

The complaint

Mr B complains, with the help of a representative, that James Hay Administration Company Ltd (James Hay) failed to undertake sufficient due diligence in relation to the Elysian Fuels investment, didn't follow its own internal protocols and as a result he has suffered a number of losses.

What happened

Mr B established a James Hay SIPP, transferred monies from his existing pension into it and then used those monies to purchase Elysian Fuels shares he had purchased in his personal capacity. Mr B has told us that he did this on the advice of an unregulated business and that they completed all of the relevant paperwork.

The original purchase of the shares was funded by way of a 16p per share cash contribution and with the remaining 84p per share funded by a limited recourse loan from Future Capital Partners – the promoters of the investment. Mr B has told us that the cash contribution was funded by a third-party.

Mr B completed a James Hay SIPP application form. This confirmed that he was a merchant banker with approximate annual earnings of £220,000. And, that his SIPP would be funded by the transfer of benefits from existing pensions.

A share certificate dated 18 December 2013, for 177,650 Elysian Fuels shares in Mr B's name was issued.

In a letter dated 19 December 2013 a law firm, which I'll refer to as W, wrote to Mr B setting out some details of the proposed arrangement with him:

"I write to advise you that my firm acts for Exceptional Management Limited in connection with the proposed acquisition by your self invested personal pension ("SIPP") of 177,650 £1.00 shares in [Elysian Fuels]. You will acquire title to the Elysian Shares which will then be acquired by your SIPP. In accordance, with the same terms of your enclosed Loan Agreement ("Agreement") my client will lend you £29,489.90 for the purpose of your acquisition of the Elysian Shares.

In accordance with the Agreement, the sum of £177,650.00 will be paid to my firm acting on behalf of my client from the James Hay Partnership who are the trustees of your SIPP as part of your SIPP'S acquisition of the Elysian Shares.

In accordance with the Agreement, we will account to you for the sum of £67,770.00 being the balance after payment to my client of the sum of £106,590.00 together with the payment of my firm's costs and disbursements of £1,290."

A letter dated 20 December 2013 from W to James Hay stated that:

"Exceptional Management Limited [Mr B's SIPP]

We write to advise you that this firm is instructed by Exceptional Management Limited. [Mr B] is acquiring 177,650 shares in Elysian Fuels...("Shares") from our client.

We are instructed that as trustees of the [Mr B's SIPP] you acquiring on its behalf, as a permitted investment, the Shares for the consideration of £177,650.00 ("Consideration") from [Mr B]. Please advise us when you anticipate that the Share transaction will be complete and confirm that on completion you will forward the Consideration to this firm's client account details of which are:

[bank details]

You should obtain confirmation direct from [Mr B] that you are instructed to forward the Consideration to this firm."

On 7 February 2014 a number of documents were signed in connection with this transaction, including:

- A statement for self-certified sophisticated investors
- A stock transfer form (from Mr B to James Hay)
- A James Hay unquoted share questionnaire

As part of the unquoted share questionnaire, Mr B was asked how he found out about the opportunity to buy shares in this company, his response to this was independent research. Mr B also confirmed that funds for the purchase of the Elysian Fuels shares should be paid to an account belonging to W. The price per share given in the questionnaire was £1.

The sale of the shares to the SIPP took place on 20 June 2014. So, Mr B purchased the Elysian Fuels shares in his personal capacity in December 2013 and those shares were sold to Mr B's SIPP in June 2014.

The monies for the purchase of the shares were paid from Mr B's SIPP to W, he says that he only ever received a portion of the monies released. Based on the information we've been able to obtain it appears Mr B received £69,770 of the £177,650 released from his pension.

The Elysian Fuels investment subsequently failed, and the shares are valued at nil.

HM Revenue & Customs (HMRC) wrote to Mr B in 2015 notifying him that it was looking in to his 2013/2014 self-assessment return. HMRC wrote to Mr B again in 2016 to put him on notice that it was also looking in to his 2014/2015 self-assessment return. After it had finished its investigation, HMRC wrote to Mr B again (in 2021) confirming that his tax returns didn't need to be amended.

