DRN-2711608

The complaint

Mr R says Helm Godfrey Partners Ltd (HGP) gave him unsuitable advice about his pension arrangements which has resulted in financial detriment.

Mr R is represented in his case by Mac Fin Consulting Ltd.

What happened

Mr R had been a client of HGP since 2006, when he received pension transfer advice. He brought three separate complaints against HGP in 2017. It decided to deal with these as one case with a single final response.

In summary, Mr R complained that HGP was responsible for unsuitable advice and pension arrangements between 2008 and 2016. In particular, his complaint letters focussed on:

- In 2008, incorrect risk profiling which led to an unsuitable recommendation for him to invest in the Romanian Dynamic Property Fund (RDP), an unregulated collective investment scheme (UCIS).
- In 2010, inappropriate classification of him as an Elective Professional Client (EPC) and the unsuitable advice for him to invest in the specialist Seneca US Oil and Gas Opportunities Fund (Seneca) – another UCIS.
- In 2012, unsuitable recommendations related to retirement planning and the Lifetime Allowance (LTA) regime and the switch of his pension provision into an AXA Family Suntrust scheme (FST). There was also an issue around a pension contribution made around this time and about a tax-free cash (TFC) transaction.

To keep things as simple as possible and to avoid unnecessary paperwork and further delays, Mr R's complaint was split into two cases. One related to his RDP and Seneca investments - this has already been dealt with. His complaint about the advice he received concerning the FST and associated matters is the focus of this decision.

Mr R, through his representative, has various concerns about what he says was the poor advice provided by HGP between 2011 and 2016. In particular in relation to the new pension arrangements it recommended and the associated tax implications.

HGP refuted Mr R's complaint. It said the advice it had provided throughout this period had been suitable. It also set out what elements of Mr R's third complaint it thought this Service could consider, and those elements it said were outside of our jurisdiction. So, this is where I must begin my consideration of this case.

Our jurisdiction to consider Mr R's complaint

HGP wrote to this Service in November 2018 in the following terms:

"…the LTA and Fixed Protection are matters of tax, rather than matters of investment business and activities…are within the purview of HMRC, rather than regulated by the

FCA. In the circumstances, we do not see that it is necessary or material to have regard to the provisions of the FCA Handbook, or to the definition of complaint or ancillary activities. Indeed, the position is determined by the statutory provisions..."

"We have obviously confirmed that we accept – to the extent that the complaint concerns the AXA Sun Trust Scheme itself, or the suitability of that arrangement – that would concern a regulated activity and so potentially fall within the FOS's jurisdiction. However, [Mr R's] letter of complaint alleged that [Mr R] was not properly advised regarding Fixed Protection and that 'the consequences of this [losing Fixed Protection] were not fully explained' and that complaint is…clearly outside the jurisdiction of the FOS."

I note in January 2019 an ombudsman investigated whether we had jurisdiction for Mr R's complaint about advice in relation to LTA and Fixed Protection (FP). He found HGP's assertion that because these were matters dealt with by provisions in certain Finance Acts – and enacted after the Financial Services and Markets Act 2000 (FSMA), from which this Service draws its jurisdiction – they were outside our ambit.

The ombudsman set out why this was a misunderstanding of the legislation by HGP and he concluded we could consider all aspects of Mr R's case. I agree with his conclusions for broadly the same reasons. I'm not going to rehearse all the arguments again – instead I'll summarise the main points.

DISP 2.3.1 R in the FCA handbook sets out that:

The Ombudsman can consider a complaint under the Compulsory Jurisdiction if it relates to an act or omission by a firm in carrying on one or more of the following activities:

> *(1) regulated activities; …*
>
> *(6) … or any ancillary activities, including advice, carried on by the firm in connection with them.'*

A list of regulated activities is provided and includes *advising on investments*. A personal pension plan is one of the designated investments. In this case, both Mr R's ceding scheme and the proposed FST were personal pensions.

Matters such as the LTA and FP are relevant considerations for an adviser when transferring sizeable pension wealth. Of course, this requires some awareness of narrow tax matters. But the substantive advice here was around the interplay of these basic rules with Mr R's current and future pension arrangements.

