DRN-5325591

The complaint

Mr A says he was advised to open to a self-invested personal pension ('SIPP') with Embark Services Limited (formally known as Hornbuckle Mitchell) ('Embark') in order to make a number of investments. Mr A says he went on to make investments through his SIPP, some through trading accounts and others directly, which lost some or all of their value. Mr A's complaint is that Embark did not carry out adequate checks before allowing him to make the investments.

What happened

In 2008 Mr A engaged with his then accountant and financial adviser, Firm A, about investing some money in a tax-efficient way to reduce his tax liabilities as he was a higher-rate taxpayer. In March 2008, Firm A recommended Mr A take out a SIPP with Embark and make a one-off contribution of £50,000 (net) to the SIPP. The recommendation letter noted that Mr A had chosen some investments he wished to make himself and Firm A had not provided any investment advice.

Firm A was a business providing accounting services and financial advice. It was authorised and regulated by the Financial Conduct Authority ('FCA', formerly the Financial Services Authority – 'FSA') from 1 December 2001 until 23 September 2011. It appears that a new company was formed (also Firm A) which provided the same services and has been regulated since 15 March 2011. The FCA register shows that this firm accepted responsibility for the past business of the previous Firm A.

On 31 March 2008, Firm A sent a copy of Mr A's completed SIPP application form to Embark. The application noted that Mr A was a self-employed builder and he wished to make a single personal contribution of £50,000 (net) to the SIPP. Mr A provided the details of a 'Mr C' of Firm A as his financial adviser. The form noted that Firm A was not to receive any remuneration from Mr A's pension fund.

Mr A said that he did not wish to appoint an investment manager and no investment details were provided. Mr A signed the application declaration on 27 March 2008.

Embark wrote to Mr A on 31 March 2008, acknowledging receipt of his application and contribution. It said:

"Initially the monies are to be held in cash but you may wish to invest in other funds in the future and you have confirmed that you are happy to make your own investment choices. The SIPP will be treated as a Single Investment SIPP initially and be charged accordingly. A Fee Schedule is enclosed. Should you make further investments in the future, the charges will be amended at that time, as detailed in the illustration previously supplied to you."

The SIPP was opened on 2 April 2008 and Mr A's contribution of £50,000 (net) was paid into the SIPP on 7 April 2008.

In May 2008, Firm A made some enquiries with Embark via email on Mr A's behalf about acquiring some shares in a particular AIM-listed company. Embark responded, saying that

the shares could be purchased through a stockbroker, and if Mr A wanted to do this, he'd need to open an account with the stockbroker within the SIPP. This would then allow him to purchase the shares. Embark said it was up to Mr A as to which stockbroker he wanted to use, as long as the account could be set up within a SIPP. Firm A passed this on to Mr A via email on 8 May 2008, suggesting that if Mr A had a stockbroker he used he should speak to them directly.

It appears that Mr A decided to use IG Markets, as I can see that IG Markets emailed Mr A later that day on 8 May 2008 thanking Mr A for his telephone call and attaching an application form for him to complete and pass on to Embark. It appears that Mr A returned this, and a Contracts for Difference ('CFD') account was opened for him.

On 22 May 2008, the tax relief that applied to the contribution Mr A made was paid into his SIPP bank account.

On 6 June 2008, just under £14,000 was sent to Mr A's CFD account with IG Markets. Mr A placed some trades, including in respect of the AIM-listed company he'd previously been interested in.

It appears Mr A also applied for a share-dealing account with Selftrade, as an account was opened within the SIPP on 12 June 2008. However, it doesn't appear Mr A went on to make any trades through this account.
On 12 June 2008, Mr A completed an application form for a Blackrock unit trust stocks and shares ISA confirming he wished to invest £10,000. However, this didn't proceed as the amount Mr A wished to invest exceeded the ISA limit.

Mr A went on to make investments in Blackrock funds directly through the SIPP in June 2008, totalling around £25,000.

It appears that in June 2008 Mr A also attempted to open an account with Aberdeen Investment Trusts in order to invest a sum of £10,000, but again, this didn't proceed.

