

The complaint

Mr T has complained about several issues concerning the administration of his Self-Invested Personal Pension (SIPP) by Embark Services (“Embark”), formerly Hornbuckle Mitchell. In summary, his concerns relate to:

- Embark failing to correctly set up VAT registration when commercial property held in his SIPP was purchased.
- Embark failing to check the property in the SIPP was properly insured.
- Embark providing an incorrect SIPP valuation when Mr T was going through divorce proceedings.
- Embark failing to send rent invoices and rent payments not being made to the SIPP.
- Embark’s application of fees for non-block insurance and VAT administration to the SIPP.
- Embark’s poor management of the SIPP, resulting in it being worth less than it should be.

What happened

Mr T is the owner and director of a business I’ll refer to as, “Business T”.

In 2015, Mr T bought commercial office space for Business T to operate out of. He used his Embark SIPP to purchase 25% of the property, while Business T was used to purchase the remaining 75%. The total cost of the property purchase was £800,000. As the property tenant, it was agreed that Business T would pay rent totalling £12,187.50 pa to Mr T’s SIPP.

In November 2016, Mr T requested a SIPP valuation from Embark. Embark provided the valuation, however it incorrectly stated that Mr T’s SIPP owned 100% of the property instead of 25%. Mr T later complained about this, also raising concerns about his SIPP’s VAT registration, and rent invoices not having been sent.

Embark provided an initial response to Mr T’s complaint on 27 January 2017, apologising for errors it had made and, in summary, saying that:

- When the property was purchased, VAT registration had been completed incorrectly, with it only being set up for the SIPP instead of jointly with Business T. A joint account should’ve also been put in place to manage any cash transactions relating to the joint VAT registration, but this hadn’t happened.
- The intention had been for Business T to recover 75% of the VAT incurred on the property purchase, with the SIPP recovering the remaining 25%. But, as it was a legal requirement for joint property owners to make joint VAT registrations, HMRC had rejected the SIPP’s claim for VAT.
- Its VAT fees weren’t justified until the correct VAT structure was in place, so they wouldn’t be applied to the SIPP until this happened.

Finally, Embark set out the steps required to correct the VAT position and offered Mr T £50 for distress and inconvenience caused.

On 31 January 2017, Embark sent Mr T its final response on the matter. In summary it:

- Apologised for the incorrect SIPP valuation sent and confirmed a correct one had since been issued.
- Referred to the solution set out in its 27 January 2017 letter to correct the VAT registration, saying it understood Mr T had agreed to this.
- Offered Mr T the £50 distress and inconvenience payment it had previously and provided referral rights to our service.

Following a telephone conversation on 16 May 2017, Embark wrote to Mr T advising him not to accept its redress offer of 31 January 2017. It explained that if its offer wasn't accepted, Mr T could refer his complaint to our service without fear that it had somehow tried to limit its obligations to him. It reassured Mr T that its primary focus was to resolve the issues with his SIPP, and once this had been achieved and the position of any loss and inconvenience had been established, it would revisit the matter of compensation. Embark asked Mr T to complete and return the attached paperwork if he was happy to proceed on this basis.

Mr T signed and returned relevant paperwork on 17 May 2017, which, in addition to other documents, Embark forwarded to HMRC.

Having requested an update from Embark, on 26 June 2017, Mr T was told that HMRC had confirmed receipt of documents previously sent and steps were being taken to resolve matters.

In August 2017, Embark wrote to Mr T, providing an update on attempts to resolve the VAT registration issue with HMRC. Additionally, it apologised for VAT fees not being refunded when they should've been and provided assurances that it would suspend these fees until the VAT position was corrected. Finally, Embark acknowledged that rent invoices were outstanding and said this would be chased up.

In September 2017, Mr T forwarded Embark correspondence he'd received from HMRC, stating that Business T owed £120,000 in underdeclared VAT.

Embark responded to Mr T in October 2017, saying that having considered Mr T's concerns further, it felt a payment of £500, in addition to the £500 worth of VAT fees waived in the SIPP's first year, represented a fair offer for distress and inconvenience caused, which Mr T was invited to accept. It added that it was still working to resolve the delay in sending rent invoices.

On 17 September 2021, Mr T called Embark to complain. Embark's understanding was that by not requesting insurance documentation for the commercial property since his SIPP started, Mr T felt it had failed to act in his and his SIPP's best interests.