A pension is essentially a tax wrapper around an investment – so the extent to which Mr R would continue to benefit from that tax wrapper in full would be relevant to the advice. When giving advice I think it would be reasonable to expect issues concerning the tax implications of any recommendations to be taken into account.

HGP acknowledged such in its final response to Mr R:

"The Suntrust Scheme was identified as an alternative to applying for Fixed Protection 2012 of £1.8M as any growth within the Suntrust scheme could be directed to your client's wife and children thus ensuring that the value of his pension benefits would not breach the new LTA thereby preventing a potential 55% tax charge on the excess."

In any event, the service provided by HGP is captured as ancillary to its advice about Mr R's pension arrangements.

Mr R's complaint can be considered by this Service in its entirety.

I issued my provisional decision in April. Neither party had additional evidence or arguments for me to consider. As such, I see no reason to depart from my initial findings and conclusions.

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.

Where there's conflicting information about what happened and gaps in what we know, my role is to weigh the evidence we do have and to decide, on the balance of probabilities, what's most likely to have happened.

Both parties have provided information and argument concerning the events complained about. I've not given a detailed response to all the points raised. That's deliberate; ours is an informal service for resolving disputes between financial businesses and their customers.

While I've taken into account and considered all submissions, I've concentrated my findings on what I think is relevant and at the heart of this complaint.

I'm not upholding Mr R's complaint. I'll explain why.

Mr R's complaint has different components, covers a period between 2011 and 2016 and is bound up with more than one piece of advice. These matters were somewhat conflated in the complaint letter to HGP of September 2017. So, I think it's helpful to tease out the key elements for my consideration:

- A concern about a pension contribution of £150,000 made through Mr R's limited company. This was under consideration from early in 2011, although both parties indicate it wasn't given effect until his AXA FST was in place. It's suggested the consequences of the contribution were not explained in relation to the LTA and FP position, nor other options explored.
- At the heart of Mr R's complaint is the advice he received to switch his pension provision into a FST and the associated consideration of any LTA and FP implications. My understanding is that the transfer of his retirement funds was implemented in 2012. The matter of the legitimacy of the scheme is also raised.
- The suitability of advice for Mr R to draw TFC from his personal pension in 2016.

Meeting notes from 24 March 2011 indicate Mr R was likely to take a dividend from his company of around £250,000. At the time he was undecided about what he wanted to do with the funds. He was considering making an investment or the purchase of another property overseas.

HGP met Mr R again on 22 November 2011. As well as reviewing the performance of his portfolio, the main items on the agenda were consideration of his pension tax position. In particular, operation of the LTA and FP regimes and his options.

On 25 November 2011, I can see HGP responded to a request from Mr R for some further advice about making a substantial pension contribution through his company. It said:

“As discussed over the phone yesterday you can make a pension contribution to Nucleus for £150,000, this is achieved by utilising you unused annual allowance of £50,000 over the last 2 tax years and the current year’s allowance. The company will receive corporation tax relief and it’s a good way of getting funds out of the company tax efficiently.”

HGP produced a suitability letter on 12 January 2012, this summarised Mr R’s circumstances, requirements and risk outlook. It also identified the purpose of their recent meeting:

“…to review your pension and investment arrangements, with a view to making the maximum possible contribution to your pension. You advised that the company could afford a one-off contribution of £150,000…”

Based on what I’ve seen, I think Mr R wanted to make a significant contribution to his pension. He could do so in the knowledge that there were significant tax benefits which levered his position. I’m satisfied other options for investment were considered. But given his desire to bolster his pension pot, HGP’s advice seems reasonable.

Mr R’s representative specifically raised what it asserts was a detrimental impact of the decision to invest £150,000 in his pension on his LTA and FP position. The main focus of HGP’s suitability letter from January 2012 was the options open to him in that regard. It noted:

“Your pension has now reached £1.33m… (having taken into account the recent employer contribution of £150,000), so you are getting close to the [LTA] which is currently set at £1.5m. If you exceed the [LTA] you will suffer a tax charge equivalent to 55% on the excess which you have said you would prefer to prevent if possible. It is possible that you will want to make ongoing pension contributions, depending on how your business performs.”

