

The complaint

Mrs M is unhappy that EBS Pensions Limited (Embark) didn't make her aware of rent arrears on a property held in her SIPP (self invested personal pension). Mrs M is also unhappy with an increase to charges and insurance premiums.

What happened

In brief, Mrs M's SIPP with Embark includes two industrial units which are let out. At the end of 2020 the tenants of one of the units stopped paying rent and other charges. Mrs M didn't find out until 23 February 2022 by which time a significant debt had accumulated. Mrs M asked Embark for copies of the documentation for her SIPP which wasn't forthcoming despite reminders.

Mrs M complained to Embark on 14 June 2022. Embark issued its final response on 1 July 2022, upholding the complaint. Embark said Mrs M had consistently requested copies of the SIPP documentation without response. She'd made it clear the information was required urgently as she was trying to resolve an issue with a non paying tenant and remove them to introduce a new tenant. Embark said the requested documents had now been provided. On 23 June 2022 Embark had sent Mrs M the Supplemental Deed, Property Management Agreement (PMA) and an updated rent reconciliation for the unit in respect of which the rent was in arrears. Embark had also confirmed it would arrange for the Deed of Surrender, Leases and Rent Deposit Deeds to be countersigned and returned to allow the new tenant to be put in place. Embark offered £100 for the distress and inconvenience Mrs M had been caused.

Mrs M referred her complaint to us. We made several information requests to Embark. Mrs M kept us updated with her efforts to get view only access to the SIPP bank account. I think access was finally achieved in about November 2022. Queries had also arisen about the buildings insurance, the SIPP charges and the VAT treatment of the rent payments.

Our investigator issued her view on 14 June 2023. In summary her findings were:

- Embark had only been able to provide an unsigned copy of the PMA. But Embark had said that the property purchases couldn't have been completed without a signed PMA. So, on balance it was likely Mrs M had signed the PMA at the time.
- The investigator set out extracts from the (unsigned) PMA and which said Mrs M is the property manager. The manager's obligations include providing the services as set out in the schedule. These included invoicing the tenants for rent, service charge, insurance premiums and other payments due. And collecting the rent with any VAT payable and the other payments due.
- The PMA made it clear that Mrs M was responsible for checking that the rent had been received. Embark's responsibilities included ongoing administration in relation to the property, the payment of any invoices, insurance administration, receiving rental payments and allocating them to the correct account(s), rent reviews and arranging revaluations.
- It was unclear how Mrs M would be able to perform her duties as the property manager. Embark had confirmed that online access to the SIPP bank account wasn't

normally given to clients when an account is opened. Clients and financial advisers may have been given access to a portal which mirrored the transactions through the bank account. But it was unclear if Mrs M had been provided with access.

- Mrs M hadn't been provided with the access she needed to carry out her role as the property manager. She was unable to view statements to see if the rent had been paid and she only became aware of the issue when she met with the tenant. Had she had access to the account, she'd have been aware much sooner there was an issue and been able to take action sooner. It was likely she'd have been able to get a new tenant into the property and the arrears would've been much less.
- Embark had confirmed they'd normally expect any arrears to be highlighted to them to allow them to support the client in chasing the arrears, which would usually involve them writing to the tenant to try and recover payment of the rent before exploring, on agreement of the member, a legal route to recover any unpaid rent.
- There was nothing to indicate Embark had contacted the tenant to try to recover the rent or explored any legal route to recover the unpaid rent. It had taken Mrs M a long time to get access to the SIPP bank account. Embark could've done more to support her in trying to recover the arrears and getting access set up. Mrs M had been caused substantial upset and worry. She's retired and her SIPP is her main pension provision. But the rent was the tenant's responsibility, not Embark's, and was still owed to the SIPP.
- The investigator had checked the SIPP fee schedule. She set out the fees payable, including those for the properties. It didn't seem there'd been any errors.
- Embark had explained that in the past the properties had been incorrectly insured and that had now been corrected.
- The compensation of £100 offered by Embark wasn't fair considering the trouble and upset the matter had caused Mrs M. The investigator suggested £1,500 instead. She also said Embark should support Mrs M with the recovery of the arrears.

