DRN-3409921

The complaint

Mr M complains that he's lost over £104,000 from his SIPP. He believes that Embark Services Limited trading as Hornbuckle (Embark) failed to act in his best interests, didn't fulfil its obligations and didn't conduct enough due diligence in respect of his adviser or the investments subsequently made.

What happened

Mr M was advised to transfer his defined benefit Occupational Pension Scheme (OPS) to a Self-Invested Pension Plan (SIPP) with Embark by Acuma Wealth Management (Acuma). The Embark application form was signed by Mr M on 18 March 2008. It confirmed that he would be going into income drawdown, taking tax-free cash and pension payments – with figures to be confirmed.

Acuma Wealth Management is listed as the adviser in respect of the SIPP on the form and Mr M confirmed that he'd received face-to-face advice from it in respect of this transaction. No initial or renewal commission was payable to Acuma for its advice. Acuma was also appointed as investment manager of the SIPP.

On 9 March 2009, Acuma wrote to Embark confirming submission of the final paperwork, proof of address for Mr M, and asking that it chase the transfer regularly once in process because the consumer needed the Tax-Free Cash (TFC) for a property purchase.

The application form for the Friends Provident International (FPI) bond was processed around June 2009. A number of investments were subsequently made via the bond.

Dealing instructions were made to FPI in August 2011.

Mr M says that he was low-medium investor, but he's found out that his funds went into high-risk funds. A number of the funds he invested in collapsed and now have no value, in particular:

- LM 24 month
- LM 36 month
- Premier New Earth
- Mansions Student Accommodation

In 2014, Mr M appointed a new adviser (Abacus Financial Consultants, also Dubai based) and sought to transfer away from Embark. By that point Embark had decided not to deal with international advisers who don't have pension permissions in the UK.

On 27 May 2014, Mr M signed a transfer request form, to move the pension funds held with Embark to a Brooklands SIPP. The reason given for transferring was that he wasn't happy with the fees and that Embark refused to deal with offshore IFAs.

Embark's relationship with Acuma

Embark has provided us with an introducer agreement dated 1 February 2008 between it and Acuma.

The agreement confirmed it wasn't exclusive. Under the agreement Embark was, at its absolute discretion, entitled to refuse an introduction for any reason.

Acuma was obliged, amongst other things, to:

- Obtain and maintain all authorisations, licences, permits, registrations and notifications that it requires for the purposes of its business.
- Comply fully with all laws, rules, regulations, directions and codes of guidance and codes of practice which apply to its business from time to time.
- Notify Embark immediately if it becomes subject to an action or investigation by a regulatory body and/or if any necessary authorisation, licence, permit, registration or notification is withdrawn, suspended, cancelled or varied or if any circumstances arise which may result in such withdrawal, suspension, cancellation or variation.

Embark also provided a copy of Acuma's professional license, which had been issued in 1999 by the government of Dubai's department of economic development. And, it's licence *"to Conduct Banking, Financial and Investment Consultations in the United Arab Emirates",* issued by the central bank of the United Arab Emirates.

We asked Embark for details of the overall business it received via referrals from Acuma. It confirmed that it received 77 introductions over the course of three years. The introductions were relatively evenly spread out over the time the relationship continued. The majority of the pensions went into overseas bonds provided by a couple of providers, including FPI.

Background to the complaint

A number of the investments made via Mr M's SIPP lapsed without value. Mr M says he's lost over £104,000 from the value of his pension. Mr M says that he was low-medium investor, but he's found out that his funds went into high-risk funds. The investments that lost their value were:

- LM 24 month
- LM 36 month
- Premier New Earth
- Mansions Student Accommodation

Mr M complained to Embark in February 2018. On 7 March 2018, Embark issued its final response letter, it concluded that his complaint had been brought too late on the basis that it had been more than six years since the event complained about and more than three years since Mr M ought to have known that he had cause for complaint. Embark first clarified its role in the transaction and that it wasn't responsible for the suitability of the SIPP or investment decisions made. Then explained that the SIPP was established in March 2009 and by 2014 there had been a significant shift in the value of the investments, which ought to have alerted Mr M to his cause for complaint.

