

Complaint

Mr W and Ms B have complained about the decision by Phoenix Wealth Services Limited (Phoenix), previously known as AXA Wealth Services Limited (AXA), to withdraw an important aspect of the Family SunTrust that they had set up.

Background

The Family SunTrust Scheme was a self-invested personal pension scheme (a "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 – (the "flexibility option").

The scheme was provided by a part of AXA which was subsequently bought by Phoenix

In January 2015 Mr W and Ms B consulted their independent financial adviser. They had three objectives:

- To obtain access to a variety of existing money purchase policies.
- To increase Ms B's pension savings and reduce Mr W's pension savings.
- To mitigate the impact of lifetime allowance on the totality of Mr W's pensions and savings.

The Family SunTrust was recommended as it was the only product capable of addressing all three objectives because of the unique feature of the flexibility option which was fundamental to Mr W and Ms B's investment decision.

Mr W and Ms B applied for the Family SunTrust in 2015 and invested the monies into the [scheme](#) in April 2016.

AXA closed the scheme to new business in July 2016 and withdrew the flexibility option on 2 September 2016.

Mr W and Ms B are of the view that in withdrawing the flexibility option, AXA breached the scheme's terms and conditions. They don't think the decision was a legitimate exercise of AXA's discretion but rather it was made because of the upcoming sale of parts of AXA to Phoenix.

They also feel AXA misrepresented information by failing to disclose the risk of the option being withdrawn and thereby "*induced*" their investment into the Family SunTrust scheme.

They are also unhappy that their adviser was given assurances that HMRC was "*comfortable*" with the flexibility option despite several months of discussion with HMRC about the option.

AXA says it withdrew the flexibility option after full consideration of changes within the pension regulatory and tax environment. It says it acted in accordance with the scheme's terms and conditions and gave the required notice period. It feels Mr W and Ms B accepted the contractual right AXA had to withdraw the option at any time when they took out the product. And it is satisfied that Mr W and Ms B's adviser was kept fully informed of AXA's dealings with HMRC regarding this issue.

The complaint was investigated by one of our adjudicators. He was of the opinion that the decision AXA made was a legitimate exercise of its commercial judgement and so the complaint shouldn't be upheld.

Mr W and Ms B didn't agree with the assessment. They weren't satisfied that all of their concerns had been answered and challenged what evidence had been provided by AXA to prove it withdrew the flexibility option in line with its terms and conditions.

I issued my provisional findings in March 2020 where I explained why I was of the view the complaint shouldn't be upheld. An extract is below and forms part of this final decision.

Did AXA breach the scheme's terms and conditions and was the decision to withdraw the scheme a legitimate exercise of AXA'S discretion

The terms and conditions of the Family SunTrust scheme state:

[AXA] has the right to decide that the provisions set out in the "Operative provisions" in part 3 of the document [i.e. the provision of the flexibility option] will cease to apply..... [AXA] can exercise this right only if there are changes in, or [our] interpretation changes of, applicable pensions, tax or other law, legislation, regulation or industry codes of practice. [AXA] can exercise this right upon giving....30 days written notice so far as practicable to do so.

So, I am satisfied that AXA had the ability to remove the flexibility option if it met the criteria in the terms and conditions. And I am satisfied that in doing so it exercised its commercial discretion.

I have next considered whether AXA did indeed meet the criteria mentioned above – in other words whether AXA changed its interpretation of the applicable pension laws and regulation.

To do this I have looked at the history of AXA's involvement and dealings with the Family SunTrust Scheme.

AXA has provided me with information concerning the communication it had with HMRC about the Family SunTrust. I have seen:

- The template letters from the AXA Family SunTrust manager to advisers where the scheme was applied for /or had been taken out. These are dated 2015 and 2016.*
- The timeline of the development of the Family SunTrust scheme, provided by AXA.*
- Letters between HMRC and the Family SunTrust team at AXA from May 2015 to July 2015 discussing the scheme and more specifically the flexibility option.*
- The confidential report to AXA from legal counsel regarding the flexibility option.*
- An email between Mr W and Ms B's adviser and the business development manager at AXA in April 2016. In this email the adviser asked AXA to confirm his understanding of the situation regarding the flexibility option and asked for an email he intended to send out to his clients be approved by AXA.*

From this information I can see 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 Family SunTrust 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 in time 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, until 2015 the information indicates AXA kept reviewing the scheme and despite some changes to pension regulation over these years AXA remained satisfied that HMRC was content with the scheme and that its flexibility option was within the relevant rules.

However, in May 2015 HMRC asked for further details from AXA about how the pooled growth in the scheme 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. However, HMRC resumed registration in October 2015.

