B, who advised her to transfer her pensions to a SIPP and invest in Elysian Fuels. Ms F has told us that Mr B made all of the arrangements for her.

There's no indication that James Hay was aware of Mr B's involvement or of the plan of action that had been put in motion.

Ms F established a SIPP and transferred her existing pensions into it. She then initially purchased the shares in her personal capacity and then subsequently purchased them via her SIPP.

The impact of James Hay's failings

Overall, I'm satisfied for the reasons set out above that James Hay acting fairly and reasonably and in line with its obligations and good practice shouldn't have permitted the purchase of Elysian Fuels shares by Ms F's SIPP in this instance.

I think that James Hay is responsible for the impact of the purchase of the shares and needs to put right the losses that Ms F has suffered as a result. I don't think that James Hay had any reason to decline Ms F's application for a SIPP or the transfer of funds from her then existing pension schemes. And, I don't think that James Hay should fairly and reasonably be held responsible for the events that pre-dated its purchase of the Elysian Fuels shares in this instance.

I accept that, for example, Mr B's actions may have been predicated on the sale of shares to a SIPP being possible – but, I don't think that James Hay guaranteed to purchase the shares in advance in this case. And, in any event, it would have been open to James Hay to put a stop to the transaction at any point up until the purchase of the shares went ahead.

Because the release of the funds from Ms F's pension has been treated as an unauthorised payment, she is being pursued by HMRC for an unauthorised payment charge on the £112,000. The release of the funds was only made possible as a result of the purchase of the shares, which I don't think should have gone ahead. So, I think James Hay should compensate Ms F for this. Had these funds been withdrawn from the pension as an income, Ms F would have had to have paid income tax at her marginal rate (which is assumed to be basic rate) on 75% of it. James Hay should pay *any* amount in excess of what I've found she would likely otherwise have paid which Ms F pays to HMRC. To be clear, this includes any interest on the unauthorised payment charge and surcharge which Ms F is required to pay.

I understand that Ms F thinks that we should direct James Hay to pay to her the unauthorised payment charge and any other applicable fees/interest and that it should then

be for her to settle matters with HMRC. I can appreciate that Ms F wants to draw a line under this and doesn't want to be reliant on an undertaking from James Hay. However, I'm still not persuaded that it would be fair or reasonable to require James Hay to compensate Ms F for monies that she hasn't yet paid to HMRC and may not be required to pay depending on any negotiations she enters into with HMRC. I'm satisfied that an undertaking remains appropriate in the circumstances.

James Hay paid the £112,000 from Ms F's SIPP to Wannops LLP, a UK based regulated law firm. Ms F says that she only received a portion (£27,307.75) of these funds and has provided evidence of receipt of those funds. If James Hay had not permitted the purchase of the Elysian Fuels shares, those funds would have remained in Ms F's pension. So, I think that this loss is as a result of James Hay's failures, but I still need to consider if it would be fair and reasonable for it to compensate Ms F for this.

The relevant form asked for the vendor's bank details for payment of the monies for the shares. In this case, the vendor was Ms F not Wannops LLP. Whilst the involvement of a solicitor may not be particularly unusual in such transactions in principle. I think James Hay should have checked why the funds were being paid to a party other than the vendor, Ms F. The importance of it making such checks was enhanced by what I think James Hay should have understood about the Elysian Fuels investment and Ms F's transaction in particular by this stage, and the concerns it ought to have had, which I've set out in some detail earlier in this decision.

James Hay has said that we should ask Ms F for more information about what happened in relation to the payment to Wannops LLP. Ms F has been clear in her submissions that she didn't have a good understanding of what happened at the time, that everything was sorted by Mr B and that it was not until her representative told her that she'd lost a significant portion of her pension, that she understood what had happened in relation to the monies released from her pension. And, in any event, I'm satisfied that I have sufficient information to fairly and reasonably decide this aspect of Ms F's complaint. So, I'm not persuaded that asking additional questions at this stage is necessary or, indeed, would prove helpful.

Since I issued my provisional decision, we've received some further information from Wannops LLP, it has confirmed that the only amount paid to Ms F by it was £27,307.75. Separately, it also confirmed:

"Wannops received £112,000 from a James Hay Santander bank account on 30 April 2014. Wannops acted for its client Exceptional Management Limited as lender..."

On 30 April 2014, Wannops sent to Ms F £27,307.75. The records do not record the bank account details to which the funds were transferred. The balance less Wannops fees of £1,290 of £83,402.25 was sent on the same date to Exceptional Management Limited."