Mr T clarified his complaint on 29 October 2021. In summary saying:

- Embark made repeated errors, only one of which was its failure to check the property in his SIPP was correctly insured.
- The VAT registration hadn't been set up correctly at the outset, resulting in lengthy delays recovering VAT his SIPP was due. This also led to HMRC claiming £120,000 in alleged underdeclared VAT, which took time to be refunded and created cashflow problems for his business.
- He'd received no follow up from Embark since its May 2017 offer.

- The incorrect SIPP valuation Embark provided in 2016 meant that he'd had to prove he hadn't been trying to suppress his assets during divorce proceedings. This led to him incurring unnecessary legal bills.
- Despite numerous chasers, no invoices were ever sent to Business T for rent that should've been paid into his SIPP. As a result, there was a significant shortfall in his SIPP's value which was further reduced by Embark applying fees for work it hadn't done.
- Along with Business T, he'd been severely disadvantaged by how Embark had handled his SIPP.

Embark sent its final response to Mr T's complaint on 19 November 2021. In summary it said:

- Although it had promised to provide an explanation of the services provided for each fee applied to his SIPP, it acknowledged this had been delayed.
- Property insurance documentation hadn't been requested when it should've been. Non-block insurance fees applied between December 2016 and September 2020 should've prompted it to do so, ensuring there was sufficient cover in place. As this didn't happen, it would arrange for these fees to be refunded.
- The issues with VAT registration were dealt with in its final response of 31 January 2017. And following more concerns being raised, it had then reviewed the matter and offered £500 compensation for distress and inconvenience caused. There was no record of Mr T's response to this offer.
- In line with its Fee Schedule and Terms and Conditions, it was entitled to charge fees for preparing and submitting VAT returns. However, if Mr T wanted to handle this himself, he could do so, at which point, the VAT return fee would stop being applied.
- In 2014, it outsourced its property administration service to a third party, before it was brought back in-house in 2019. There was nothing to indicate it ever told Mr T that the property administration service would no longer be provided or that administration responsibilities would be assumed by him. So, it accepted that Mr T expected rent invoices to be issued and rent reviews to be undertaken.
- It promised to issue missing rent invoices and undertake reviews that had been overlooked since the property administration service had been brought in-house. However, it confirmed that rent payment reminders wouldn't be sent, so a standing order should be set up to ensure no further payments to Mr T's SIPP were missed.
- As the SIPP administrator, Embark wasn't responsible for investment performance.
- It was sorry for the service Mr T had received, so it offered him a further payment of £100.
- Finally, Embark provided referral rights to our service.

Mr T later referred his complaint to our Service. One of our Investigators considered the matter, but he didn't think we could look at all the issues Mr T had raised. In summary he said:

- Mr T's concerns about the SIPP valuation and VAT registration had been referred to us more than six months after Embark issued its 31 January 2017 final response on the matter.
- The six-month period began on 31 January 2017 and ended on 31 July 2017.
- As Mr T didn't refer his concerns about the SIPP valuation and VAT registration to our Service until 4 May 2022, these issues had been brought too late.
- Mr T's remaining concerns about rent invoices; property insurance; the application of fees for non-block insurance and VAT administration; and the value of his SIPP had been referred in time, so our Service could consider them.

The investigator considered the merits of the concerns he felt Mr T had referred in time and, in summary, he concluded:

- Rent invoices weren't sent to Business T when they should've been. However, rent should've been paid to the SIPP irrespective of this.
- Embark should send Business T any outstanding invoices for rent and Mr T, in his capacity as its owner, should arrange for missing rent payments to be paid to his SIPP.
- Rent reviews should've taken place and hadn't, so Embark should ensure a review was carried out immediately.
- Regarding the application of non-block insurance fees to the SIPP, Embark had never checked what insurance was in place for the commercial property held within it. And this is why it had agreed to refund any fees applied between December 2016 and September 2020.
- As it appeared that Embark wouldn't charge non-block insurance fees if it was satisfied proper insurance cover was in place, it was reasonable to expect it to refund any of these fees taken since September 2020.
- Embark was entitled to apply VAT administration fees to the SIPP where it was responsible for this.
- Rental income not being paid into the SIPP when it should've been had heavily impacted its value. But even if poor performance had caused this, Embark, as the SIPP administrator, wasn't responsible for this.
- Overall, the service Mr T received from Embark had been poor so it should pay him £900 for distress and inconvenience caused.

