

## **The complaint**

Mr T has complained that Embark Services Limited delayed the completion of a new lease agreement for the commercial property held in his self-invested personal pension. Mr T has claimed that he's suffered a financial loss as a result.

## **What happened**

Mr T holds a self-invested personal pension (SIPP). Embark is the administrator of Mr T's SIPP.

Mr T's SIPP owns a commercial property. The first floor in the property was let to a software company, but the ground floor was unoccupied. Mr T was the Chief Executive Officer of the software company that held the tenancy for the first floor in the SIPP property. This meant that the tenant was a connected party.

On 13 October 2021 Mr T emailed Embark to say that due to growth in the tenant's business, they now wanted to take a lease against the whole property.

On 22 October 2021 Embark responded to Mr T. They said that they'd consulted their legal team and had been told that there were two options on how the tenant's existing lease could be changed. Embark gave details of these two options as follows:

### *"Option 1*

*A Deed of Variation could be put in place to extend the area of the current lease to include the ground floor. When a Deed of Variation increases the area being covered by the lease, the Deed in law acts as a surrender and regranting of the current lease. As the tenant is a connected party, to comply with HMRC regulations we would require a new market rental valuation from a MRICS surveyor for the whole property. This would set the rental for the lease.*

### *Option 2*

*A second lease is granted for the ground floor. A market rental valuation from a MRICS surveyor for ground floor would be required as the tenant is connected".*

On 15 November 2021 Embark emailed Mr T to ask if there was any update on the proposed change to the tenant's lease. In this email Embark also asked some questions about the

condition of the ground floor in the SIPP property. Mr T responded to answer Embark's questions about the ground floor but didn't give any further update on the proposed change in the lease.

On 28 March 2022 Mr T's lawyers emailed both Mr T and Embark with questions they had on the SIPP property to help them with drafting the new lease. Embark responded to these questions on 10 April 2022.

On 11 April 2022 Mr T's lawyers sent Embark a Terms of Engagement document for them to sign. On 12 April 2022 Embark asked the lawyers if Mr T had already signed the Terms of Engagement and the lawyers replied on the same day to say that Mr T hadn't signed the document.

On 13 April 2022 Embark sent the Terms of Engagement document to Mr T for him to sign. Embark then chased Mr T for the return of the signed document on 2 May 2022 and 13 June 2022.

On 20 June 2022 Mr T replied to Embark to say that he had been unwell but would now sign the Terms of Engagement document issued by the lawyers. Embark then received back the signed document from Mr T on 19 July 2022, which they then countersigned on 28 July 2022 and sent to Mr T's lawyers on 2 August 2022.

On 12 August 2022 Mr T's lawyers sent Embark documentation to surrender the tenant's existing lease and to then set up a new lease which covered the whole property. The new lease was to be for a ten year term. This documentation was sent to Embark so that they could check and approve it.

However, Embark didn't respond to the lawyers about this documentation until 17 October 2022. They then raised some queries on the new lease, which the lawyers answered on 18 October 2022. On 20 October 2022 Embark told Mr T's lawyers that they were happy to proceed with the new lease but at the same time asked if any premium was payable on the surrender of the existing lease.

On 24 October 2022 Mr T's lawyers replied to Embark to say that no premium was payable on the surrender of the lease and again sought Embark's agreement for the new lease to proceed. Embark then re-confirmed to Mr T's lawyers on 10 November 2022 that they were happy to proceed with the new lease. On 14 November 2022 the lawyers told Embark that the lease documents would be sent to Mr T for signing.

On 29 November 2022 Embark emailed Mr T's lawyers to ask for an update on the new lease. Mr T's lawyers replied to Embark on 1 December 2022 to say that the lease was being re-drafted to change the term from ten years to seven years.

On 29 September 2022 Mr T emailed Embark to complain about the time taken for the new lease to be set up. Mr T claimed that because the rent payable under the new lease was higher than the rent paid under the old lease his SIPP had missed out on income due to Embark's delays.

Embark responded to Mr T's complaint on 25 October 2022. Embark admitted that it had taken them too long to respond to the lawyer's email of 12 August 2022, when they had been sent the new lease together with documentation for surrendering the old lease. Embark hadn't responded to the lawyer's email until 17 October 2022.

Embark upheld Mr T's complaint and offered him £50 in compensation for their delay. But Embark didn't agree that their delay had meant that Mr T's SIPP had missed out on any higher rental income.