And

"...Wannops did not act for any of [James Hay's] clients named in [James Hay's] letter nor, of course, for the avoidance of doubt, did it act for James Hay. Wannops was instructed in relation to the drafting of loan agreements for the lender Exceptional Management Limited. Wannops received funds from a Santander account from James Hay on the instructions of the borrowers to facilitate the repayment of the loans..."

This information was shared with the parties to the complaint, and they were given the opportunity to respond to this.

James Hay, amongst other things, said:

- The monies which weren't paid to Ms F were used to repay the loan she had entered into to fund the purchase of the Elysian Fuels shares in her personal capacity. The cause of this loss therefore was said loan agreement entered into before James Hay's involvement. And, the monies were used in any event for the benefit of Ms F, to award capital and investment losses would overcompensate her.
- If James Hay had refused to make the payment Ms F would have been in breach of her obligations under the loan agreement (of which it was unaware) and it would have been in breach of a formal written instruction.
- The correct analysis of the situation is that the monies wouldn't had been transferred to Wannops LLP but for the loan agreement. The connection between the loan and transfer to Wannops LLP is key as this is what lead to Ms F giving an amount from her pension. This is the causally relevant event and not James Hay payment to Wannops LLP.

The agreement is dated around a month after Ms F purchased the Elysian Fuels shares in her personal capacity. I do however accept that that is the stated purpose of the loan. Under the circumstances it seems unlikely that monies were actually paid to Ms F under the loan agreement, which she then used to purchase the shares. Under the arrangement Ms F borrowed £18,592 and had to pay £83,402.25 in interest and arrangement costs alone. These terms are quite extraordinary.

I set out the above simply to highlight the unusual nature and timing of the loan, I accept that James Hay is in no way responsible for the terms of the loan.

James Hay may seek to argue that if it hadn't released the funds to Wannops LLP, this could have resulted in Ms F being pursued for £84,692.25 under the loan agreement she signed. I think this is unlikely taking everything into account. For example, Ms F, based on what we've been told, has never paid back the capital borrowed and hasn't been pursued for this. I also think it may have proven difficult for anyone to seek to enforce the loan agreement under the circumstances.

Ms F has provided bank statements showing the amount she received from Wannops LLP and this aligns with what we've now been told by Wannops LLP, James Hay may wish to see some additional evidence in relation to this. If it does, it should make clear what evidence it requires, and I would expect Ms F to take reasonable steps to comply with any such request.

James Hay has questioned proximity or link between what I've found to be its failings in this instance and the losses for which I've found it fair and reasonable for James Hay to compensate Ms F for. I've identified a number of what I consider to be failings on James Hay's part in relation to the transaction about which Ms F complains. Amongst other things, these include:

- James Hay's decision to permit the purchase of Elysian Fuels shares via Ms F's SIPP.
- Its failure to ask additional questions about Ms F's purchase of the Elysian Fuels shares, given what it knew – or ought to have known – about the financing arrangements associated with this scheme.
- Its failure to follow its own internal procedures at the point of purchase of these unquoted shares.

- Its failure to identify and interrogate inconsistencies in the information provided to it at point of sale, such as Ms F's profession and the evidence provided in support of the sophisticated investor form.
- Its failure to identify and investigate why the monies for the purchase of the shares were not being paid to Ms F and instead to an apparently unconnected third party.

Ultimately, I think this loss was suffered as a result of James Hay's failings and that it wouldn't have been incurred *but for* those failings and, additionally, that it is fair and reasonable for James Hay to compensate Ms F for these losses in the particular circumstances of this case.

The DISP rules set out that when an ombudsman's determination includes a money award, then that money award may be such amount as the ombudsman considers to be fair compensation for financial loss, whether or not a court would award compensation (DISP 3.7.2R).

As I set out above, I think it's fair and reasonable in the circumstances of this case to hold James Hay accountable for its own failure to comply with the relevant regulatory obligations and to treat Ms F fairly.

The starting point, therefore, is that it would be fair to require James Hay to pay Ms F compensation for the loss she's suffered as a result of James Hay's failings. I've considered whether there's any reason why it wouldn't be fair to ask James Hay to compensate Ms F for her losses which I consider to be resultant from the purchase of the Elysian Fuels shares by her SIPP. And I'm satisfied it's appropriate and fair in the circumstances for James Hay to compensate Ms F to the full extent of the financial losses she's suffered that I consider to stem from its failings.

I accept that it may be the case that Mr B and FCP, in advising Ms F to enter into a SIPP, arranging the financing and promoting the investment, are responsible for initiating the course of action that led to Ms F's loss. And, that those and other parties have contributed to the subsequent loss of £84,692.25 of the funds released from Ms F's SIPP. However, it's also the case that if James Hay had complied with its own distinct regulatory obligations as a SIPP operator, the purchase of the Elysian Fuels shares via Ms F's SIPP wouldn't have gone ahead, and the loss she suffered as a result could have been avoided.