Mr T disagreed with the complaint points the investigator thought had been referred too late. He also explained why he thought a higher payment for the distress and inconvenience caused was more appropriate.

Embark broadly agreed with the investigator's position on the concerns he felt had been referred in time and the level of compensation recommended for the distress and inconvenience caused. However, it disagreed with his conclusions regarding the application of non-block insurance fees.

As no agreement could be reached on whether we were able to consider Mr T's concerns regarding the SIPP valuation and VAT registration issues, his complaint was passed to me for a decision on whether we had jurisdiction to consider these matters.

I issued a jurisdiction decision on 31 July 2023, where I concluded that Mr T's complaint about VAT registration and the 2016 SIPP valuation couldn't be considered by this service. But I said we could consider his complaint points about property insurance; rent invoices; the application of fees for non-block insurance and VAT administration; and the value of the SIPP.

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'm upholding Mr T's complaint, but not to the extent he'd like. I'll explain why.

I should first say that I'm very sorry to learn of Mr T's experiences with Embark. It's clear he hasn't received the service he should've. As I said in the jurisdiction decision I issued, I

sympathise with Mr T's position and appreciate his strength of feeling about *all* the concerns he's raised. However, in my decision, I'm going to concentrate on the issues I determined our service could consider and what I think is relevant and at the heart of this complaint.

Property insurance and non-block insurance fees

Embark's terms and conditions set out the requirements for insuring commercial property within a SIPP. Specifically, they state that the SIPP scheme member – Mr T – is “*responsible for arranging suitable Insurance for any property investment in [their] Plan*”.

Embark is the landlord for the floor in the building Mr T's business operates from, but there's a ‘*Superior Landlord*’ who insures the whole building. The cost of insurance cover for the floor Business T occupies is included in the service fees it pays.

As Business T's premises isn't insured under Embark's block insurance policy, non-block insurance risk fees were applied to Mr T's SIPP between 2016 and 2020, in line with the SIPP fee schedule. The fees reflect the additional work involved in checking that commercial property insurance provided outside of Embark's block policy is adequate.

In September 2021, Mr T received correspondence from Embark, confirming that as insurance documents for the SIPP property were never requested, Embark had been unaware of the basis on which it was insured. Accordingly, Mr T argued that Embark's non-block insurance risk fees had been unfairly applied. I agree. After all, the fees were supposed to represent the extra time Embark would have to spend each year, reviewing insurance coverage to ensure it was sufficient and didn't put Mr T's SIPP at risk in the event of a claim. Embark acknowledges that it didn't review the details of insurance cover for the SIPP property until 2021, so no extra work was carried out which would justify the application of non-block insurance risk fees prior to this.

It's worth noting that the lease for the SIPP property states that Embark, in its capacity as the trustee of Mr T's SIPP, is responsible for ensuring the property is appropriately insured against loss or damage, so getting insurance documentation from Mr T at the outset was crucial. As this didn't happen, I can understand why Mr T feels that Embark failed to act in his best interests.

Embark accepts that it should've requested insurance documentation much earlier than it did and has apologised for not doing so. In recognition of this, it refunded £720 to Mr T's SIPP, representing non-block insurance risk fees it applied between 2016 and 2020. I think this is fair.

As the SIPP property remains insured outside of Embark's block insurance policy, I'm satisfied that, going forward, Embark is entitled to apply non-block insurance risk fees in line with the fee schedule Mr T agreed to when his SIPP was established. I won't be asking it to do anything further in this respect.

VAT administration fees

Two VAT related fees apply to Mr T's SIPP. A VAT set up fee for registering the SIPP for VAT returns. And a fee for the completion of VAT returns for the SIPP property investment.

As the parties will be aware, in the jurisdiction decision I issued I determined that our Service couldn't investigate Mr T's concerns about the VAT registration of his SIPP. Because of this, I've only considered the fees Embark has charged for VAT returns.

In January 2017, Embark wrote to Mr T acknowledging the errors it had made when setting up VAT registration for the SIPP and agreeing that VAT return fees wouldn't be charged until the issue was resolved. As Embark couldn't complete the work the fees related to, I'm satisfied this was appropriate action for it to take at the time.

Unfortunately, Embark went on to make further errors by incorrectly applying VAT return fees to Mr T's SIPP before VAT registration had been corrected. However, following a review, Embark identified its mistake and credited the relevant amount (£270) to Mr T's SIPP.