HGP identified the three main options open to Mr R:

- Do nothing and hope that the value of his pension benefits didn’t exceed his LTA when he decided to draw his benefits. Given the size of his fund at the time and modest assumptions about future investment growth and his circumstances, it’s possible to understand why this approach wasn’t favoured.
- Apply for FP 2012 prior to the deadline on 5 April 2012. This would’ve fixed his LTA at £1.8m. The consequence here would’ve been that he’d have been unable to make further contributions to his pension pot. And ongoing review of his investment strategy would’ve been required to ensure the cap wasn’t breached.
- Establish a FST, which HGP advised would provide him with the most flexibility, for example him to reallocate investment growth to other members of the scheme.

Although the investment of £150,000 had some effect on his LTA and FP position, it wasn’t telling in terms of the recommendation HGP made or the decision Mr R had to take in this regard. He was still within the limits applicable at the time and had flexibility about what to do looking forward.

I’m also satisfied that *at the time* the FST was reasonably identified by HGP as an alternative approach to applying for FP 2012. Although he could’ve secured a LTA of £1.8m, this would’ve curtailed his ability to make further pension contributions. And as we’ve seen from the suitability letter, it’s clear he was disposed to keeping that option open.

The FST offered Mr R the prospect of continuing to make tax efficient pension contributions with the ability to allocate growth to other members of the scheme (his wife and children). This could've been an effective mechanism for ensuring that the value of his pot didn't breach the new LTA, preventing a potential 55% tax charge on the excess.

I'm satisfied that Mr R thought this option was the best way forward for him in his circumstances. And that HGP's advice was fair at the time given what was known. But as it warned in the advice it gave him:

"All statements concerning the tax treatment of products and their benefits are based on our understanding of current tax law and HM Revenue and Customs' practice."

And we know about subsequent changes that may've had an impact on Mr R.

For example, the Government introduced the LTA in 2006 setting a maximum value of benefits someone could receive without a tax penalty at £1.5m. This increased each year until 2010-11, when it reached £1.8m. The Government decided to reduce the LTA in 2012-2013 when it was set at £1.5m. In 2014-2015 it fell to £1.25m. In 2016-17 the LTA was set at £1.0m and more recently there have been some increases to take account of inflation.

As the LTA was reduced the Government introduced transitional measures to ease the impact on consumers who had, or expected to have, benefits which exceeded the new limits. Including FP2012, which Mr R decided on the advice of HGP not to take advantage of.

Mr R's representative raised a broader concern about the legitimacy of the AXA FST. I'll now turn to this aspect of his complaint.

The FST was a Self-invested Personal Pension (SIPP) which had been on the market since 2009. It allowed individual pensions to be grouped together and included a facility where investment growth could be re-allocated between members' pensions on a non-proportionate basis.

AXA has provided this Service with information about the development of the FST as well as some of the communications that took place between it and HM Revenue & Customs (HMRC) about the use of the scheme to reallocate investment growth. I think this is important context for my decision in this case. We've seen:

- The timeline of the development of the FST scheme, provided by AXA.
- Letters between HMRC and the FST team at AXA from May 2015 to July 2015 discussing the scheme and more specifically the flexibility option.
- Confidential reports to AXA from legal counsel regarding the flexibility option.

The information indicates that:

- AXA started to look into the feasibility of launching the product in late 2006. In light of HMRC legislation and after legal advice it launched the FST on a limited basis in March 2008 and launched it fully in February 2009.
- It's documented in the timeline provided by AXA that at this point HMRC's view was that the flexibility option was within the rules, but it was noted that HMRC provided no guarantees that position wouldn't change in the future.
- For the next few years, the information indicates AXA kept reviewing the scheme and despite some changes to pension regulation over these years it remained

satisfied that HMRC was content with the scheme and that its flexibility option was within the relevant rules. This included further legal opinion indicating the environmental risk in the area of pensions had increased but that the underlying legislation had not changed. In light of this AXA decided to continue operation of the FST unchanged.

