

The complaint

Mr P complains, with the help of a professional representative, that Intelligent Money Ltd (IM) failed in its responsibilities to him in relation to the acceptance of Elysian Fuels shares in his Self-Invested Personal Pension (SIPP).

What happened

Mr P invested in a number of tranches of Elysian Fuels shares. This complaint relates only to the 103,500 Elysian Fuels shares Mr P sold to his IM SIPP in 2014.

At the time of the events that are the subject of this complaint, Mr P already had an IM SIPP which held prior tranches of Elysian Fuels shares.

Mr P's SIPP application form was submitted to IM on or around 30 January 2012, the copy of the form that we've been provided is relatively poor quality, but I can see it notes that:

- Mr P's occupation was an independent financial advisor.
- His annual earnings were £150,000.
- He was the financial adviser in respect of the SIPP.

On 13 March 2014, Mr P emailed IM saying:

"I have attached your contribution carry forward declaration showing existing pension contributions.

I want to top up another £104,455 as you can see on the second page from the HMRC carry forward calculator.

Can you confirm this looks OK plus confirm we are still OK for me to make a further Elysian investment."

I understand that Mr P 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. Mr P went on to sell these shares to his SIPP at a price of £1 per share.

A stock transfer form confirming the re-registration of the relevant Elysian Fuels shares from Mr P to his IM SIPP was signed and dated 8 April 2014. As I understand it, Mr P was paid £103,500 in connection with this transaction.

The Elysian Fuels scheme has since failed, and HM Revenue & Customs (HMRC) has found the payment made to Mr P 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.

We have been provided with some of the HMRC correspondence issued in connection with its investigation into Mr P's tax returns.

HMRC correspondence

On 14 March 2016, HMRC wrote to Mr P confirming that it was looking into his tax return for the year ended 5 April 2015, it said:

“Reason for the check

I understand you have taken part in arrangements which involved you becoming a member of (partner in) Elysian Fuels No...LLP and acquiring and then disposing of shares in a company Elysian Fuels No...PLC which is or was a member of that LLP.

You have omitted the partnership page from your tax return. However the partnership return reflects your share of the loss as £106,994.00.

You may have transferred or sold the above-mentioned shares to another entity in exchange for cash or other benefits. HMRC considers that you and other entities might not have treated the arrangements and related transactions correctly for tax purposes and are therefore investigating these arrangements.”

And

“As you know, I am already checking your return for the year ended 5 April 2012, 2013 and 2014 in which I am reviewing the arrangements which involved you becoming a member (or partner) of Elysian Fuels...LLP and Elysian Fuels...LLP.”

And

“Please be aware that you may owe additional tax in relation to the arrangements and that interest will be charge on this. If you wish to prevent such interest from continuing to grow, you can make a payment on account of your liabilities. You can do this regardless of whether you wish to settle your case at the moment or not. If additional tax is not due, any amounts we hold will be repaid.”

Background to the complaint

Mr P referred his complaint to IM in late 2019.

The November 2019 letter:

Mr P’s representatives initially wrote to IM on 14 November 2019. This letter set out that it was in relation to “*Elysian Fuels Pension Investments*” and says that:

“Further to our letter of 2 August 2019, we have been instructed by further clients as listed in Appendix A to pursue complaints on their behalf in respect of Elysian Fuels shares within their pension arrangements.”

Within the body of the letter, it’s then requested that IM undertake a number of actions, in particular:

- Acknowledge the letter and record the representative’s involvement on all relevant files.
- Inform its professional indemnity insurers and put them on notice in respect of these claims: *“We will be outlining individual circumstances and quantum in due course.*

However, without prejudice to our clients' cases, the gross estimated quantum for the client(s) listed in Appendix A is between £400,000 to £450,000."

- Confirm that its professional indemnity insurers had been put on notice in respect of potential claims.
- Acknowledge and respond to the attached subject access request (SAR) and additional request for information.

In closing the letter said:

"At this stage, we are willing and would suggest that it would be beneficial to enter into an alternative dispute resolution process and/or a 'without prejudice' telephone, or face to face meeting with Intelligent Money as quickly as possible. We feel it is in the best interest of all parties concerned to expedite these claims forestalling the need to enter into lengthy and costly correspondence and/or legal intervention.

We are very willing to attend a 'without prejudice' meeting with representatives from Intelligent Money in London and indeed, would be happy to take the lead in arranging a meeting at central London offices at an agreed time and date, convenient to all parties.

We look forward to receiving your responses in due course and in the meantime, should you have any queries or problems please do not hesitate to contact us so that we can discuss the best way forward."

The December 2019 letter:

Mr P's representative set out the particulars of his complaint to IM on 17 December 2019. Amongst other things, they said:

"In basic terms, there is no way in which the stock could be worth anything at the time that you authorised the transactions with Elysian.