Mr T and Embark's submissions indicate that the VAT registration issue was eventually resolved sometime around September/October 2017. At this point, Embark was able to carry out the work involved in submitting VAT returns for Mr T's SIPP to HMRC. Accordingly, quarterly VAT return fees have been applied to the SIPP since April 2018.

As Mr T hasn't chosen to assume responsibility for preparing and sending VAT returns, Embark handles these activities on his behalf. In line with the SIPP fee schedule, Embark charges a £95 fee quarterly for the VAT returns it submits. Although I can appreciate Mr T's reluctance to pay the fee given the issues caused by Embark's poor handling of the VAT registration process, I'm unable to agree that Embark should waive all VAT return fees going forward. I think it's reasonable for it to apply the relevant charge for work it has carried out, so I won't be directing it to do otherwise.

Rent invoices and SIPP value

Mr T's SIPP holds his property investment and a cash balance. The value of the SIPP depends on several things; however, I think it's fair to say that the most significant contributing factor is the rental income Mr T's business agreed to pay. If Business T didn't pay rent, Mr T's SIPP wouldn't receive the expected regular contributions, meaning its value would inevitably be much lower than anticipated.

Mr T says Embark's errors, specifically, its failure to send rent invoices, ensure the payment of rent, and conduct rent reviews, has caused the value of his SIPP to be significantly lower than it should be.

Regarding the payment of rent, the SIPP property lease states:

"The Tenant [Business T] shall pay the Annual Rent and any VAT in respect of it by four equal instalments in advance on or before the Rent Payment Dates. The payments shall be made by banker's standing order (...)"

And concerning regular contributions, the SIPP terms and conditions state that upon receiving these, Embark will pass them onto the relevant SIPP account. They also say:

"You can stop and start your contributions at any time (...), although charges continue to apply whether or not you are contributing."

In his capacity as the owner and director of Business T (the property tenant), I'm satisfied that the onus was on Mr T to ensure the agreed rent was paid to Embark on time. There's no record of any agreement between the parties that Business T paying rent depended on it receiving rent invoices from Embark, so I don't find that by not sending invoices, Embark is responsible for the deficit in Mr T's SIPP value, caused by his business not paying rent. Although not making regular contributions is permitted under Mr T's SIPP, the lease is clear about the Business T's requirement to pay rent as prescribed. And the relevant term and conditions warn that charges will apply to the SIPP irrespective of whether contributions are

made. So, I think Mr T should reasonably have been aware of the importance of his business paying rent and the impact of it not doing so.

Under the terms of the lease, Business T was required to pay just over £12,000 in annual rent to Embark before it would be transferred to Mr T's SIPP. Here, the rental income would benefit tax relief and allow VAT savings to be reinvested in the SIPP fund. Given the level of rental expected, and the period over which Business T paid none (almost seven years), I think it was foreseeable that the value of the SIPP would differ substantially from what it would've been had the agreed payments been made.

There was no obligation on Mr T to check the value of his SIPP, however, I think it would've been prudent for him to do so given how much the asset it was holding was worth. Generally, we'd say it's reasonable to expect a consumer to check the performance of their pension at least once a year. Had Mr T done so, he would've seen the impact of his business not paying rent on the value of his SIPP, and hopefully taken steps to pay what Business T owed.

It's worth noting that under the lease, Embark is permitted to apply interest to Business T's overdue rent until it's paid. And the SIPP terms and conditions allow it to apply a rent default fee (£300) quarterly. I can't see that, having received no rent from Business T, Embark has taken either of these actions. If it had, Mr T's business would need to pay even more to the SIPP than it would if the rent been paid on time.

The SIPP terms and conditions allowed Mr T to appoint a property manager or manage the SIPP property himself. Embark set out the wide-ranging responsibilities of a property manager, which included ensuring the terms of the lease were met, collecting and forwarding rent to the SIPP, and debt management (arrears collection and enforcement of repayment plans).

Although I've seen a note of a call Mr T had with Embark in September 2021 where he said he'd appointed a property manager, no further details have ever been shared with Embark despite requests. So, in the absence of anything to suggest a property manager was acting for him, Mr T became the default property manager, and it was therefore incumbent on him to ensure rent was paid by his business. Because of this, I don't think it would be fair to say that Embark is to blame for the rent arrears Business T has accumulated.