Embark objected to us considering the complaint on the same basis as set out above. One our investigators initially agreed that the complaint had been brought out of time. Mr M disagreed and requested that the complaint be escalated on the basis that he wasn't an experienced investor and didn't track or understand financial markets. He didn't receive regular statements or updates from either the provider or the adviser. He did raise this in 2014 and received a visit from an adviser and was told about the collapse of the L&M fund,

he wasn't offered any advice at the point. The options to sell, switch or manage weren't things he was aware of as a first-time investor.

One of our investigators reviewed our jurisdiction to consider Mr M's complaint in light of the objection Embark raised. The investigator agreed with Embark and concluded that the complaint had been brought too late. Mr M disagreed and the complaint was escalated to one of our ombudsmen. The ombudsman found that Mr M's complaint was one we could consider, because the evidence didn't support him reasonably being aware that Embark may have failed in its obligations when setting up his SIPP.

So, the case was passed back to the investigator for investigation. Ultimately, the investigator didn't think the complaint should be upheld. In summary, he concluded that:

- Mr M was resident in Dubai and Acuma was a financial advisory firm operating out of Dubai, regulated by the Central Bank of the United Arab Emirates.
- So, although the pension transfer took place in the UK, there was no requirement for Acuma to be authorised to give pension advice by the UK regulator. And, there's no reason Embark should've found it unusual for a consumer based in Dubai to seek advice from an adviser based in Dubai.
- Embark couldn't confirm the due diligence undertaken in respect of Acuma, which wasn't unreasonable seeing as its relationship with it had ended more than 10 years prior, around 2010.
- The levels of business brought/referred by Acuma over the three years don't appear to have been concerning.
- The due diligence checks Embark conducted on another overseas introducer were detailed in a published decision we issued (DRN7916209). And, whilst we don't know if the same checks were undertaken in respect of Acuma, we haven't seen any evidence these checks would've led Embark to decline to accept introductions from it.
- Embark should've carried out independent due diligence on all the investments to be held in Mr M's SIPP, it doesn't appear to have done this. Indeed, it maintains that it only had to ensure the investments could legitimately be held in the SIPP and were not a scam.
- But, in any case, there weren't sufficient grounds to believe that carrying out checks at the relevant time would've revealed reasons to refuse to accept these investments.
- The main investment wrapper was a Friends Provident International bond. FPI is generally considered to be a large and reputable investment manager and was (and is) a UK authorised business – so there was no reason for Embark to have been concerned about accepting the bond structure.
- Embark could also take comfort from the involvement of FPI, in that all of the investments held within the bond were permitted by it.
- Limited evidence has been provided in respect of the investments complained about but, from what we do know, there's nothing to suggest that there were underlying problems with the nature of the investments that would've been uncovered at the time has Embark made further enquiries. They also weren't part of a fraud or a scam.

Mr M disagreed with the investigator's findings. He remained of the view that Embark had failed to act with due care and diligence in its dealings with him. In particular, in relation to the nature of the investments made despite him being a low to medium risk investor.

I sent Mr M and Embark my provisional decision explaining why I didn't think the complaint should be upheld. Embark accepted my decision. Mr M disagreed and made further comments. Briefly, he said:

- He made it clear to Acuma that he was a low to moderate risk investor and that he wanted an investment that was capital protected.
- The investments made were supposed to be low risk and capital protected.
- He didn't know that the adviser received substantial commission for making the introduction.
- At no time did Embark or Acuma apply any due diligence in this case.
- He wasn't provided with regular statements by Embark or Acuma, he had to proactively ask for updates, so he didn't know how his investments were performing.
- When he raised this, Embark just said it was an administrative error.

Because Mr M disagreed, the case has been passed back to me for review. I've carefully considered everything Mr M's said and reconsidered all of the available evidence. Having done so, my findings remain as set out in my provisional decisions. I've largely re-iterated 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.

When considering what is fair and reasonable in the circumstances, I need to take account of relevant law and regulations, regulator's rules, guidance and standards, codes of practice and, where appropriate, what I consider to have been good industry practice at the relevant time. This goes wider than the rules and guidance that come under the remit of the FCA. Ultimately, I'm required to make a decision that I consider to be fair and reasonable in all the circumstances of the case.

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.

It's my role to fairly and reasonably decide if the business has done anything wrong in respect of the individual circumstances of the complaint made and – if I find that the business has done something wrong – award compensation for any material loss or distress and inconvenience suffered by the complainant as a result of this.

The parties to this complaint have provided detailed submissions to support their position and I'm grateful to them for doing so. I've considered these submissions in their entirety. However, I trust that they won't 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 and reasons for reaching them.

