

The complaint

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

What happened

Mr B says that his financial adviser recommended that he establish a SIPP with James Hay, purchase Elysian Fuels shares in his personal capacity and then use monies contributed to the SIPP by way of an employer contribution to purchase the shares (a single contribution of £52,000).

Mr B's James Hay SIPP was applied for and established in early 2014.

Mr B then purchased the shares in the Elysian Fuels scheme in his personal capacity by way of paying a 16p per share cash contribution and with the 84p per share balance financed by a limited recourse loan. A share certificate was issued confirming that Mr B was the registered holder of 50,000 Class A preference Elysian Fuels shares of £1 each fully paid on 6 March 2014.

A James Hay unquoted share questionnaire was signed and dated by Mr B on 21 March 2014. This confirmed that Mr B intended to sell 50,000 Elysian Fuels shares to his SIPP at a price per share of £1.

Mr B then sold the Elysian Fuels shares held in his personal capacity to his SIPP at a price of £1 per share. When Mr B's SIPP purchased the Elysian Fuels shares, he was paid £50,000 in connection with this transaction.

The Elysian Fuels scheme has failed, and HM Revenue & Customs (HMRC) has found the payment – made to Mr B in connection with the purchase of the shares by the SIPP – to be an unauthorised payment and has pursued him for an unauthorised payment charge, surcharge, and interest.

As I understand it, Mr B paid just under £27,000 to HMRC in 2018 in settlement of the tax charge it had levied in connection with the unauthorised payment it found had been made to Mr B.

Background to the complaint

Mr B complained to James Hay about its acceptance of the Elysian Fuels shares in his SIPP in 2019. James Hay didn't uphold Mr B's complaint.

Unhappy with its response, Mr B referred his complaint to this service. One of our investigators looked into Mr B's complaint and concluded that it should be upheld. Both parties made further submissions disagreeing with the investigator's findings.

Mr B also raised a complaint about his financial adviser and referred it to our service. An ombudsman has since issued a final decision upholding Mr B's complaint about his financial adviser, which he accepted. To put things right, the decision sought to put Mr B in the position he would have been in had he not invested in Elysian Fuels, in line with this he received compensation for:

- The investment losses he suffered from investing in Elysian Fuels including charges incurred. Less the value of the £50,000 released from his SIPP.
- The cash contribution he made towards the purchase of the Elysian Fuels shares, any repayments made towards the loan provided in connection with the purchase of the shares in his personal capacity and any fees paid to third parties in connection with the administration of the Elysian Fuels LLP.
- The sum he paid to HMRC in connection with the unauthorised payment in addition to any tax he had paid HMRC because of his interest in the LLP.
- Compensation for the distress and inconvenience the impact of investing in Elysian Fuels had caused him.

As I understand it, Mr B has since received this compensation, amounting to £44,940.07.

Considering the above, we asked Mr B to confirm what outstanding loss he was seeking compensation for under this complaint. He confirmed, across a number of submissions, that he wanted:

- Confirmation in writing that James Hay will not pursue him in connection with the scheme sanction charge it incurred.
- The tax-free growth that he would have enjoyed if James Hay had not authorised the purchase of Elysian Fuels shares and his monies had remained in the pension, which he says wasn't accounted for in the award made on the linked adviser complaint. He qualified this by saying:
"Although when [Mr B] would have drawn down his pension on retirement, the funds would have become taxable, due to the years of compounded tax-free growth and the 25% tax free allowance, he would be better off had these remained within his pension and as such this loss needs to be accounted for."
- Compensation for the distress and inconvenience caused by this situation.

We asked James Hay to clarify its position in respect of the scheme sanction charge. James Hay confirmed that it hadn't pursued any SIPP members in connection with the scheme sanction charge it had incurred and had no intention to do so.

Our investigator reconsidered Mr B's complaint and explained that they thought Mr B had been fully compensated in respect of the transaction he complains about here under the linked complaint, so they didn't uphold his complaint about James Hay or make any recommendation. They were also satisfied that James Hay's confirmation that it hadn't pursued anyone in connection with the scheme sanction charge and had no intention to do so was sufficient.

Mr B disagreed highlighting the above outstanding losses and confirming he didn't think what James Hay had said in respect of the scheme sanction charge was sufficient or definitive.

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 Mr B's complaint should be upheld. 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.

As set out in the background to the complaint, Mr B also complained about the adviser who recommended the course of action about which he complains here. And, whilst awaiting the outcome of this complaint, Mr B has accepted a final decision issued in respect of that complaint and received compensation. That compensation was under our award limits, so the compensation awarded was paid in full.

We asked Mr B to confirm what he considered his outstanding losses to be. He confirmed that he thought he should be indemnified against the risk of James Hay pursuing him in connection with the scheme sanction charge it incurred in relation to Elysian Fuels.

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, surcharge, and interest. There were other tax implications resultant from investments in the Elysian Fuels scheme such as the scheme sanction charge incurred by James Hay.

During this complaint James Hay initially confirmed that it hadn't pursued any SIPP members in connection with the scheme sanction charge and had no intention of doing so. Mr B felt this wasn't sufficient reassurance. I asked James Hay to clarify its position and, ultimately, it confirmed definitively that it would not pursue Mr B in connection with the scheme sanction charge it had incurred under the circumstances.

I'm satisfied that this is fair and reasonable under the circumstances. I'm not persuaded that James Hay need take any further action in relation to this.

Mr B has also said that as a result of the monies being released from his pension, he has missed out on the tax-free growth that would otherwise have been enjoyed. I don't agree that this hasn't already been accounted for/Mr B hasn't already been compensated in full for his alleged investment losses. To be clear, I make no comment here as to whether Mr B ought to be compensated for the potential investment growth he has missed out on as a result of releasing monies from his pension. Or, whether this alleged loss is one for which James Hay is responsible. But I'm satisfied that, in any event, Mr B has been compensated in full for this.

The compensation awarded under Mr B's linked complaint about his adviser included the investment growth the monies released from Mr B's SIPP would likely have enjoyed had they remained invested throughout the relevant time and enjoyed growth in line with a named benchmark and the only tax deducted was a notional deduction for the tax that would have been payable had those monies subsequently been withdrawn from a pension in the normal course of things.

Overall, I find that Mr B has been fully compensated elsewhere for the losses he claims here, and that the confirmation I've been provided that James Hay won't pursue Mr B in connection with the scheme sanction charge it incurred is sufficient under the circumstances. So, James Hay doesn't have to undertake any further action.

My final decision

I don't uphold Mr B'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 B to accept or reject my decision before 21 June 2024.

Nicola Curnow
Ombudsman