There then followed much discussion between AXA and HMRC. And AXA again sought legal advice during this period. However, because of the continued HMRC investigations AXA closed the Family SunTrust to new business in May 2016.

The information I have from AXA states that the legal advice it received at this point acknowledged that the risk environment within the pension area had changed. AXA has told me that because of this and HMRC's continued investigations, it made the decision that it was no longer appropriate for it to continue with its interpretation that the flexibility option was appropriate within the ever-changing pension environment.

Taking account of this information, I'm satisfied AXA had been carefully considering the nature of the flexibility option for some time. It also appears to have engaged quite heavily with HMRC over the years to ensure it was being compliant with HMRC's thinking and relevant regulation as well as seeking legal opinion when it felt prudent. I therefore don't think this decision was made quickly without careful consideration. I'm satisfied it followed a genuine change in AXA's interpretation of applicable "pensions, tax or other law, legislation, regulation or industry codes of practice". While I appreciate this happened around the same time as the sale to Phoenix was progressing, I think this was mere coincidence rather than central to the decision to withdraw the feature.

I also note that AXA gave notice on 2 August 2016, which was just over 30 days before the option was officially withdrawn (on 2 September 2016), as required by the terms and conditions. I therefore don't think AXA acted unfairly or unreasonably when it withdrew the flexibility option and it acted in accordance with its terms and conditions when it did so.

Did AXA intentionally misrepresent information by failing to disclose the risk of the option being withdrawn

I've next looked at the information that AXA provided to Mr W and Ms B and their financial adviser throughout this period. I've considered whether AXA gave any guarantees about the availability of the flexibility option or whether AXA misrepresented any information so as to induce Mr W and s B's investment.

As already mentioned, the terms and conditions of the Family SunTrust stated the option

could be withdrawn in the circumstances already set out above. So, it was clear from the outset the flexibility option may not be a permanent feature of this product.

As well as this in the communication between AXA and Mr W and Ms B's adviser (through the Scheme's product literature, terms and conditions and update letters) I can see that it was stated that the option could be withdrawn. The passing on of this information was for their adviser to do. So, this is, in my view, enough to put any investor in the Family SunTrust on notice that this could be withdrawn at any time

So, I can't see that Mr W and Ms B were told at any time that option was guaranteed to remain part of the Family SunTrust.

AXA did also send communication to advisers in October 2015 and January 2016 which explained discussions with HMRC were ongoing and reiterated that not all the features of the Family SunTrust could be guaranteed. This information also invited advisers to withdraw applications at that time if their clients wanted. It also mentioned HMRC was still continuing with its investigations and that registration of new schemes was at its own risk. This information should have been communicated to Mr W and Ms B by their adviser. So even though this was before Mr W and Ms B transferred monies into the Family SunTrust this information would have formed part of their decision to continue with the investment or not. And in this case, even though they were told HMRC were investigating, they decided to continue with it.

I therefore think that AXA provided the information it had to and did it in a fair and clear way at that point in time.

Did AXA give false assurance about the scheme

Mr W and Ms B have said AXA misrepresented information to "induce" this investment. Mr W and Ms B feel that the email their adviser received from AXA in March 2016, which stated "HMRC are fully aware of the features of the Family SunTrust and continue to approve [AXA's] schemes. [AXA is] comfortable that the scheme continues to comply with HMRC pension rules and its business as usual for us", was intended to provide reassurance that there was no imminent risk of withdrawal of the flexibility option when that wasn't the reality of the situation.

They feel that at the time these assurances were given AXA must have had good reason to doubt whether or not it really would be "business as usual" but it failed to disclose any such risk to its customers.

I think it's important at this stage to reiterate what was happening between HMRC and AXA at this point in time. As mentioned above, in May 2015 HMRC wanted to look further into how the pooled growth from the Family SunTrust was allocated because it was concerned that this facility wasn't in line with The Finance Act 2004. But it's important to point out that while HMRC had these concerns and temporarily stopped registering new schemes it did start registering them again not long after, which infers HMRC's concerns were allayed. So, while AXA and HMRC were indeed in discussions about this given HMRC resumed registration it's reasonable that this action would have given AXA some reassurance which it then passed onto its customers.

Ultimately, it was AXA's view that mattered here, and AXA's reassuring comments to the adviser in March 2016 don't seem to reflect an unreasonably held or disingenuous opinion at

the time, given where it's discussions with HMRC had gotten to at that particular time. Therefore, in this context it's not unreasonable that AXA made the statement it did in March 2016.

In summary therefore, given everything I have seen, I currently don't think AXA acted against the terms and conditions of the Scheme when it withdrew the flexibility option. It seems to me that AXA consulted and thought considerably about withdrawing this option before it made its decision. And I am satisfied the decision was made because of changes in AXA's interpretation of pension rules and regulation rather than because of the then upcoming sale to Phoenix.