Relevant considerations

I've carefully taken account of the relevant considerations to decide what is fair and reasonable in the circumstances of this complaint.

At the time Mr M's application form was accepted by Embark the regulator was the Financial Services Authority (FSA). Later, the regulator became the FCA. For ease of reference, outwith quotations, I've referred to the FCA throughout.

In my view, the FCA's Principles for Businesses are of particular relevance. The Principles for Businesses, which are set out in the FCA's Handbook "*are a general statement of the*

fundamental obligations of firms under the regulatory system" (PRIN 1.1.2G). Principles 2, 3 and 6 provide:

> *"Principle 2 – Skill, care and diligence – A firm must conduct its business with due skill, care and diligence.*
>
> *Principle 3 – Management and control – A firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems*
>
> *Principle 6 – Customers' interests – A firm must pay due regard to the interests of its customers and treat them fairly."*

I've carefully considered the relevant law and what this says about the application of the FCA's Principles. In *R (British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin) ("BBA") Ouseley J said at paragraph 162:

> *"The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The Specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirement they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules."*

And at paragraph 77 of BBA Ouseley J said:

> *"Indeed, it is my view that it would be a breach of statutory duty for the Ombudsman to reach a view on a case without taking the Principles into account in deciding what would be fair and reasonable and what redress to afford. Even if no Principles had been produced by the FSA, the FOS would find it hard to fulfil its particular statutory duty without having regard to the sort of high level Principles which find expression in the Principles, whoever formulated them. They are of the essence of what is fair and reasonable, subject to the argument about their relationship to specific rules."*

In *R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service* [2018] EWHC 2878) ("BBSAL"), Berkeley Burke brought a judicial review claim challenging the decision of an ombudsman who had upheld a consumer's complaint against it. The ombudsman considered the FCA Principles and good industry practice at the relevant time. He concluded that it was fair and reasonable for Berkeley Burke to have undertaken due diligence in respect of the investment before allowing it into the SIPP wrapper, and that if it had done so, it would've refused to accept the investment. The ombudsman found Berkeley Burke had therefore not complied with its regulatory obligations and had not treated its client fairly.

Jacobs J, having set out some paragraphs of BBA including paragraph 162 set out above, said (at paragraph 104 of BBSAL):

> *"These passages explain the overarching nature of the Principles. As the FCA correctly submitted in their written argument, the role of the Principles is not merely to cater for new or unforeseen circumstances. The judgment in BBA shows that they are, and indeed were always intended to be, of general application. The aim of the Principles-based regulation described by Ouseley J. was precisely not to attempt to formulate a code covering all possible circumstances, but instead to impose general duties such as those set out in Principles 2 and 6."*

The BBSAL judgment also considers section 228 of FSMA and the approach an ombudsman is to take when deciding a complaint. The judgment of Jacobs J in BBSAL upheld the lawfulness of the approach taken by the ombudsman in that complaint, which I've described above, and included the Principles and good industry practice at the relevant time as relevant considerations that were required to be taken into account.

As outlined above, Ouseley J in the BBA case held that it would be a breach of statutory duty if I were to reach a view on a complaint without taking the Principles into account in deciding what is fair and reasonable in all the circumstances of a case. And, Jacobs J adopted a similar approach to the application of the Principles in BBSAL. I'm therefore satisfied that the Principles are a relevant consideration that I must take into account when deciding this complaint.

On 18 May 2020, the High Court handed down its judgment in the case of Adams v Options SIPP [2020] EWHC 1229 (Ch). Mr Adams subsequently appealed the decision of the High Court and, on 1 April 2021, the Court of Appeal handed down its judgment in Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 474. I've taken account of both these judgments when making this decision on Mr M's case.

I note that the Principles for Businesses didn't form part of Mr Adams' pleadings in his initial case against Options SIPP. And, HHJ Dight didn't consider the application of the Principles to SIPP operators in his judgment. The Court of Appeal also gave no consideration to the application of the Principles to SIPP operators. So, neither of the judgments say anything about how the Principles apply to an ombudsman's consideration of a complaint. But, to be clear, I don't say this means Adams isn't a relevant consideration *at all.* As noted above, I've taken account of both judgments when making this decision on Mr M's case.