Embark accepted the investigator's suggested outcome. Mrs M didn't. Her main objections were:

- She'd waited almost a year for this service to resolve her complaint about the handling of her SIPP, the lack of response to her repeated requests for information and the failure to address how the tenant arrears could be resolved or recovered.
- She was disappointed that we'd repeatedly given Embark more time to respond to our requests for information but we'd asked for her response within seven days. She pointed out that she was still awaiting a response from Embark following an email on 22 June 2022.
- The investigator had said that Embark should support her with the recovery of the rent arrears. But it was unclear how things could be resolved, especially given the lack of responses by Embark since March 2022.
- Mrs M also queried the investigator's view that the PMA must've been signed despite there being no evidence of that.
- What was clear was that Embark hadn't enabled her to monitor debits and credits through the bank accounts. The investigator had said Mrs M 'may have been given' access (to the portal). But the procedure should be that clients and financial advisers are given access as a matter of course. Without that information, neither the client nor the financial adviser can accurately and efficiently manage the property. Mrs M pointed to the investigator's finding on that issue – that it wasn't clear how Mrs M would've been able to perform her duties as the property manager when online access to the SIPP bank account wasn't normally given.
- Mrs M maintained that Embark had failed in the overall management of her SIPP by withholding access to information that would've prevented the arrears escalating. If Embark didn't have a defined and transparent methodology for property income

management they shouldn't be in the business of providing a SIPP created for that purpose.

Mrs M didn't think the compensation suggested was sufficient for the months of frustration, distress and financial loss and when Embark's unresponsiveness continued.

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.

I'm very sorry to learn of Mrs M's experiences with Embark. Particularly at what has been and continues to be a very difficult time for Mrs M. I've considered very carefully all Mrs M has said. But in my decision I'm just going to concentrate on what I see as key. Essentially, although I appreciate that Mrs M will remain disappointed and dissatisfied, I agree with the outcome suggested by the investigator. I think the sum she recommended that Embark should pay, which Embark has confirmed it accepts, is fair and reasonable in all the circumstances of this complaint.

Embark accepts that they haven't dealt with things as they should've done. In particular there have been delays in providing information requested by Mrs M and despite repeated reminders having been sent. Embark's records seem deficient too – Embark should be able to produce completed and signed documentation.

On that issue, even if Mrs M didn't sign the PMA at the time I don't think that must mean she isn't bound by it. An unsigned contract may still be valid – for example if there's evidence that the terms were accepted. Acceptance could be by exchange of emails, or verbally or by conduct. If the relevant documentation including the PMA was issued to Mrs M then I don't think it's unfair to say that the terms should apply as that was the notified basis upon which Embark or its predecessor was prepared to accept the properties into the SIPP.

But, in any event, I tend to agree with the investigator that it's likely that Mrs M did sign the PMA and the other documents and returned them to Embark even if they can't now be produced. Holding commercial properties in a SIPP can be complicated and I don't think it's likely that the properties could've been acquired by the SIPP without all the legal formalities having been completed. It's also the case that the original SIPP provider went into administration and so the SIPP was taken over by Embark. A change in business may sometimes mean that not all relevant documentation is passed on.

Mrs M's position is that Embark should've told her that the tenants had stopped paying the rent. Or, if access to the bank account had been set up at the outset, then Mrs M would've seen for herself what was happening and taken steps before significant arrears accumulated. But the PMA makes it clear that Mrs M is the property manager and it's her responsibility to invoice the tenants for the rent and other sums due and to collect the payments. The income due from the property is then to be deposited in the specified bank account. It's also the property manager's responsibility to advise the SIPP trustees and administrator (Embark) of any actual or anticipated rent collection difficulties and take appropriate action to secure any deficit against the tenant in a timely fashion.

The arrangement seems to have been that the tenant paid the rent direct to the SIPP bank account. I don't know how that came about but it may be, as Mrs M issued the invoices for the rent, that the tenants agreed with her that payment could be made direct rather than via her. But it's still the case that, under the terms of the PMA, it was for Mrs M to notify Embark of any difficulties, rather than the other way round. I don't doubt, if Mrs M had been fully familiar with her responsibilities under the PMA, that she'd have made sure she had the

necessary access so she could make sure that payments were being made. And, as she has suggested, problems would've been avoided if, as a matter of course, access was set up at the outset and as a matter of routine.

