

The complaint

Mr G complained about the quality of service that Embark Services Limited (Embark) provided him in respect of the management of his self-invested personal pension (SIPP). In particular, its failure to issue rental invoices to the tenants of property held within this SIPP caused him a significant financial loss from unpaid income.

He would like Embark to compensate him for the loss he has suffered and to pay appropriate compensation for the distress and inconvenience this has caused him.

What happened

I issued my provisional decision July 2024, the relevant parts of which are reproduced below and forms part of my decision:

Mr G has held the SIPP account with Embark since May 2013. The SIPP contains assets including a commercial property in which he owned 50% share. This property was contained two separate units, which I will refer to as unit A and unit B.

From 2013 until 2019, a third party surveyor retained by Embark issued the rental invoices to the tenants of units A and B. This relationship ended in or around 2020, at which point Embark took over responsibility for issuing invoices to the tenants.

Unit B began a new tenancy began on 6 July 2020, running until 5 July 2025 with a rental of £1,500 due each quarter i.e. £6,000 per annum.

Another tenancy agreement for unit A was subsequently agreed on the same financial terms and with the same end date. Both units were let individually to separate companies, although these companies had the same beneficial owners.

On 7 November 2020, Mr G emailed Embark to ask for confirmation of whether the first rental payment had been made for unit B. He also asked if it had not, what steps Embark was taking to ensure payment would be made as soon as possible.

Mr G contacted Embark again on 12 November 2020 as he had become aware that rental invoices had not been issued to the tenants in unit B and that the tenants did not have details of the account to make payment to.

Mr G continued to chase Embark to send the overdue invoices until February 2021, and again had to chase Embark to issue the next invoice in June 2021.

By February 2023, there were rental arrears of around £9,201 in respect of unit B, with c£4,300 of rent paid from a total of £13,500 due. No rent had been paid since July 2021.

Mr G sought advice from a solicitor who informed him that company occupying unit B had been dissolved in September 2022 with debts of around £4,000. The tenant in unit A also appeared to be in financial difficulty.

Mr G complained to Embark on 9 March 2023 about its delays in issuing the rental invoices in respect of both properties. He complained that had the rental invoices been issued in good time,

there is every chance at least some of the rent would have been paid and [Mr G] would not now be facing such a large shortfall.

Embark issued its response to Mr G on 3 May 2023. It partially upheld his complaint, confirming that it had provided a poor service by issuing rental invoices later than had been agreed and offered Mr G £100 as compensation for the distress and inconvenience he had suffered.

Embark did not, however, agree that it was liable for any loss of the rental income. It said that Mr G had signed an application form when establishing the SIPP which confirmed that he:

understood that a Property Manager for unit A and unit B needed to be appointed to manage the property and ensure that rental payments had been paid and the terms of the lease had been met. The document confirmed that a Property Manager must be nominated by the members and that if no third-party Property Manager was appointed then those responsibilities would wholly be for the members themselves to undertake.

Embark also stated that monthly bank statements were issued to Mr G's nominated address for review, so he had been aware of the situation relating to the loss of rental income.

The tenancy for Unit B was subsequently ended, though with significant rental arrears in place and legal advice suggested Mr G was unlikely to receive this from the tenant given it was a limited company and had been dissolved.

Unhappy with this response, Mr G brought his complaint to our service. Our investigator reviewed the information provided by both parties and formed the view that Mr G's complaint regarding the financial loss he had suffered should not be upheld, and that Embark was not responsible for any loss. They also felt that the compensation for distress and inconvenience of £100 was appropriate in the circumstances.

Mr G was unhappy with this view, and so the complaint has been passed to me to make a final decision.

Mr G responded to my provisional decision. He clarified that he was not asking for full reimbursement of his unpaid income from the tenants, but that he would leave the decision about any amount of compensation for his financial loss for me to decide, which I have. He asked for some more clarification about my recommended compensation in respect of the distress and inconvenience of £200.

Embark responded to accept my provisional decision, so I will issue my final decision now

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 my provisional decision, I stated:

Having done so, I have reached a different conclusion to our investigator and intend to uphold this complaint. Consequently, I think it's appropriate to give both parties an opportunity to consider my findings before I issue my final decision.

I will explain now how I have reached my decision.

Firstly, I think it's important to reflect upon the role of this service. Our role is to impartially review the circumstances of a complaint and make a decision on whether a business has made errors or treated a customer unfairly. Where it has, we expect a business to compensate a customer for any financial loss and distress and inconvenience they have suffered as a result.

It's also important to note in the circumstances of this case that Embark does not dispute that it consistently failed to send invoices to the tenants in both unit A and unit B. It has offered compensation for this failure and the distress and inconvenience it has caused Mr G.

Embark does not, however, believe it is responsible for any loss of income which Mr G has suffered. I have reviewed the terms and conditions of the agreement that Mr G had with Embark, which stated:

The day-to-day management of the property will be the responsibility of the property manager in accordance with the principles of good estate management and will need to consider how to manage the property to ensure the terms and conditions of any leases are met.

A property manager will ensure that any tenant fully meets their responsibilities as detailed in the lease agreement. The property manager's responsibilities will include, but are not limited to:

.....