I acknowledge that COBS 2.1.1R (*A firm must act honestly, fairly and professionally in accordance with the best interests of its client)* overlaps with certain Principles, and that this rule was considered by HHJ Dight in the High Court case. Mr Adams pleaded that Options SIPP owed him a duty to comply with COBS 2.1.1R, a breach of which, he argued, was actionable pursuant to section 138(D) of FSMA ("the COBS claim"). HHJ Dight rejected this claim and found that Options SIPP had complied with the best interests rule on the facts of Mr Adams' case.

The Court of Appeal rejected Mr Adams' appeal against HHJ Dight's dismissal of the COBS claim on the basis that Mr Adams was seeking to advance a case that was radically different to that found in his initial pleadings. The Court found that this part of Mr Adams' appeal didn't so much represent a challenge to the grounds on which HHJ Dight had dismissed the COBS claim, but rather was an attempt to put forward an entirely new case.

I note that in Adams v Options SIPP, HHJ Dight found that the factual context of a case would inform the extent of the duty imposed by COBS 2.1.1R. HHJ Dight said at paragraph 148:

> *"In my judgment in order to identify the extent of the duty imposed by Rule 2.1.1 one has to identify the relevant factual context, because it is apparent from the submissions of each of the parties that the context has an impact on the ascertainment of the extent of the duty. The key fact, perhaps composite fact, in the context is the agreement into which the parties entered, which defined their roles and functions in the transaction."*

I note that there are significant differences between the breaches of COBS 2.1.1R alleged by Mr Adams and the issues in Mr M's complaint. The breaches were summarised in paragraph

120 of the Court of Appeal judgment. In particular, as HHJ Dight noted, he wasn't asked to consider the question of due diligence before Options SIPP agreed to accept the store pods investment into its SIPP. The facts of the case were also different. And I need to construe the duties Embark owed to Mr M under COBS 2.1.1R in light of the specific facts of Mr M's case.

So, I've considered COBS 2.1.1R – alongside the remainder of the relevant considerations, and within the factual context of Mr M's case, including Embark's role in the transaction.

However, I think it's important to emphasise that I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. And, in doing that, as above, I'm required to take into account relevant considerations which include: law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. This is a clear and relevant point of difference between this complaint and the judgments in Adams v Options SIPP. That was a legal claim which was defined by the formal pleadings in Mr Adams' statement of case.

I also want to emphasise here that I don't say that Embark was under any obligation to advise Mr M on the SIPP and/or the underlying investments.

Overall, I am satisfied that COBS 2.1.1R is a relevant consideration – but that it needs to be considered alongside the remainder of the relevant considerations, and within the factual context of Mr M's case.

The regulatory publications

The FCA (and its predecessor, the FSA) has issued a number of publications which remind SIPP operators of their obligations and which set out how they might achieve the outcomes envisaged by the Principles, namely:

- The 2009 and 2012 thematic review reports.
- The October 2013 finalised SIPP operator guidance.
- The July 2014 "Dear CEO" letter.

The 2009 Thematic Review Report

The 2009 report included the following statement:

> *"We are very clear that SIPP operators, regardless of whether they provide advice, are bound by Principle 6 of the Principles for Businesses ('a firm must pay due regard to the interests of its clients and treat them fairly') insofar as they are obliged to ensure the fair treatment of their customers. COBS 3.2.3(2) states that a member of a pension scheme is a 'client' for COBS purposes, and 'Customer' in terms of Principle 6 includes clients.*
>
> *It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six TCF consumer outcomes.*
>
> *…*
>
> *We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP*

operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the members to confirm the position, or by contacting the firm giving advice and asking for clarification. Moreover, while they are not responsible for the advice, there is a reputational risk to SIPP operators that facilitate SIPPs that are unsuitable or detrimental to clients.

Of particular concern were firms whose systems and controls were weak and inadequate to the extent that they had not identified obvious potential instances of poor advice and/or potential financial crime. Depending on the facts and circumstances of individual cases, we may take enforcement action against SIPP operators who do not safeguard their customers' interests in this respect, with reference to Principle 3 of the Principles for Business ('a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems').