In 2009 IG Markets made a commercial decision to close its CFD SIPP accounts and wrote to Mr A to inform him of this. It said any open positions would be closed and monies returned to his SIPP bank account.

On 11 February 2009, just over £12,000 from Mr A's IG account was credited back to his SIPP bank account.

In February 2009, Mr A invested an additional £24,000 in Blackrock funds.

Mr A approached Firm A in October 2009 as he needed to take a Tax-Free Cash ('TFC') payment from his SIPP in order to help pay a VAT bill. Firm A noted that Mr A would need to disinvest some funds from Blackrock so that he could take the maximum TFC available to him. So, Mr A made a request to disinvest around £4,000 from Blackrock.

Firm A processed Mr A's TFC request in November 2009, after Mr A received funds from his Blackrock investments. Mr A received TFC of around £14,800 in December 2009.

In July 2011, Mr A requested that his Blackrock holdings be disinvested, as he was interested in purchasing a plot of land using his SIPP. Mr A's SIPP bank account statement shows that around £51,400 was received back into the SIPP from Blackrock on 26 July 2011.

Mr A wrote to Embark on 4 August 2011, enclosing a valuation of his company's premises. He said he'd enclosed a pension cheque for £55,000 to purchase a 20% stake in the property for his pension. Mr A said although no loans had been taken against the property, he intended to take a loan to purchase an adjoining property.

Mr A completed a property purchase application on 9 August 2011. The form noted that Mr A owned the property but he wished to sell a 20% share in the property to his SIPP as he was looking to raise funds to expand his business.

In July 2012, Mr A received confirmation that the plot of land his SIPP had purchased had settled and Mr A received a cheque for around £51,000 after the deduction of the solicitor's fees.

Embark contacted Mr A in December 2014 regarding fees following his contact. Embark set out the fees applicable to Mr A's SIPP account, which mostly related to the ongoing administration of his property investment. Embark added that the SIPP hadn't received any rent due since the SIPP purchased the property, which amounted to £400 per month. It asked for the rent to be brought up to date as if not, Embark would have to report the missing rent to HMRC which would mean penalties on both the scheme and Mr A personally.

In October 2015 Mr A emailed Embark as he'd received an email reminding him that he owed SIPP fees of around £2,400. Mr A called the fees 'outrageous', saying he hadn't signed up for all of the extra charges – he said the £600 yearly administration fee ought to be enough to cover the operation of his 'dormant' pension account. Mr A said he was prepared to pay £600 per year but no more and hoped that the issue could be resolved amicably.

Embark wrote to Mr A again in November 2015, saying that he now owed over £3,000. This included fees associated with his property purchase in 2012. It wrote to Mr A again in June 2016 saying that he now owed fees of over £4,000 in connection with his SIPP.

In May 2017 Embark contacted Mr A about several issues relating to his property investment, including that it couldn't see evidence of a lease having been completed and registered and that no rent had been received into the SIPP despite the draft lease providing for rent of £4,800 per year. It also reminded Mr A that fees were outstanding.

Mr A responded, saying:

"This scheme is not at all what I thought it was going to be and I want to get out of it as soon as possible please."

Embark responded, urging Mr A to seek professional advice with regard to his options, which included transferring his scheme assets to another pension provider. However, if he wanted to stay with Embark he'd need to carry out the steps it had highlighted to 'regularise' the property asset, or he could dispose of it.

Embark sent Mr A a 'final letter before legal action' on 12 June 2017 regarding outstanding fees, which had reduced to around £1,500 following some payments received from Mr A.

Mr A maintained that he wanted out of the arrangement but Embark informed him he needed to settle the outstanding fees. Mr A said he'd been misled and mis-sold the SIPP. He said the solution to the problem was simply to reduce the 'eye-watering' fees.

It appears that Embark subsequently started court action to recover the outstanding fees. M A says that this was served on him in 2018. However, the evidence I've seen shows that Embark served its claim form on Mr A in January 2020 for unpaid invoices of £4,146.49 plus interest and costs.

