

The complaint

Mr O complains, with the help of a representative, that James Hay Administration Company Ltd (James Hay) accepted the in-specie contribution of Elysian Fuels shares into his self-invested personal pension (SIPP) without undertaking appropriate due diligence, ensuring the shares were independently valued or having proper procedures in place for transactions of this nature.

What happened

Mr O established a James Hay SIPP, he purchased Elysian Fuels shares in two separate tranches in his personal capacity. As I understand it, both tranches were purchased by way of paying a 16p per share cash contribution and with the 84p per share balance financed by a limited recourse loan provided by Future Capital Partners (FCP) the promoters of the investment.

He then sold these to his company for £1 per share. The company then transferred these to his SIPP by way of an employer in-specie contribution.

A James Hay in-specie contribution notification and declaration was completed, confirming a contribution of £100,000 would be made and the company paying the contribution was listed as Mr O's business. This was signed and dated on 16 July 2012. This transaction isn't being considered as part of this complaint.

On 2 August 2012, James Hay wrote to Mr O explaining that:

"The cheque from [Mr O's business] in the sum of £1,495.00 has been credited to the Central Trustee Bank Account. Please find enclosed Contribution Payment acknowledgement. The monies will be held as cash pending investment instructions.

If your total contributions in respect of a tax year to all registered pension schemes is more than the annual allowance (currently £50,000) you may be liable to a personal tax charge called the annual allowance charge, which is equivalent to your marginal rate of tax. It is possible for unused annual allowance to be carried forward for up to three years. You should speak to your financial adviser about this.

I note that there is to be a transfer into the portfolio from [Mr O's business] of the Elysian Fuels holdings. We require Stock Transfer Forms and the Share Certificate for this holding. After being in contact with [contact at accountancy firm] in regards to these, once in receipt of the above we will then be able to request the transfer."

Mr O later purchased a further 96,000 shares in a later tranche of Elysian Fuels in his personal capacity in the same manner as set out above. He then sold these shares to his company at £1 per share, in connection with this sale, £96,000 was paid to him by his company.

A share certificate dated 27 September 2013 confirmed that Mr O's business was the registered holder of 96,000 Class A Preference Elysian Fuels shares of £1 each fully paid.

A James Hay in-specie contribution notification and declaration was signed and dated 29 September 2013. This confirmed a contribution of £90,000 would be made and the company paying the contribution was listed as Mr O's business.

A James Hay unquoted share questionnaire signed and dated 30 September 2013, confirmed, amongst other things that he found out about this opportunity from FCP – the promoters of this investment. The listed vendor was Mr O's company.

On 7 October 2013, Mr O's accountants wrote to James Hay enclosing share transfer forms and share certificates on behalf of a number of individuals including Mr O.

The letter explained:

"Please note that the shares transferred into the SIPP for [Mr O] is only 90,000 of the 96,000 shares. We look forward to receiving a share certificate for the balance of the shares."

On 6 March 2014, Mr O's accountant provided a statement of self-certified of high net worth based on Mr O's share in two businesses including the business that was transferring the shares to the SIPP.

A subsequent share certificate dated 1 May 2014 confirmed that Mr O's SIPP was the registered holder of 90,000 Class A Preference Elysian Fuels shares of £1 each fully paid. These shares had been transferred in-specie into his SIPP by way of an employer contribution from his company. This complaint relates only to this transaction.

An annual review pack dated 5 August 2014, shows that prior and in addition to the in-specie contribution of 90,000 shares, Mr O's SIPP also received an employer contribution of £1,145 in cash.

James Hay has confirmed that no tax relief was claimed at source.

The Elysian Fuels scheme has since failed, and the shares transferred into Mr O's SIPP are valued at nil.

Background to the complaint

Mr O complained to James Hay on 7 January 2020. James Hay issued a final response letter on 17 January 2020 explaining that it thought the complaint had been referred to it late. Unhappy with James Hay's response, Mr O referred his complaint to this service.

As noted above, Mr O purchased and sold two separate tranches of Elysian Fuels shares which were transferred into his SIPP by way of employer contributions at different times. This complaint relates only to the second tranche of shares, what happened in relation to the first tranche of shares has been considered under a separate complaint.

One of our investigators reviewed Mr O's complaint and concluded that it had been made in time but that he hadn't suffered a loss in his personal capacity for which James Hay could reasonably be held responsible. Mr O disagreed and made further submissions, but the investigator wasn't persuaded to change their view.

Mr O's submissions:

- If James Hay hadn't accepted the in-specie contribution, then Mr O's business would have paid an equivalent cash contribution into his pension.
- Mr O's business did pay him cash for the shares, but it obtained the equivalent value of Elysian Fuels shares, so at that stage they were in a neutral position. And, it would still have paid a cash contribution into Mr O's SIPP if James Hay hadn't accepted the in-specie contribution.
- Mr O has incurred numerous fees, including specifically in relation to the Elysian Fuels shares and James Hay failed to provide the services it charged for.
- These wouldn't have been incurred had James Hay not authorised the in-specie contribution of the shares.
- As a result of James Hay's actions Mr O has suffered a significant amount of stress and inconvenience.