The following are examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms:

- *Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm's clients, and that they do not appear on the FSA website listing warning notices.*

- *Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.*

- *Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified.*

- *Being able to identify anomalous investments, e.g. unusually small or large transactions or more 'esoteric' investments such as unquoted shares, together with the intermediary that introduced the business. This would enable the firm to seek appropriate clarification, e.g. from the client or their adviser, if it is concerned about the suitability of what was recommended.*

- *Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely.*

- *Routinely identifying instances of execution-only clients who have signed disclaimers taking responsibility for their investment decisions, and gathering and analysing data regarding the aggregate volume of such business.*

- *Identifying instances of clients waiving their cancellation rights, and the reasons for this."*

The later publications

In the October 2013 finalised SIPP operator guidance, the FCA states:

> *"This guide, originally published in September 2009, has been updated to give firms further guidance to help meet the regulatory requirements. These are not new or amended requirements, but a reminder of regulatory responsibilities that became a requirement in April 2007.*
>
> *All firms, regardless of whether they do or do not provide advice must meet Principle 6 and treat customers fairly. COBS 3.2.3(2) is clear that a member of a pension scheme is a "client" for SIPP operators and so is a customer under Principle 6. It is a SIPP operator's responsibility to assess its business with reference to our six TCF consumer outcomes."*

The October 2013 finalised SIPP operator guidance also set out the following:

> ***"Relationships between firms that advise and introduce prospective members and SIPP operators***
>
> *Examples of good practice we observed during our work with SIPP operators include the following:*
>
> - *Confirming, both initially and on an ongoing basis, that: introducers that advise clients are authorised and regulated by the FCA; that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the FCA website listings for un-authorised business warnings.*
>
> - *Having terms of business agreements that govern relationships and clarify the responsibilities of those introducers providing SIPP business to a firm.*
>
> - *Understanding the nature of the introducers' work to establish the nature of the firm, what their business objectives are, the types of clients they deal with, the levels of business they conduct and expect to introduce, the types of investments they recommend and whether they use other SIPP operators. Being satisfied that they are appropriate to deal with.*
>
> - *Being able to identify irregular investments, often indicated by unusually small or large transactions; or higher risk investments such as unquoted shares which may be illiquid. This would enable the firm to seek appropriate clarification, for example from the prospective member or their adviser, if it has any concerns.*
>
> - *Identifying instances when prospective members waive their cancellation rights and the reasons for this.*
>
> *Although the members' advisers are responsible for the SIPP investment advice given, as a SIPP operator the firm has a responsibility for the quality of the SIPP business it administers. Examples of good practice we have identified include:*

conducting independent verification checks on members to ensure the information they are being supplied with, or that they are providing the firm with, is authentic and meets the firm's procedures and are not being used to launder money

having clear terms of business agreements in place which govern relationships and clarify responsibilities for relationships with other professional bodies such as solicitors and accountants, and

using non-regulated introducer checklists which demonstrate the SIPP operators have considered the additional risks involved in accepting business from non-regulated introducers."

In relation to due diligence the October 2013 finalised SIPP operator guidance said:

"Due diligence

Principle 2 of the FCA's Principles for Businesses requires all firms to conduct their business with due skill, care and diligence. All firms should ensure that they conduct and retain appropriate and sufficient due diligence (for example, checking and monitoring introducers as well as assessing that investments are appropriate for personal pension schemes) to help them justify their business decisions. In doing this SIPP operators should consider:

- *ensuring that all investments permitted by the scheme are permitted by HMRC, or where a tax charge is incurred, that charge is identifiable, HMRC is informed and the tax charge paid*

- *periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme*

- *having checks which may include, but are not limited to:*

    - *ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and*
    - *undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers*

- *ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified*

- *good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and*

- *ensuring these benchmarks clearly identify those instances that would lead a firm to decline the proposed business, or to undertake further investigations such as instances of potential pension liberation, investments that may breach HMRC tax-relievable investments and non-standard investments that have not been approved by the firm"*

The July 2014 *"Dear CEO"* letter provides a further reminder that the Principles apply and an indication of the FCA's expectations about the kinds of practical steps a SIPP operator might reasonably take to achieve the outcomes envisaged by the Principles.

The *"Dear CEO"* letter also sets out how a SIPP operator might meet its obligations in relation to investment due diligence. It says those obligations could be met by:

- *correctly establishing and understanding the nature of an investment*
- *ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation*
- *ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable)*
- *ensuring that an investment can be independently valued, both at point of purchase and subsequently, and*
- *ensuring that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc.)*

Although I've referred to selected parts of the publications, to illustrate their relevance, I've considered them in their entirety.