If it wishes, James Hay can have the option to take an assignment of any rights of action Ms F has against any of the other parties involved in this transaction in respect of the events this complaint concerns *before* compensation is paid. And the compensation can be made contingent upon Ms F's acceptance of this term. This assignment would need to be limited to the amount by which James Hay compensates Ms F. James Hay would need to meet any costs in drawing up the assignment.

I want to make it clear that I've carefully taken everything James Hay has said into consideration. And I'm of the view that it's appropriate and fair in the circumstances for James Hay to compensate Ms F to the full extent of the financial losses she's suffered due to James Hay's failings. And, taking into account the combination of factors I've set out above, I'm not persuaded that it would be appropriate or fair in the circumstances to reduce the compensation amount that James Hay is liable to pay to Ms F.

And I'm satisfied that in the circumstances, for all the reasons given, it's fair to say James Hay should compensate Ms F for the loss she's suffered as a result of it allowing the purchase of the Elysian Fuels shares. I don't think it would be fair to say in the circumstances that Ms F should suffer the loss because she ultimately instructed the purchase of the shares and the payment of the funds to Wannops LLP.

Putting things right

I consider that James Hay failed to comply with its own regulatory obligations by permitting the purchase of Elysian Fuels shares by Ms F's SIPP. My aim in awarding fair compensation is to put Ms F back into the position she would likely have been in had it not been for James Hay's failings. Had James Hay acted appropriately, I think it's *most likely* that Ms F wouldn't have invested her SIPP in the manner she did.

I take the view that Ms F would have invested differently. It's not possible to say *precisely* what she would have done differently. But I'm satisfied that what I've set out below is fair and reasonable under the circumstances.

In light of the above, James Hay should:

- Calculate the notional transfer value of Ms F's SIPP. Allowing for the £27,307.75, which Ms F received from her SIPP.
- Obtain the actual transfer value of Ms F's SIPP, including any outstanding ~~charges~~
- Pay a commercial value to buy any illiquid investments (or treat them as having a zero value).
- Pay an amount into Ms F's SIPP so as to increase the transfer value to equal the notional value established. This payment should take account of any available tax relief and the effect of charges.
- If the SIPP needs to be kept open only because of the illiquid investment/s and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.
- If Ms F has paid any fees or charges from funds outside of her pension arrangements, James Hay should also refund these to Ms F. Interest at a rate of 8% simple per year from date of payment to date of refund should be added to this.
- Undertake to pay *any* amount Ms F has to pay to HMRC in relation to the £112,000 released from her pension, which is in excess of the basic rate of tax she would have incurred on 75% of £27,307.75 had the funds been withdrawn as a pension income in retirement.
- Pay to Ms F £1,500 to compensate her for the distress and inconvenience she's been caused.
- Provide an indemnity not to pursue Ms F in relation to the scheme sanction charge it's had to pay. James Hay has confirmed that it will not pursue her for this however it's clear from her submissions that this remains a significant concern for her. So, I think it would be fair and reasonable for James Hay to set this out formally.

I've set out how James Hay should go about calculating compensation in more detail below.

Treatment of the illiquid assets held within the SIPP

I think it would be best if any illiquid assets held could be removed from the SIPP. Ms F would then be able to close the SIPP, if she wishes. That would then allow her to stop paying the fees for the SIPP. The valuation of the illiquid investment may prove difficult, as there is no market for it. For calculating compensation, James Hay should establish an amount it's willing to accept for the investment as a commercial value. It should then pay the sum agreed plus any costs and take ownership of the investment.

If James Hay is able to purchase the illiquid investment, then the price paid to purchase the holdings will be allowed for in the current transfer value (because it will have been paid into the SIPP to secure the holding).

If James Hay is unable, or if there are any difficulties in buying Ms F's illiquid investment/s, it should give the holding/s a nil value for the purposes of calculating compensation. In this instance James Hay may ask Ms F to provide an undertaking to account to it for the net amount of any payment the SIPP may receive from the relevant holding/s. That undertaking should allow for the effect of any tax and charges on the amount Ms F may receive from the investment and any eventual sums she would be able to access from the SIPP. James Hay will have to meet the cost of drawing up any such undertaking.

Calculate the loss Ms F has suffered as a result of making the investment

James Hay should arrive at a notional valuation by assuming the monies would have enjoyed a return in line with the FTSE UK Private Investors Income Total Return Index from the date the Elysian Fuels shares were purchased by the SIPP and up until the date of calculation. That is a reasonable proxy for the type of return that could have been achieved over the period in question if Ms F's pension had *remained intact* and no funds had been released.