I'm mindful that when Mr T started his SIPP, Embark was using a third party I'll refer to as "Company L" to provide some of its property administration services. As part of this, Company L was supposed to send rent invoices to tenants like Business T and undertake rent reviews. Unfortunately, there's no evidence of either activity taking place. Embark has apologised for this, recognising that it also neglected to notify Mr T that it stopped using Company L in 2019, and decided to make issuing rent invoices and conducting rent reviews the responsibility of property managers like Mr T.

While I don't find that Embark's failings in this respect altered Mr T's duty to ensure rent was paid by his business, it's clear that Embark hasn't provided Mr T with the level of service he should've been able to expect from it as his SIPP administrator. In my view, it showed a concerning lack of regard for the information needs of its client. And in doing so, put Mr T in a position where, in an effort to understand what was going on with his SIPP, he had to make repeated requests for documentation and clarification which was on several occasions either delayed, incorrect, or not provided.

Embark's SIPP literature clearly recognises the complexity of situations like Mr T's, where the SIPP member owns the business which is the tenant of the SIPP property. It notes that this connection can sometimes conflict with a SIPP member's understanding of running their

business and pension scheme as separate entities. Although Embark says this can sometimes mean it needs to provide clarification and additional support to ensure certain roles and responsibilities are maintained, I've seen little evidence of Embark's efforts in this respect.

In my view, there were clear shortcomings in the service Embark provided to Mr T. Understandably, Embark's repeated errors, sustained over almost seven years, have compounded the distress and inconvenience Mr T has suffered. And when errors came to light, disappointingly, opportunities to provide clarification and prevent further problems from arising seem to have been missed. I think it's fair that Mr T receives compensation for this.

I'm aware that Mr T doesn't consider the compensation of £900 suggested by the investigator (and accepted by Embark) is enough. But, as I've said, I can't say that Mr T suffered the financial loss he's claiming (the shortfall in the value of his SIPP) because of any service failings on Embark's part, such as not providing rent invoices to Business T. I don't think Embark is responsible for the rent arrears that have built up.

Having carefully considered the circumstances of this case, I think that Embark should pay Mr T £900 for trouble and upset caused. I consider this to be fair and reasonable bearing in mind the impact of Embark's service failings over a sustained period and what it could've done better.

Finally, I'm conscious that Business T's rent arrears mean that Mr T's SIPP is missing almost seven years' worth of regular contributions. Given Mr T's concerns about the value of his SIPP, I think it's in his best interests to ensure the missing rent is paid by Business T as soon as possible. Not only to try to restore the value of the SIPP, but also to avoid any unintended - and preventable - consequences of the rent not being paid. Mr T may already be aware of the possibility of unauthorised payment charges being levied by HMRC against his SIPP and him personally if he or his business has benefitted from not paying rent. I'm sure this is something Mr T would be keen to avoid. As has already suggested, Mr T may wish to consider setting up a standing order for rent to be paid by Business T going forward.

It's reasonable for Mr T to want a clear breakdown of his business' rent arrears, and I can see that Embark sought to do this when it produced a rent reconciliation document. I appreciate that Mr T's experiences over the years, mean his confidence in Embark's figures is limited. However, I don't think establishing how much rent needs to be paid should be complicated.

As Mr T has confirmed, Business T has never paid rent to Embark. The lease sets out the rent Business T was required to pay annually, so it seems to me that calculating how much rent is outstanding after almost seven years of non-payment should be relatively straightforward. As a starting point it would seem to make sense for Embark to provide Mr T with an updated rent reconciliation document as well as any rent invoices which haven't already been provided to him. That being said, I don't think it's possible to be specific as to what exactly recovering the outstanding rent should entail as it will depend on what steps Embark and Mr T agree upon. And as the primary responsibility for taking appropriate action to address the rent deficit is Mr T's, it will be up to him to decide what to do and for Embark to assist him in any way it can - for example by providing up to date details of the amounts outstanding. To this end, I'd expect Embark to respond to any queries Mr T has as soon as possible and to liaise with him about the arrears. It will be up to Mr T to decide what to do and how to move forward.

My final decision

I uphold the complaint. Embark Services Limited must pay Mr T £900 as compensation for

the distress and inconvenience its service failings have caused.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 18 October 2023.

Chillel Bailey
Ombudsman