I acknowledge that the 2009 and 2012 reports and the *"Dear CEO"* letter aren't formal *"guidance"* (whereas the 2013 finalised guidance is). However, the fact that the reports and *"Dear CEO"* letter didn't constitute formal guidance doesn't mean their importance should be underestimated. They provide a *reminder* that the Principles for Businesses apply and are an indication of the kinds of things a SIPP operator might do to ensure it's treating its customers fairly and produce the outcomes envisaged by the Principles. In that respect, the publications which set out the regulators expectations of what SIPP operators should be doing also go some way to indicate what I consider amounts to good industry practice, and I'm, therefore, satisfied it's appropriate to take them into account.

It's relevant that when deciding what amounted to good industry practice in the BBSAL case, the ombudsman found that *"the regulator's reports, guidance and letter go a long way to clarify what should be regarded as good practice and what should not."* And the judge in BBSAL endorsed the lawfulness of the approach taken by the ombudsman.

Like the ombudsman in the BBSAL case, I don't think the fact that some of the publications post-date the events that took place in relation to Mr M's complaint, mean that the examples of good practice they provide weren't good practice at the time of the relevant events. Although the later publications were published after the events subject to this complaint, the Principles that underpin them existed throughout, as did the obligation to act in accordance with the Principles.

It's also clear from the text of the 2009 and 2012 reports (and the *"Dear CEO"* letter in 2014) that the regulator expected SIPP operators to have incorporated the recommended good practices into the conduct of their business already. So, whilst the regulators' comments suggest some industry participants' *understanding* of how the good practice standards shaped what was expected of SIPP operators changed over time, it's clear the standards themselves hadn't changed.

That doesn't mean that in considering what's fair and reasonable, I'll only consider Embark's actions with these documents in mind. The reports, Dear CEO letter and guidance gave non-exhaustive examples of good practice. They didn't say the suggestions given were the limit

of what a SIPP operator should do. As the annex to the Dear CEO letter notes, what should be done to meet regulatory obligations will depend on the circumstances.

In determining this complaint, I need to consider whether, in accepting Mr M's SIPP application and subsequent investment instructions from Acuma, Embark complied with its regulatory obligations to act with due skill, care and diligence, to take reasonable care to organise its business affairs responsibly and effectively, to pay due regard to the interests of its customers, to treat them fairly, and to act honestly, fairly and professionally. And, in doing that, I'm looking to the Principles and the publications listed above to provide an indication of what Embark could've done to comply with its regulatory obligations and duties.

In this case, the business Embark was conducting was its operation of SIPPs. I'm satisfied that meeting its regulatory obligations when conducting this business would include deciding whether to accept or reject particular investments and/or referrals of business. The regulators' reports and guidance provided some examples of good practice observed by the FSA and, later, FCA during its work with SIPP operators. This included confirming, both initially and on an ongoing basis, that introducers that advise clients have the appropriate permissions to give the advice they're providing and undertaking sufficient due diligence on any investments it was accepting into the SIPP.

Did Embark act fairly and reasonably by accepting Mr M's introduction by Acuma?

Mr M's business was introduced to Embark by Acuma in 2008 and the subsequent investments, which are the subject of Mr M's complaint, were made over the next few years. Over the relevant period in time, there was nothing to prohibit Embark from accepting business from advisers outside of the UK. So, subject to it undertaking sufficient due diligence in respect of any advisers it accepted business from, it was at its commercial discretion whether or not to accept such business.

Embark doesn't now have details of the due diligence it undertook in relation to Acuma. I think this is understandable given the amount of time that's lapsed since their relationship with it ended. So, I don't have evidence that it did undertake due diligence in line with its responsibilities.

It's clear that it did undertake some due diligence; for example, it obtained copies of Acuma's licences provided by the relevant authorities in the country it was operating, as described in the background to this complaint. So, I think Embark did take some steps to assure itself that Acuma had the requisite permissions in the country the advice was being given.

Embark had an agreement in place with Acuma, which is one of the examples the FCA has listed as good practice.

I asked Embark for details of the overall business it accepted from Acuma to see if there was anything about the volume or nature of that business that ought to have been concerning to Embark. During the course of the three years, Acuma made 77 introductions to Embark and these introductions were spread relatively evenly throughout that time period. I've also not seen anything that ought to have been a red flag, so to speak, in terms of the nature of the business it introduced to Embark.