On 12 March 2021, a claims management company ('CMC') made a complaint to Embark about its failure to carry out due diligence on the investments Mr A made in his SIPP. The CMC acknowledged that Mr A didn't receive any advice from Embark, but it said a SIPP provider can't turn a blind eye to unsuitable investments present in its portfolios, which would be unsuitable and inappropriate for a retail client. Mr A also complained that he'd had numerous problems with the SIPP – he didn't hear from Embark for over two years and he only started to hear from Embark when it began to chase him for fees that continued to increase. Mr A said he'd been led to believe the fees would be only £600 per year but more continued to be added. Mr A also said that Embark didn't assist him as it should have with a property investment he'd made in 2012.

Embark provided a final response in April 2021. It said Mr A had made his complaint too late under the Regulator's Dispute Resolution ('DISP') rules. It said it was more than six years since Mr A had opened the SIPP and made the investments, and more than three years since he ought to have known there was a problem with them. It said Mr A told Embark in 2017 that he had been misled and mis-sold the SIPP, so he was aware of the issues he'd complained about then. Overall, Embark considered the complaint was time-barred.

Embark added that it was only the administrator of his SIPP and didn't provide any advice about the suitability of the SIPP or the investment. Mr A had received advice from Firm A, so it was responsible for ensuring the SIPP and investments were suitable for him. However, it was satisfied that the investments Mr A made were suitable to be held in a SIPP and that they would not attract a tax charge.

In respect of Mr A's land investment, Embark said given Mr A's status as a connected party tenant to the UK commercial property, it would've expected that he was aware of the inherent risks of his chosen investment and how to fulfil his connected party tenant requirements in this capacity. It said this should have been explained to Mr A by his Financial Adviser prior to instructing Embark to proceed with the investment.

Mr A subsequently referred his complaint to the Financial Ombudsman Service.

Mr A also made complaints about Firm A and IG Markets about their respective roles in the transactions Mr A complains of here. These complaints were considered separately by the Financial Ombudsman Service and in each case, the Investigator found that Mr A had made his complaint too late under the DISP rules.

The Investigator asked Embark for more information about the checks it undertook on the investments Mr A had made. However, Embark doesn't appear to have responded.

After reviewing all the evidence, the Investigator thought Mr A's complaint had been made in time. Although he noted Mr A had concerns about his investments several years before he complained, he said Mr A wouldn't have had any reason to consider Embark was responsible for the position he was in. However, the Investigator didn't uphold the complaint. He said that it was reasonable for Embark to rely on IG Markets having undertaken an appropriateness test for Mr A's investment in CFDs. And he noted that the Blackrock investments were standard, so no additional due diligence was required. With regard to Mr A's investment in his business premises, it said Mr A was in the best position to determine whether the investment was in his best interests. The Investigator also thought that Embark had kept Mr A informed about changes to fees.

Mr A's representative said Mr A didn't agree and asked for an Ombudsman's decision. Mr A said he didn't hear from Embark for two years after the SIPP was established and when he did finally hear back it advised that it was tripling his fees and wanted to backdate them. Mr A also added that Embark increased his fees further when he decided to insure his land with another company.

As no agreement could be reached, the complaint was passed to me to make a decision.

A second case was set up as Mr A had complained about two distinct events at different times. This complaint concerns the due diligence checks Embark performed on the investments Mr A made in 2008 and 2009. The other issues Mr A has complained about have been considered separately.

I issued a provisional decision on 19 February 2025. I explained that I could consider Mr A's complaint about the due diligence checks performed on the investments Mr A went on to make in his SIPP between 2008 and 2009. However, I didn't uphold the complaint. I said I thought Embark needed to carry out further checks in accordance with the Regulator's rules, Principles and good industry practice before accepting the SIPP application and the investments into Mr A's SIPP. But even if Embark had carried out further independent checks, I hadn't found anything at the time that ought to have led Embark to refuse to permit the investments to be made within the SIPP.

Embark didn't respond to my provisional decision. Mr A responded, saying that he didn't agree but he didn't provide any further comments.