James Hay confirmed that it agreed with the investigator's findings and didn't have any further comments at that stage.

Because agreement couldn't be reached, this case was passed to me for review. I sent my provisional decision explaining why I didn't think this complaint should be upheld to James Hay and Mr O. I said that I would consider anything either party wanted to add, neither party made any further submissions. My findings remain as set out in my provisional decision, I've reiterated these below.

What I've decided – and why

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

The parties to this complaint have provided detailed submissions to support their respective positions 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 was an unusual arrangement. It involved buying shares largely with a limited recourse loan and then typically – in the cases that we've seen – selling those shares to a SIPP so that funds were paid out of the pension scheme to the investor. This is, as I have said, an unusual arrangement and on closer inspection HMRC was not happy with it. It found that such payments were unauthorised payments and imposed unauthorised payment charges, surcharges and interest. In other cases, investors transferred shares held in their name to their pension by way of in-specie contributions. HMRC has also denied a number of different tax reliefs claimed in connection with the Elysian Fuels scheme.

However, what happened in this instance, as set out above, is quite different. And, whilst the transaction involved some of the same attributes as those described above (such as the manner in which Mr O purchased the shares and the transfer of these to a SIPP), it's of note that the shares were transferred into the SIPP by way of an in-specie employer contribution, so no monies were released from the SIPP – and, whilst Mr O may have purchased the shares in the manner set out above, the party (Mr O's business) transferring the shares to his SIPP had actually paid him £1 per share.

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

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."

As set out at the outset of this decision, Mr O purchased 96,000 shares in Elysian Fuels in his personal capacity. He then sold these shares to his company at £1 per share, in connection with this sale £96,000 was paid to him by his company. 90,000 shares were subsequently transferred in-specie into his SIPP by way of an employer contribution from his company. So, the activity that's the subject of this complaint was part of a wider endeavour undertaken by Mr O and I've considered this carefully in reaching the conclusions set out below.

Mr O complains, in his personal capacity, that James Hay failed to comply with its regulatory obligations and act in his best interests in connection with its decision to accept the in-specie contribution/transfer of the Elysian Fuels shares from his company.

I'm not persuaded that Mr O has personally suffered adverse tax implications because of James Hay's decision to permit the in-specie contribution of the Elysian Fuels shares. No monies were released from Mr O's SIPP in connection with this transaction, so he hasn't been pursued for an unauthorised payment charge and James Hay has confirmed that no at source relief was claimed on this contribution.

I acknowledge that Mr O may have suffered tax implications as a result of his personal investment in Elysian Fuels shares and subsequent sale of these to his business, but I don't think this could fairly and reasonably be linked to an act or omission on James Hay's part. It's also possible that Mr O's business has faced tax implications as a result of these transactions, but it is not the complainant in this case.

Stamp duty was paid in connection with the re-registration of the Elysian Fuels shares. This charge isn't specific to Elysian Fuels and is applied to transactions of this nature regardless

of the particular asset. The re-registration did take place in this instance, and, in the circumstances of Mr O's case, I'm not persuaded that it would be fair and reasonable to direct James Hay to refund this charge to Mr O. As noted above, the activity that's the subject of this complaint was part of a wider endeavour undertaken by Mr O and, in any event, it was Mr O's company – not Mr O – that paid a cash contribution into the newly established SIPP and again shortly before the in-specie contribution of the 90,000 shares proceeded.

Mr O has also said that his employer (his business) would have paid a cash contribution into his pension, if James Hay hadn't accepted the Elysian Fuels shares as an in-specie contribution. At the point James Hay decided to permit the in-specie contribution of Elysian Fuels shares into Mr O's SIPP, his business had already paid £96,000 to him in cash for the purchase of the shares in question. I'm not persuaded it's more likely than not that if James Hay had refused to accept the in-specie transfer of these shares that his business would have instead made a cash contribution to his SIPP.

I'm also not persuaded that James Hay has caused Mr O distress and inconvenience for which it should fairly and reasonably compensate him.

In my view, in the unusual circumstances of Mr O's case, even if James Hay did not carry out adequate due diligence on the Elysian Fuels scheme and or undertake sufficient steps before deciding to accept this in-specie transfer (and I make no finding on that point), I don't think Mr O – in his personal capacity – has been caused a loss for which it would be fair and reasonable to hold James Hay responsible. So, I do not uphold Mr O's complaint and I make no award.

My final decision

Taking everything into account and for the reasons set out above, my final decision is that I don't uphold Mr O's complaint about James Hay Administration Company Ltd and I make no award.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O to accept or reject my decision before 22 November 2024.

Nicola Curnow
Ombudsman