However, in May 2015 HMRC asked for further details from AXA about how the pooled growth in the FST was allocated to its members. This appears to have been prompted by an increase in 'pension liberation' scams (a type of fraud). AXA's response tried to reassure HMRC about the flexibility option, but HMRC advised that it had concerns over the model being used to allocate growth and it felt that this could be contrary to sections 172 (Assignment of benefits) and/or 172A (Surrender of benefits) of the Finance Act 2004.

Because of these concerns, HMRC stopped registering new schemes. There was a further meeting between AXA and HMRC in September 2015. HMRC resumed registration of the FST in October 2015. In the same month AXA issued communications to advisers that registration of the FST had resumed but it's discussions with HMRC were ongoing and all features of the product couldn't be guaranteed to remain into the future. Advisers were invited to withdraw applications from new clients.

Around this time AXA obtained further legal opinion in response to specific points HMRC raised at meetings between itself and AXA in September 2015. This led to AXA writing to HMRC in October 2015 asking it to withdraw their objections in light of its most recent legal opinion. There then followed much discussion between AXA and HMRC. And AXA again sought legal advice during this period.

In January 2016 AXA issued a second communication to advisers informing them that HMRC continued to investigate elements of the FST and that registration of the new schemes was at their own risk. However, because of the continued HMRC investigations AXA closed the FST to new business in May 2016. And by July 2016 the Board of AXA made the decision that it was no longer appropriate to continue with the interpretation that disproportionate allocation of growth was appropriate within the pension framework as it was at that time.

I think this background demonstrates that HGP would've have had reasonable assurance about the soundness of the AXA FST at the time it advised Mr R to move his pension funds into it.

Finally, Mr R's representative raised a concern he'd been treated as an insistent client with regard to taking TFC from his FST in 2016. It implied the purpose of this transaction had been to generate more fees and charges. Later it suggested he'd not wanted to take his TFC but had done so because HGP had told him the Government could reduce relevant rates and allowances. A linkage was also suggested between a LTA rate of £1.5m and his protected LTA of £1.3m.

I think it's fair to say that the complaint point made here on Mr R's behalf wasn't precisely made and seems to have evolved.

HGP's suitability letter from 9 February 2016 about this transaction identified Mr R's objectives:

"As your pension fund is close to your protected Lifetime Allowance, you would like to look at the merits of withdrawing your remaining tax-free lump sum from the Axa Family SunTrust and investing the proceeds for the potential of capital growth over the medium to

long term (10 years plus). You do not want the capital to be inaccessible should you need access but, at present you have sufficient income from your employment and do not require additional income. You would like the volatility in any new investment to be limited. As you intend to scale back your business over the next few years, you are likely to want to increase your income at some point in the future."

It seems the transaction was in line with Mr R's stated objectives. I'd also observe the following from the evidence I've reviewed:

- There's nothing which shows Mr R was being treated as an insistent client for the purposes of accessing his TFC. Indeed, in its suitability letter dated 9 February 2016 HGP recommended he drew on the funds.
- I've not seen an upfront charge taken by HGP for the investment Mr R made with his TFC capital. And it says whether the funds had remained in his FST or the new investment, its fees for ongoing service would've been the same. Mr R hasn't produced any evidence to the contrary.
- HGP says Mr R applied for Individual Protection in 2015 which had the effect of fixing his LTA at £1.3m. This seems unconnected with his decision in 2016 to take his TFC, certainly it didn't reduce his LTA.

At the time of HGP's final response to Mr R, it said he'd taken about 99% of his TFC allowance. He's had the opportunity to invest that money or use it for his wants and needs. It's not clear what financial detriment his representative is suggesting has occurred here. And I've not seen enough to make me think the advice he received was obviously wrong.

My final decision

It follows from my findings and conclusions as I've already set out, I'm not upholding Mr R's complaint. And I don't require HGP to do anything further.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 7 June 2021

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Kevin Williamson
Ombudsman