Background to complaint

Mr B complained to James Hay in December 2019, and it issued a final response letter explaining that it thought the complaint had been raised too late. Unhappy with its response, Mr B referred his complaint to this service.

One of our investigators considered Mr B's complaint and concluded that it had been referred to us in time but that it shouldn't be upheld. Mr B disagreed and made further submissions. Mr B said:

- He wasn't a direct client and was being advised by an unregulated introducer.

- He was the subject of fraud and manipulated by another party.
- When taking into account the financial implications of the transaction it doesn't make sense that he was aware that the release of the money from his pension was an unauthorised payment.
- He entered into a full recourse loan with Exceptional Management Limited.
- At the time he was just three years away from being able to take benefits from his existing pension.
- If James Hay had refused to accept the shares he wouldn't have gone ahead with the transaction.
- This was a sophisticated scheme involving professional criminals, advisers and regulated lawyers – he had put his faith in these parties.
- It hadn't occurred to him that this might be pension liberation, his pension was stolen from him.
- James Hay should be accountable for all of the losses he has suffered in connection with this transaction. He didn't know that the payment from his pension could be regarded as an unauthorised payment and was certainly not aware of the underlying criminal activity.
- He thought he was investing in a viable clean energy investment as this was how the scheme was presented to him by those who introduced him to the scheme.
- He borrowed money to purchase the shares, the monies released from his pension in connection with the sale of the shares to the SIPP weren't all paid to him, he was only paid £40,000 of the £140,000 – the rest was paid to a third-party law firm (W) in connection with the loan.
- So, this did not appear to him as an unauthorised payment. He viewed the monies he did receive in connection with the investment as a bonus.
- The cost for him to facilitate the Elysian Fuels investment amounted to a total of £137,650 which is far more than the 16p in the £1 that we've said would have made him aware that he was selling the Elysian Fuels stock at a premium. The potential charges of 55% on the £177,650 would result in additional tax to pay of around £100,000. It wouldn't make sense for him to proceed with the transaction knowing that it could be regarded as an unauthorised payment as the associated costs of around £240,000 far exceeded the potential gain.

James Hay also made further submissions. It provided documentation from the point of sale and correspondence exchanged between James Hay and Mr B. Briefly it said:

- It had no knowledge of Mr B having taken advice from an unregulated business or individual. Any dealings he had were not disclosed to James Hay until Mr B raised a complaint.
- It questioned why Mr B would choose to rely on advice from an unregulated individual and why this information was withheld from James Hay at the time.
- Given Mr B's occupation and experience, he would have been well aware of the risks involved in dealing with such entities and individuals.
- James Hay doesn't accept introductions of any new business from such entities. Mr B's application was treated as non-advised, and the SIPP was established on a direct client basis.
- Given Mr B's background, experience and consequently his level of financial sophistication he would have been fully aware of the investment he had made, the nature of the transaction and the potential risks.

James Hay says that Mr B set out his sophistication and experience in a fax to it on 29 May 2014:

"I am a CF30 Authorised Representative of the Financial Conduct Authority...As a partner of [name of business] and, prior to that, as a Managing Director of [name of business] both FCA authorised investment firms, I have been working in the equity and SME financing sector since 2008. Prior to that I was a Managing Director in the [name and location of business]. In October 2013, I co-led the acquisition and de-listing of [name of business] by [name of business] and a syndicated of [Ultra High Net Worth] Investors, and am currently acting as the full time Chief Financial Officer of [name of business]."

W confirmed to us that in accordance with its digital records it paid to Mr B £69,770 on 2 July 2014.

We asked Mr B to explain his recollections of what happened and his understanding of the transaction. Briefly, he said:

- He was contacted by way of a cold call.
- He didn't receive any documentation from the unregulated business.
- He doesn't have bank statements from the time of the transaction but on review of his records he can confirm that the amount he received was £69,770 in line with W's submissions.
- He was told that the return on the Elysian Fuels investment would be a multiple of the amount he invested.
- He doesn't have any further correspondence from HMRC.
- The losses he believes James Hay are responsible for include the loss to his pension of around £107,990 plus investment growth, charges levied by James Hay from Mr B's SIPP throughout, and any charges arising from the Elysian Fuels investment paid from outside the SIPP.
- He also wants James Hay to compensate him for the distress and inconvenience the situation has caused him and provide an indemnity against it pursuing him in connection with the sanction charge it incurred.