What I've decided – and why

Jurisdiction

Neither party has disputed the findings I made in respect of our jurisdiction to consider the complaint. But for completeness, I've set out my decision on this point again.

The rules I must follow in determining whether we can consider this complaint are set out in the Dispute Resolution ('DISP') rules, published as part of the FCA's Handbook.

Embark says that Mr A hasn't made his complaint in time. The section of the rules that Embark refers to here mean that, unless Embark consents, we can't look into this complaint if it's been brought:

- more than six years after the event complained of;
- or, if later, more than three years after Mr A was aware – or ought reasonably to have become aware – he had cause for complaint;
    - unless the complaint was brought within the time limits, and there's a written acknowledgement or some other record of it having been received; or
    - unless, in the view of the Ombudsman, the failure to comply with the time limits was as a result of exceptional circumstances.

Mr A's representative referred this complaint to Embark on 12 March 2021. The complaint I'm considering here is that Embark had failed to carry out appropriate due diligence checks on the investments Mr A went on to make between 2008 and 2009. In effect, Mr A says that Embark should not have allowed him to make these investments as they weren't suitable for him as a retail client. The investments were made between June 2008 and February 2009,

which was more than six years before Mr A referred his complaint to Embark in March 2021. Therefore, Mr A's complaint has been brought too late under the six-year part of the rule.

So, I have to consider when Mr A became aware, or ought reasonably to have become aware of his cause for complaint. And having established that date, whether Mr A complained to Embark within three years of it. This means if Mr A ought reasonably to have been aware of his cause for complaint before March 2018, he made his complaint to Embark too late under the Regulator's rules.

The term 'complaint 'is defined for the purposes of DISP in the FCA handbook as:

"any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a person about the provision of, or failure to provide, a financial service…which:

a) *Alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience; and*
b) *Relates to an activity of that respondent, or any other respondent with whom that respondent has some connection in marketing or providing financial services or products …which comes under the jurisdiction of the Financial Ombudsman Service."*

And *respondent* means a regulated firm covered by the jurisdiction of the Financial Ombudsman Service.

The material points required for Mr A to have awareness of a cause for complaint include:

- awareness of a problem;
- awareness that the problem had or may cause him material loss; and
- awareness that the problem was or may have been caused by an act or omission of Embark (the respondent in this complaint).

It's therefore my view that it's necessary for Mr A to have had an awareness (within the meaning of the rule) that related to Embark, not just awareness of a problem that had caused a loss. Knowledge of a loss alone is not enough. It can't be assumed that upon obtaining knowledge of a loss a consumer had knowledge of its cause. And I don't accept that the three-year time limit necessarily means knowledge of a loss means the consumer has three years to make enquiries to discover all parties who might be responsible, failing which they run out of time to make a complaint.

Embark says that Mr A was aware of the issues with his SIPP more than three years before he complained. It points to an email it received from Mr A on 27 September 2017, where he said that he believed he'd been misled and mis-sold the SIPP. Although Mr A wasn't complaining about any loss to his investments at this time, on the whole, he didn't think the arrangement was right for him. However, I'm not satisfied that Mr A would have, or ought to have, been aware that Embark could have any responsibility for the position he was in.

There's nothing I've seen that was sent to Mr A more than three years before his complaint was referred to Embark that would have caused Mr A, or a reasonable retail investor in his position, to link Embark to the problems he was having with his pension. I think it's worth highlighting that Mr A wasn't advised by Embark about setting up the SIPP or the suitability of investments. And I think the obvious first thought when problems arose would have been that Firm A, the business that recommended the SIPP to him and arranged the investments, was most likely responsible for the problems he was having.

I'm not aware of anything Embark said or did at the outset of its relationship with Mr A that would have caused him to think it might be responsible if a problem with his pension

investments occurred. Nor am I aware of anything Embark said or did that ought to have caused Mr A to think it was responsible once Mr A became aware of a problem.