As we note above, the Elysian stock is worthless and furthermore investigations by HMRC have led them to conclude that the Elysian partnerships were in fact not trading and the purchases of Elysian stock by investor's pensions (by virtue of the tax implications) was regarded as an unauthorised liberation of pension funds [p1], HMRC's core argument that the transactions with the pensions should be regarded as pension liberation stems from the valuation of the stock at the time that it was acquired by the pension schemes involved and that it was in fact "worthless". This has not only resulted in loss of initial capital, pension growth and numerous ongoing fees, but has given rise to numerous tax implications as Intelligent Money should be aware. Your involvement in the transaction gave Elysian credibility. Your involvement gave your client sufficient reassurance to invest in Elysian on each occasion, however your total disregard for the Principles has left them in a dire predicament."

And

"Intelligent Money should have never permitted the acquisition of Elysian stock by [Mr P's] pension. FCP churned out Elysian stock on a conveyor belt and you were an essential cog in the machine. This bred contempt, as evidenced by the disregard for internal controls and the speed by which you executed the acquisition of this high-risk unquoted stock. [Mr P], invested large sums of his pension into Elysian as soon as funds were put in place. Although not to a layman, in the eyes of a pension Trustee and Operator these should be regarded as potential warning signs of pension liberation."

This letter also set out that:

“We do not want this to be a long drawn out process as [Mr P] and others have been through enough. We do not see any point in arguing the intricacies of the points above as fundamentally there is no argument that your actions (or lack thereof) resulted in his loss.

Please regard this as a formal claim submission in accordance with the FCA DISP guidelines and we would appreciate a full response to all points raised within this letter within the prescribed 8-week time limit. In the interim we would of course be happy to have a WP [without prejudice] meeting at your convenience to discuss this further.”

IM issued its final response letter in May 2020, it didn't uphold Mr P's complaint. Unhappy with its response, Mr P referred his complaint to this service.

One of our investigators considered the merits of Mr P's complaint and concluded that it shouldn't be upheld.

Mr P disagreed and made a number of further submissions, in summary he said:

- He relied on IM's valuation of the shares at £1 and authorisation of the purchase of the shares at that price. In his view, IM wouldn't have acquired the shares at overvalue.
- As a financial adviser he was aware of the extent of the due diligence that IM ought to have undertaken and was reassured by this.
- He was entitled to rely on IM to provide the service for which he had paid it.
- It isn't fair and reasonable for him to bear the consequences when it is IM that failed in its regulatory obligations.
- He wasn't required to undertake due diligence in respect of the shares when acquiring these in his personal capacity, he wasn't aware that they weren't worth £1 or that the payment would be regarded as an unauthorised payment. Whereas IM was required to undertake due diligence.
- He was IM's client and wasn't acting in a professional capacity in respect of his pension.
- It wouldn't make sense for him to enter into this transaction and advise all of his long term and trusted clients to do the same, had he known that the payment would be regarded as an unauthorised payment. Leading to substantial losses and years of stress.
- There's no evidence that he would've gone ahead with the transaction if IM had not permitted the transaction. Or, that he was aware of the implications of selling the Elysian Fuels shares to his SIPP.
- His complaint isn't about the suitability of the investment, it's about the due diligence IM undertook in authorising the purchase of the Elysian Fuels shares.

The investigator explained that the comments made hadn't changed their view of the complaint.

Because agreement couldn't be reached, the case has been passed to me for review.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and

reasonable in the circumstances of this complaint.

Having done so, I've reached the same conclusions as the investigator and for broadly the same reasons.

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 in this case was an unusual arrangement. It generally, amongst other things, involved the investor 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 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 P, because of his own professional expertise, will have realised the Elysian Fuels scheme was unusual and was at risk of challenge from HMRC. Mr P was an experienced financial professional at the time of the transaction and had advised a number of his clients to invest in Elysian Fuels. I consider that Mr P 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.

I think it is more likely than not that Mr P 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 IM 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 P knew, or should have known, he was taking should fairly and reasonably transfer to IM.

IM wasn't Mr P's adviser. It didn't advise him that taking those risks was suitable for him. Mr P made that decision for himself. But, in my view, in determining his complaint against IM only, that was a decision Mr P 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 P 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 IM.

However, I'm of the view that, in the unusual circumstances of Mr P's case and taking into account everything that he's told us, even if IM didn't carry out adequate due diligence on the Elysian Fuels scheme (and I make no finding on that point), it isn't fair and reasonable to require it to pay compensation to Mr P. And so, in the particular circumstances of his case, I do not uphold Mr P's complaint.

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

My final decision

It's my final decision that I don't uphold Mr P's complaint about Intelligent Money Ltd and I make no award.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 27 May 2024.

Nicola Curnow
Ombudsman