In their response letter Embark said: *"However, I do not foresee any issues with the lease being backdated to an agreed date of entry, provided this is not prior to 12 August 2022 (when we first received the documentation for review). This will allow the revised rent to be paid to the SIPP, as intended, and at no detriment to the SIPP because of the administrative delays caused by us, or external parties"*.

Mr T wasn't happy with Embark's response. He therefore brought his complaint to the Financial Ombudsman Service. One of our Investigators reviewed Mr T's complaint and concluded that the complaint should be upheld and that Embark should pay Mr T £150 to compensate him for the delay they'd caused between 12 August 2022 and 17 October 2022. The Investigator didn't think that Embark could be held responsible for any loss of income to Mr T's SIPP.

Mr T accepted the Investigator's view but Embark have not responded to the view. Mr T's complaint has therefore been brought to an Ombudsman.

### **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.

In October 2021 Mr T contacted Embark to ask about the existing tenants taking a new lease on the whole property owned by his SIPP. Embark replied to Mr T and gave him details of two options open to him and to explain that as the tenant was a connected party then to comply with HMRC regulations they would need a new market rental valuation for the whole property. Embark asked Mr T for an update on the lease change in November 2021, but I've not seen any evidence to show that Mr T provided any update at that time.

I think that action taken by Embark in their reply to Mr T's email of 13 October 2021 was reasonable. They replied within seven working days, which I think is reasonable, and gave Mr T details on options open to him.

When Embark received the Terms of Engagement document from Mr T's lawyers in April 2022 they forwarded the document to Mr T for signing within two working days. They also chased Mr T for the return of the signed document on two occasions.

I have not seen any evidence to show that Embark were responsible for the delay in Mr T not returning the signed Terms of Engagement document until 19 July 2022. Instead, the delay appears to be due to Mr T being unwell.

I therefore don't think that Embark were responsible for any delay before they received the documentation from Mr T's lawyers to surrender the existing lease and to set up a new lease on 12 August 2022. Embark didn't respond to Mr T's lawyers until 17 October, which was over two months after they'd received the lawyer's email.

I think that this time period is unreasonable and Embark have admitted that it took them too long to respond to the lawyers email of 12 August 2022.

Once Embark responded to the lawyers on 17 October 2022 they confirmed on 20 October 2022 that they were happy to proceed with the new lease but raised a question about a lease surrender premium. On receiving a reply on their question from Mr T's lawyers Embark

re-confirmed that they were happy for the lease to proceed on 10 November 2022.

I think that the actions that Embark took after they had responded to Mr T's lawyers on 17 October 2022 were reasonable. I therefore don't think that Embark were responsible for any further delays after they'd replied to Mr T's lawyers on 17 October 2022. They also asked Mr T's lawyers for an update in November 2022 and were only then told that the term of the new lease was being changed.

Mr T has claimed that his SIPP had missed out on rental income because of the delays caused by Embark. This is because the rent paid by the tenants under the new lease agreement was more than the rent paid under the old lease.

However, Embark have said above that they don't foresee any issues with the lease being backdated to an agreed date of entry, provided this is not before 12 August 2022. They've also said that this would then allow the higher rent under the new lease to be paid as intended.

I think that Embark are saying that by backdating the new lease to the earliest date that they received documentation from Mr T's lawyers (12 August 2022) then Mr T's SIPP won't lose out on any of the higher rental income under the new lease.

I also think that there were other factors that delayed the completion of the lease that Embark were not responsible for. The Terms of Engagement document was not signed and returned by Mr T until 19 August 2022 and when Embark asked for an update on the new lease at the end of November 2022 they were then told that the term of the new lease was being changed.

I therefore don't think that Embark are responsible for any possible loss of income to Mr T's SIPP.

However, I think that Embark were responsible for the delay in responding to Mr T's lawyer's email between 12 August 2022 and 17 October 2022.

I think that Embark should compensate Mr T for the distress and inconvenience that he suffered as a result of this delay. Embark have offered Mr T £50 in compensation for their delay but I think that £150 is more reasonable in this case.

### **Putting things right**

Embark need to pay Mr T £150 in compensation for the distress and inconvenience that he's suffered as a result of their errors. Embark then don't need to take any further action.

### **My final decision**

My final decision is that I am upholding Mr T's complaint against Embark Services Limited and that Embark Services Limited now need to compensate Mr T as detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 12 October 2023.

Ian Barton  
**Ombudsman**