Any contributions or withdrawals Ms F has made will need to be taken into account.

Any withdrawal out of the SIPP should be deducted at the point it was actually paid so it ceases to accrue any return in the calculation from that point on. We know that Ms F received £27,307.75 from her pension, this should be treated as a notional withdrawal as at the date this payment was made for the purposes of this calculation. The same applies for any contributions made, these should be added to the notional calculation from the date they were actually paid, so any growth they would have enjoyed is allowed for.

The notional value of Ms F's pension plan less the current value of the SIPP (as at date of calculation) is Ms F's loss in respect of her pension.

Pay an amount into Ms F's SIPP so that the transfer value is increased by the loss calculated above.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Ms F's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Ms F as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to her likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

If either party disagrees with the presumed income tax rate, they'll need to let us know as soon as possible and, if agreement can't be reached at this stage, certainly before a final decision is issued after which the redress can't be amended.

SIPP fees

If the investments can't be removed from the SIPP, and because of this it can't be closed after compensation has been paid, then it wouldn't be fair for Ms F to have to continue to pay annual SIPP fees to keep the SIPP open. So, if the SIPP needs to be kept open only because of the illiquid investment/s and is used only or substantially to hold that asset, then any future SIPP fees should be waived until the SIPP can be closed.

Undertaking to pay the monies owed to HMRC

I've given careful consideration to what Ms F has said about this, I understand that she would like to draw a line under this situation and that payment should be made to her without delay. Under the circumstances, I remain of the view that what I've set out below is fair and reasonable.

James Hay must undertake to pay *any* amount Ms F has to pay to HMRC in relation to the £112,000 released from her pension, which is in excess of the basic rate of tax she would have incurred on 75% of £27,307.75 had the funds been withdrawn as a pension income in retirement. To be clear, this includes any interest Ms F has to pay.

I'm directing James Hay to only reduce the amount it pays of the settlement with HMRC by the amount Ms F would have incurred on 75% of £27,307.75 had the funds been withdrawn as a pension income in retirement because the rest is otherwise taken into account by way of how James Hay will need to pay redress as set out above. And, Ms F shouldn't have to have this tax taken into account twice.

The undertaking should allow for payment of these funds direct to Ms F if she settles with HMRC, subject to evidence of this being provided. I understand that Ms F hasn't been able to do this so far but upon receipt of compensation as set out above, this may become a possibility.

The undertaking should also allow for payment to be made payable to HMRC, if that's the preferred course of action of the parties to the complaint. James Hay may also require, within the undertaking, that Ms F take *reasonable* steps to negotiate any settlement such as providing HMRC with evidence of the amount she actually received from her pension and/or how the arrangement came about. These steps must:

- Be set out in advance.
- Be clear and proportionate.
- Not result in a significant protraction in reaching a settlement.

James Hay will have to meet the cost of drawing up this undertaking. I understand Ms F would like to draw a line under this situation and does not want to have any further dealings with James Hay. However, as above, I remain of the view that what I've set out above is fair and reasonable under the circumstances.

Distress & inconvenience

I think the loss of the pension provision that is the subject of this complaint caused Ms F significant distress, and this is clear from her submissions to this service, and James Hay

should pay her £1,500 to compensate her for this. Not only did Ms F lose her pension provision, but she was also found to owe an HMRC bill of around £60,000 which she says she has had no means of paying.

The scheme sanction charge

Provide an indemnity not to pursue Ms F in relation to the scheme sanction charge it's had to pay. James Hay has confirmed that it will not pursue her for this, and I don't doubt its submissions to this effect however it's clear from Ms F's submissions that this remains a significant concern for her. So, I think it would be fair and reasonable for James Hay to set this out formally.

My final decision

For the reasons given, my final decision is that I uphold Ms F's complaint against James Hay Administration Company Ltd. And I require James Hay Administration Company Ltd to pay Ms F the compensation amount as set out in the steps above.

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £160,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £160,000, I may recommend that James Hay Administration Company Ltd pays the balance.

Determination and award: I uphold the complaint. I consider that fair compensation should be calculated as set out above. My final decision is that James Hay Administration Company Ltd should pay the amount produced by that calculation up to the maximum of £160,000 (including distress or inconvenience but excluding costs) plus any interest on that amount as set out above.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £160,000, I recommend that James Hay Administration Company Ltd pays Ms F the balance plus any interest on the balance as set out above.

The recommendation isn't part of my determination or award. James Hay Administration Company Ltd doesn't have to do what I recommend. It's unlikely that Ms F could accept a decision and go to court to ask for the balance and Ms F may want to get independent legal advice before deciding whether to accept this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms F to accept or reject my decision before 12 October 2023.

Nicola Curnow
Ombudsman