Because agreement couldn't be reached, this case was passed to me for review.

I sent Mr B and James Hay my provisional decision explaining why I didn't think this complaint should be upheld and invited both parties to send me any further submissions that they would like me to consider. James Hay didn't make any further submissions. Mr B provided some further submissions, setting out in detail why he thinks that his complaint should be upheld and James Hay does owe him compensation. I've considered Mr B's submissions in their entirety. Here I've set out a brief summary of what I consider to be the material points:

- It's not in dispute that Mr B was sufficiently qualified and experienced that he should have been aware of the risks he was taking when undertaking this transaction and bear the consequences of this.
- Whilst it's accepted that Mr B should bear the responsibility of investing in Elysian Fuels and then selling those shares to his pension, it's contended that further consideration should be given to James Hay's actions in relation to the payment of funds from the SIPP to W.
- James Hay's actions should be viewed in light of findings reached in a case involving similar transactions and the failings identified therein. Given that those same failings were present in this case. For example, James Hay failed to question why consideration for the shares was to be paid to a seemingly unconnected third party rather than the vendor, Mr B.

- Irrespective of whether or not Mr B should have been aware of the potential tax implications of the transaction, James Hay should be held responsible for its failings in making the payment to a third party.
- Mr B was the subject of a fraud, the execution of which required payment of consideration for the shares to the third party. And, his knowledge and experience cannot be said to have given him insight into the fraud being undertaken. Indeed, it would be illogical for anyone to knowingly take part in an investment where there was a risk of fraud taking place.
- Mr B was manipulated by an extremely experienced party who was exploiting numerous individuals for the purpose of extracting funds from their pensions.

Mr B's case was passed back to me for a final decision.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having reconsidered all of the available evidence and arguments, including Mr B's most recent submissions, I remain of the view that Mr B's complaint shouldn't be upheld. I've largely repeated the findings I set out in my provisional decision below, adding to these primarily only to address the submissions made in response to my provisional decision.

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

The Elysian Fuels scheme in this case was an unusual arrangement. It generally involved buying shares largely with a limited recourse loan and then selling those shares to a SIPP so that funds were paid out of the pension scheme to the investor. This is, as I've said, an unusual arrangement and on closer inspection HMRC was not happy with it. It generally found that the payment was an unauthorised payment and imposed an unauthorised payment charge, a surcharge and interest. As set out above the manner in which Mr B went about purchasing the shares was different, in so far as he purportedly borrowed money to fund the 16p per share contribution and the monies released were paid to W in the first instance. Mr B has told us that he was advised to enter into the transaction in this manner, he says that he was defrauded.

There are numerous examples of investment schemes that are set up to make use of tax concessions which push, with varying amounts of aggression, at the boundaries of the purpose of the concession. Sometimes people invest in those schemes without understanding that they are unusual and that there is a risk that HMRC might challenge the scheme. Sometimes people invest in those schemes understanding the unusual attributes of the scheme and accepting the risk HMRC might challenge the scheme. And over recent years, as seen for example with film partnerships, HMRC has been more and more active in challenging the schemes it thinks are tax avoidance schemes.

We've been provided with redacted correspondence from HMRC in which it said in relation to the Elysian Fuels scheme that:

*"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 out 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's initial view is the shares had no value when the transaction took place." [my emphasis]

If an investor chooses to invest in a scheme understanding and accepting the risk HMRC might challenge their scheme and might impose tax consequences upon them, is it fair and reasonable for such an investor to complain later if HMRC does challenge and does impose those consequences? That is, in effect, the issue here because, like the investigator, I consider that Mr B, because of his own professional expertise, will have realised the Elysian Fuels scheme was unusual and was at risk of challenge from HMRC. Mr B was an experienced financial professional at the time of the transaction. I consider that Mr B will have had a good understanding of taxation matters, and of the possibility of HMRC questioning a scheme involving unusual features such as the Elysian Fuels scheme in this case.