What's happened is very unfortunate. But I can't say Embark was responsible for any lack of access to the SIPP bank account if Mrs M didn't have it and didn't request it because she didn't know that responsibility for monitoring the rent payments rested with her. And I don't think it would be fair to say that Embark is to blame for the arrears accumulating if Mrs M's responsibilities included notifying Embark of any breach of the lease (which would include non payment of rent), collecting the rent and advising Embark of any rent collection difficulties, whether actual or anticipated.

I note that section 3.2 of the PMA says that the manager won't be liable as a result of any failure on the trustees' part to promptly give proper authorisations, instructions, approvals, information and documents as may be necessary to enable the manager to carry out their obligations. Ignoring the fact that Mrs M's complaint is brought against Embark as the SIPP administrator, I don't think that clause helps Mrs M as the difficulties that have arisen in obtaining information and documents were after arrears were incurred. And, in any event, even if that clause was applicable, it just means that Mrs M as the manager isn't liable – it doesn't make the trustees (or the administrator) responsible for anything – such as the rent arrears that accrued and which, as I've said, the tenant remains responsible for paying. For similar reasons I don't see that the indemnity in clause 7 of the PMA assists much either.

I agree that Embark should support Mrs M in trying to recover the outstanding rent from the tenant. But I don't think it's possible to be specific as to what that should entail as it will depend on exactly what steps are decided upon. And the primary responsibility for taking appropriate action to secure any deficit is Mrs M's, so it will be up to her to decide what to do and for Embark to assist her in any way it can – for example by providing up to date details of the amounts outstanding.

I recognise that the situation is unsatisfactory because Embark hasn't responded promptly to Mrs M's concerns and enquiries, a pattern that was repeated in Embark's dealings with us. But I don't think it's quite right to say that the investigator only gave Mrs M a week to say if she was prepared to accept the investigator's view. That was issued on 14 June 2023 and both parties were given 14 days to respond so by 28 June 2023. Not having heard from Embark by the time that deadline was nearly up, the investigator wrote to Embark on 27 June 2023 asking if Embark accepted the view. When Embark replied on 5 July 2023 saying they did, the investigator updated Mrs M and gave a further 7 days for response. So by then Mrs M would've had the investigator's view for about a month.

But that aside, I can see why Mrs M may have lost confidence in Embark and its ability, going forwards, to assist her, including providing any information Mrs M requires. And it seems that Mrs M may have some outstanding queries – for example about the VAT treatment of the rental payments. I'd ask Embark to respond to any outstanding queries as soon as possible and to liaise with Mrs M about the arrears. It will be up to Mrs M to decide what to do and how to move forward, whether that's with Embark or a new SIPP provider.

Mrs M doesn't consider the compensation of £1,500 suggested by the investigator (and accepted by Embark) is enough. But I can't say that Mrs M suffered any financial loss because of any service failings on Embark's part, such as not providing the requested information promptly. As I've explained, I don't think Embark is responsible for the arrears that built up.

But Mrs M has suffered considerable distress and inconvenience and at a very difficult time which will have heightened the impact of the service failings. We give some examples on our website about the levels of award we might make for distress and inconvenience. For example, we say an award of up to £1,500 could be fair where the impact of a business's mistake has caused substantial distress, upset and worry and where there may have been a serious disruption to daily life over a sustained period, with the impact felt over many months, sometimes over a year. In my view, that's consistent with what happened here and so I think £1,500 is appropriate and fair and reasonable in the circumstances of this case.

Lastly Mrs M also raised some other issues about an increase in insurance premiums and the charges that Embark has imposed. I've seen that the investigator looked into those matters and I agree with her findings.

My final decision

I uphold the complaint. EBS Pensions Limited must pay Mrs M £1,500 as compensation for the distress and inconvenience the service failings have caused.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 24 August 2023.

Lesley Stead
Ombudsman