*Performing due diligence checks on tenants
Invoicing and collection of rent and other income*

.....

Dealing with rent reviews and expiry of leases

We will not act as property manager as this does not form part of the services we provide. We need to be kept up to date at all times on any matters affecting the property including approval of new leases, rent reviews etc. to ensure compliance with current pensions legislation.

From this, it is clear to me that Embark and Mr G had an agreement which related to the management of the property within the SIPP. This view is reinforced by the fact that Mr G negotiated the leases for the units, although I can see in Embark's email to Mr G of 25 February 2021 that it was involved in liaising with the solicitor and obtaining signatures from the tenants for the new lease. I also have to consider that the evidence shows that Embark has managed the issuing of invoices since the inception of the SIPP in 2013, at first using the services of a surveyor and then taking on the responsibility of this directly. The evidence also shows that there was no problem with the issuing of invoices while it was handled by the surveyor, but it was once Embark began handling this itself that the problems arose. This indicates to me that Embark did, in practical terms, act as the property manager, at least in some respects.

I've also considered that the invoices were originally issued by a surveyor, who was presumably paid by Embark to do so. I also assume that these costs were passed to Mr G in the SIPP management fees he paid to Embark. Embark has said that it issued invoices for Mr G out of 'goodwill'.

I can also see that Mr G has stated that he was not aware that the surveyor was no longer involved in the issuing of invoices until November 2020 when he was informed by the surveyor itself. Embark had not made him aware of this change.

If this was a service that Mr G was paying a surveyor indirectly to carry out and it was subsequently taken on by Embark without a reduction in the SIPP fees, I think it's reasonable to find that this was a paid service Embark provided, rather than one made as a goodwill gesture.

I conclude from the above that although the terms of the agreement are clear, in practice the distinction of the roles of Embark and Mr G were less clear cut, with room for ambiguity.

I've also considered the fact that Embark issued monthly statements to Mr G which should have – and most probably did – alert him to the lack of rental income.

I've considered very carefully the view that our investigator arrived at that it is not possible to draw direct causation between the late issuing of invoices and the non-payment of those invoices, as the tenants of both units defaulted on the rental payments owing to their own financial difficulties. I think there is a great deal of merit in that view. I have, however, also considered that if the invoices had been issued in time, whether Mr G would have taken different action to limit the rent arrears from rising to the level they did – and I think it likely he would have.

It's obviously impossible to say precisely what would have happened if the invoices had been issued on time – it's possible that the tenants may not have been in the same straightened financial position at that time and able to make more rental payments than they actually did. It's also possible that if the tenants did not make additional payments but the invoices were issued on time, Mr G would have taken action to reclaim his property from them in a shorter period of time, allowing him to limit the rental arrears by evicting the tenants and potentially re-letting the units to new tenants.

Consequently, on balance, I think it's fair and reasonable in the circumstances that Embark bears some responsibility for the financial loss Mr G incurred, but not the whole amount that Mr G is requesting.

I've thought about what I consider to be fair redress in this circumstance and find that Embark should pay Mr G the equivalent of one quarter's rental income from both units. This should obviously be discounted by 50% to reflect his share of the ownership of the assets, so I find that it's fair and reasonable that Embark pay Mr G the sum of £1,500 compensation toward his financial loss.

I also have to consider whether the payment of £100 Embark offered Mr G is fair and reasonable in the circumstances. When deciding if I believe that a proposed level of compensation is appropriate, I have to consider the guidelines this service have published to ensure consistency and fairness of awards as well as the impact the mistakes have had on Mr G and his wellbeing. In the circumstances of this complaint, I find that the payment of £100 offered by Embark is not fair and reasonable in the circumstances and so Embark should increase this to £200.

Putting things right

To compensate Mr G fairly, Embark Services Limited should pay Mr G £1,500 towards the financial losses he has suffered. This should be paid into his SIPP. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection

or allowance.

If the payment into the SIPP isn't possible or has protection or allowance implications, it should be paid directly to Mr G as a lump sum after making a deduction of 15%. The payment would otherwise have been used to provide pension benefits, 25% of which would be tax free and the rest would have been taxed according to his likely tax paying status in retirement – presumed to be 20%, so the 15% deduction adequately reflects this.

Embark should also pay Mr G £200 for the distress and inconvenience it's error caused him.

In terms of the clarity Mr G asked for concerning my recommended payment of £200 in respect of his distress and inconvenience, I considered the circumstances of his complaint in terms of the guidelines this service has published. I felt that it fell within the category of £300 - £750 , which the guidance suggests for:

An award of over £300 and up to around £750 might be fair where the impact of a mistake has caused considerable distress, upset and worry – and/or significant inconvenience and disruption that needs a lot of extra effort to sort out. Typically, the impact lasts over many weeks or months, but it could also be fair to award in this range if a mistake has a serious short-term impact.

I also considered that this was an issue which affected both Mr G and the other 50% owner of the SIPP, so I felt it appropriate to divide the amount in two to compensate both of them equally.

My final decision

I uphold the complaint.

Embark Services Limited should pay Mr G the amounts calculated as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 20 September 2024.

Bill Catchpole
Ombudsman