Mr B initially told us that, given the way he came to hold the Elysian Fuels shares in his SIPP and the third-party lending arrangements, he didn't view the monies released from his SIPP as a potential unauthorised payment. Mr B thought he was investing in a viable clean energy investment as this was how the scheme was presented to him by those who introduced him to the scheme and his pension monies were ultimately stolen from him. I accept that the way in which Mr B went about purchasing the shares and the payment of the monies to a third party was unusual. But, I don't think that negates his sophistication and at the time of the transaction in question Mr B was a very experienced financial professional.

I think it's more likely than not that Mr B will have done a number of things when he was weighing up the risks involved with taking part in the Elysian Fuels scheme. And that will have, or should have, included his own assessment of the Elysian Fuels scheme as a whole – not just the share price – set against his professional understanding of matters of investment and taxation. I accept that he may also have taken into account the fact that James Hay was prepared to allow members of its SIPPs to invest in the Elysian Fuels scheme (or previous versions of it). But, in my view, that doesn't mean that the risk Mr B knew, or should have known, he was taking should fairly and reasonably transfer to James Hay.

James Hay wasn't Mr B's adviser. It didn't advise him that taking those risks was suitable for him. Mr B made that decision for himself (or in conjunction with those he says recommended this transaction to him). But, in my view, in determining his complaint against James Hay

only, that was a decision Mr B was qualified and experienced to reasonably make for himself, and it is fair and reasonable that he bears the consequences of that decision.

I understand that Mr B feels strongly that it isn't fair and reasonable that he bears the consequences of the transaction that is the subject of this complaint going ahead and not James Hay. Given its role in the transaction and particularly when taking into account the nature of Mr B's purchase of the Elysian Fuels shares. I've considered this and the other submissions that Mr B has made including that he was misled and defrauded.

As I understand it, Mr B now broadly accepts that James Hay shouldn't be held responsible for any tax implications of the transaction he entered into. He doesn't dispute that he was sufficiently qualified and experienced that he should have been aware of the risks he was taking when undertaking this transaction and bear the consequences of this. But he maintains that, considering what he says are the fraudulent actions of third parties involved in this transaction, he couldn't have foreseen the loss of monies that weren't paid to him by W – after the monies released from his pension were paid to it. And, that James Hay's failings in making payment to a third party (W) rather than the vendor, should be considered in light of the findings reached in another case involving a payment being made to the same third party.

I've carefully considered what Mr B has said about findings we've reached in another case involving payments James Hay made to third parties. And, I am, of course, mindful of the importance of consistency in these matters. However, I must reach my findings on the facts of this case. When reaching the above findings, I have taken into account what Mr B has said throughout the course of his complaint in relation to how this transaction came about.

I don't think that the payment of monies to W – in connection with the sale of the Elysian Fuels shares to the SIPP – can or should be viewed in isolation in this instance. It was part of a wider transaction. And I don't think that Mr B's knowledge, expertise and experience were relevant only to any tax implications, I think they are relevant to the transaction as a whole and his decision to enter into it.

Taking all of the above into account, I remain of the view that, in the unusual circumstances of Mr B's case and taking into account everything that he's told us, even if James Hay didn't carry out adequate due diligence on the Elysian Fuels scheme or should have taken additional steps in relation to the payment of funds to W (and I make no finding on these points), it isn't fair and reasonable to require it to pay compensation to Mr B. And so, in the circumstances of his case, I do not uphold Mr B's complaint.

I appreciate that this will come as a disappointment to Mr B, but I'm not persuaded that it would be fair and reasonable to uphold his complaint in this instance.

My final decision

My final decision is that I do not uphold Mr B's complaint against James Hay Administration Company Ltd and I make no award.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 30 April 2024.

Nicola Curnow
Ombudsman