In some instances, the involvement of an overseas adviser may be viewed as unusual. However, in this instance the client was based in the same country. So, I don't think Mr M seeking advice from an adviser in that country was concerning in and of itself.

Overall, I'm not persuaded that it was unfair or unreasonable for Embark to accept Mr M's referral from Acuma.

Did Embark treat Mr M fairly by facilitating the SIPP investments?

Embark has said that its due diligence duty in respect of the investments made by Mr M was limited to ensuring that they could legitimately be held in the SIPP and not a scam – and so it focused on these issues. But that is only partially in line with the regulations and what I think was good industry practice at the time. As I've made clear above, SIPP operators have a responsibility for the quality of the SIPP business that they administer. SIPP operators should undertake enquiries about the nature or quality of an investment proposed before determining whether to accept or decline it into its SIPP.

There's no evidence that Embark made any independent enquiries of any of the investments made by Mr M in the SIPP. But, despite this, I don't think in the circumstances of this complaint, it would be fair and reasonable for me to conclude that it treated Mr M unfairly and facilitated investments that it otherwise shouldn't have done.

The main investment wrapper was a bond with FPI. As I've said above, FPI is considered a large and reputable investment manager. It was a UK regulated business at the time of the transfer of Mr M's pension to Embark, set up of the bond and subsequent investments. So, I don't think there was any reason for Embark to have been concerned about accepting the bond structure that Mr M was using.

Similarly, I think Embark could take comfort from the involvement of FPI in the investment management process. All the investments held within the bond had to be ones which were permitted by FPI.

Mr M is unhappy about the investments in LM, International Mansion Student Accommodation and Premier New Earth. He says these were high risk UCIS funds and his investments in them shouldn't have been facilitated by Embark, particularly in light of his investment experience and attitude to risk.

Whilst the FCA did indeed prohibit the promotion of UCIS for retail investors – the ban came into effect on 1 January 2014. The investments that Mr M complains about all took place before this time.

And, in any event, it's important to make a distinction between the promotion/advice in respect of investments such as UCIS and Embark's role in this transaction. Embark didn't promote or advise Mr M about any of the investments in the bond and its role wasn't to ensure that the investments were suitable for him or in line with his objectives/attitude to risk or experience.

Nevertheless, as I've said above, Embark ought to have carried out due diligence on all the proposed investments.

I haven't been presented with a lot of evidence about these investments. I've reviewed all of the information that I've been able to obtain and – taking everything into account – I've not seen enough to conclude that Embark shouldn't have accepted any of the investments Mr M made at the time he made them. Each of these investments ran into trouble but I can't consider whether or not Embark ought to have accepted the investments in question with the benefit of hindsight. I can only consider what information would've been available to Embark at the time had it conducted sufficient due diligence.

For example, it appears Mansion Student Accommodation ran into problems in 2013 because of liquidity and market conditions, in particular, it not being able to meet redemption requests. Premier New Earth's business plan and expansion didn't go to plan for a number

of reasons, including issues with some of their plants. The LM investments were the subject of regulatory action sometime after Mr M's investment. However, there's no evidence to suggest that there were underlying problems with the nature of the investments and how they were being run that Embark would've uncovered with further enquiries at the time Mr M invested.

So, although Mr M's fund included some higher risk investments, I'm not persuaded that any due diligence conducted by Embark would've given it cause to decline to accept them into his SIPP at the relevant times.

Mr M's complaint and submissions in response to my provisional decision – and reasons for thinking it should be upheld – focus, in part, on the fact that Embark shouldn't have accepted high risk investments into his pension on the basis that he was an inexperienced investor, a retail client and didn't have the appetite for risk for making such investments. I understand Mr M's concerns, but it was the responsibility of the party giving advice to assess the suitability of the investments not Embark.

I've taken into account what Mr M's said about issues with receiving statements from Embark but this doesn't impact my findings in relation to the above.

I hope Mr M understands that the outcome I've reached in this case isn't a reflection of my view of the seriousness of what's happened in respect of his pension. It's clear Mr M's lost a substantial portion of his pension and this will have no doubt been a source of significant distress and have impacted on his retirement plans – but, I've not seen enough to conclude that this loss was as a result of a failing on Embark's part.

My final decision

I don't uphold Mr M's complaint and make no award.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 28 April 2022.

Nicola Curnow
Ombudsman