Also, while I appreciate Mr W and Ms B's frustration that the facility was withdrawn, I am of the view that AXA provided the right information to make them aware the facility was not guaranteed and could be withdrawn at any time (providing certain criteria was met). Nor do I think AXA provided misleading information to "induce" Mr W and Ms B to take out the investment.

AXA accepted my provisional findings.

Mr W and Ms B didn't accept my provisional findings and provided comments which I have paraphrased below:

Mr W and Ms B have stated that the provisional decision relies on the legal advice that AXA obtained to negative effect. The advice has been referenced several times in the provisional decision, but the dates have not been specified so it is unclear when the advice was received by AXA. They feel the precise time at which the advice was received by AXA is important because of the assurance that was given by AXA in March 2016 to the effect that "[AXA is] comfortable that the scheme continues to comply with HMRC pension rules". If AXA received the legal advice that finally prompted it to withdraw the flexibility option of the SunTrust before the date of this email, then it is difficult to justify the conclusion reached in the provisional decision.

My findings

I've reconsidered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. And despite Mr W and Ms B's comments I am not persuaded to depart from my provisional findings. I don't think the complaint should be upheld.

Given Mr W and Ms B's comments I think it would be helpful to set out a timeline of when AXA obtained legal opinion regarding the workings of the Family SunTrust and broadly what the nature of those opinions were.

This is information I referred to in my provisional findings and they have come from the timeline of the development of the Family SunTrust scheme (as mentioned above) which was provided by AXA as part of this complaint.

- November 2006 first legal opinion obtained regarding the feasibility of the Family SunTrust
- December 2007 second legal opinion obtained in light of new draft legislation from HMRC.
- February 2009 third legal opinion obtained ahead of planned full launch of the SunTrust.

- September 2013 legal opinion obtained indicating that the environmental risk had increased but that the underlying legislation had not changed. In light of this AXA decided to continue operation of the SunTrust unchanged.
- June 2015 HMRC raised its concerns over the model being used to allocate growth and that this was contrary to elements of the Finance Act 2004 (details set out above).
- September 2015 again as set out above, a meeting took place between AXA and HMRC.
- October 2015 AXA issued communications to advisers that registration of the SunTrust had resumed but its 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.
- October 2015 legal opinion obtained again in response to specific points HMRC raised at meetings between itself and AXA in September 2015.
- October 2015 AXA wrote to HMRC asking it to withdraw their objections in light of its most recent legal opinion.
- January 2016 second communications issued to advisers informing them that HMRC continued to investigate elements of the Family SunTrust and that registration of the new schemes was at their own risk.
- May 2016 AXA decided to close the SunTrust to new business.
- June 2016 HMRC advised AXA its investigations were continuing.
- July 2016 AXA obtained further legal opinion. The finding of this was that the risk environment within the area of pension had changed and more notably that HMRC continued to investigate the SunTrust position even after submission in October 2015 of legal opinion and evidence that supported the flexibility option of the SunTrust.
- Later that month 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 agree with Mr W and Ms B that if AXA had received negative legal advice about the SunTrust *before* it had sent the email to their adviser in March 2016 effectively reassuring them about the SunTrust, I wouldn't be able to justify the conclusion I had reached in my provisional decision.

However, as the timeline clearly illustrates, the legal opinion which essentially accepted there could be issues with the flexibility option of the SunTrust because of HMRC's continued investigations came in July 2016, some four months after the email Mr W and Ms B are relying on.

I am satisfied that previous legal opinion obtained by AXA over the years was "positive" in relation to the flexibility option of the SunTrust. So, I think it was reasonable for AXA to have advised its customers in March 2016 that the scheme continued to comply with HMRC pension rules. This reassurance came with the previous warnings that this feature couldn't be guaranteed to always remain in place. And that it was only when confirmation was received in June 2016 that HMRC continued with its investigations that led to the further legal opinion in July 2016 and then the subsequent withdrawal of the feature.

I therefore remain of the view that what AXA told Mr W and Ms B's adviser in March 2016 wasn't unreasonable nor was it disingenuous.

Further to this, Mr W and Ms B have not presented any further evidence to persuade me that AXA breached the scheme's terms and conditions or that it misrepresented information by

failing to disclose the risk of the option being withdrawn thereby “*inducing*” their investment into the Family SunTrust scheme.

My final decision

My final decision is that I don’t uphold this complaint and I make no award.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr W and Ms B to accept or reject my decision before 28 May 2020.

Ayshea Khan
Ombudsman