I don't think Mr A would need to have understood the details of Embark's obligations to have been aware (or be in a position whereby he ought reasonably to have been aware) of his cause for complaint. But I think Mr A would have needed to have actual or constructive awareness that an act or omission by Embark may have had a causative role in the problem causing him loss or damage. And I don't think Mr A, or a reasonable investor in his position, ought reasonably to have attributed his problem to acts or omissions by Embark more than three years before he complained to Embark.

I've thought about whether there was anything else that ought to have prompted Mr A, or a reasonable investor in his position, to have attributed his problem to acts or omissions by Embark more than three years before he complained to it.

When the unsuccessful judicial review challenge in R (Berkeley Burke SIPP Administration Ltd) v Financial Ombudsman Service [2018] EWHC 2878) ('BBSAL') was published on 30 October 2018, there was publicity and commentary surrounding it. And it could be seen from this that much of the industry's position that SIPP provider's obligations were very limited was not correct. It could also be seen that the Regulator's view, and the Financial Ombudsman Service's view, were different, and that an Ombudsman had decided that a SIPP operator was responsible for the losses a consumer suffered in some circumstances and the court had rejected the SIPP operator's challenge to that decision.

Mr A remained unhappy with the SIPP arrangement – he wanted to get out of it. So, after allowing time to notice the change in the landscape following the *BBSAL* judgment and work out the implications for him (either through his own research or by appointing an expert) I think Mr A ought reasonably to have been aware of his cause for complaint about Embark's due diligence obligations by the start of 2019. And this would've given him until the start of 2022 to complain to Embark about its role in the transactions he's complained about here.

It's evident that Mr A appointed a representative to help him with a complaint and the representative made a complaint on his behalf to Embark in March 2021. So, I think the complaint was made within three years of Mr A becoming aware, or at the point he ought reasonably to have been aware, he had cause for complaint about Embark. As such, I think he made his complaint in time and is one I can consider.

Merits of the complaint

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Mr A didn't agree with my provisional decision, but he made no comments in response. As such, I see no reason to depart from my provisional findings so I've largely repeated them below.

Relevant considerations

I'm required to determine this complaint by reference to what I consider to be fair and reasonable in all the circumstances of the case. When considering what is fair and reasonable in the circumstances, I need to take account of relevant 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.

I have taken into account a number of considerations including, but not limited to:

- The Financial Services and Markets Act 2000 ("FSMA").
- Court decisions relating to SIPP operators, in particular Options UK Personal Pensions LLP v Financial Ombudsman Service Limited [2024] EWCA Civ 541 (*"Options"*) and the case law referred to in it, including:
    - Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 474 ("*Adams"*)
    - R (Berkeley Burke SIPP Administration) v Financial Ombudsman Service EWHC 2878 (*"BBSAL"*)
    - Adams v Options SIPP UK LLP [2020] EWHC 1229 (Ch) (*"Adams – High Court"*)
- The Financial Conduct Authority ("FCA") (previously Financial Services Authority) ("FSA") rules including the following:
    - PRIN Principles for Business
    - COBS Conduct of Business Sourcebook
    - DISP Dispute Resolution Complaints
- Various regulatory publications relating to SIPP operators and good industry practice.

The legal background:

As highlighted in the High Court decision in *Adams,* the factual context is the starting point for considering the obligations the parties were under. And in this case it is not disputed that the contractual relationship between Embark and Mr A is a non-advisory relationship.

Setting up and operating a SIPP is an activity that is regulated under FSMA. And pensions are subject to HMRC rules. Embark was therefore subject to various obligations when offering and providing the service it agreed to provide – which in this case was a non-advisory service.

I have considered the obligations on Embark within the context of the non-advisory relationship agreed between the parties.

The case law

I'm required to determine this complaint by reference to what is in my opinion fair and reasonable in all the circumstances. I am not required to determine the complaint in the same way as a court. A court considers a claim as defined in the formal pleadings and they will be based on legal causes of action. The Financial Ombudsman Service was set up with a wider scope which means complaints might be upheld, and compensation awarded, in circumstances where a court would not do the same.

The approach taken by the Financial Ombudsman Service in two similar (but not identical) complaints was challenged in judicial review proceedings in the *BBSAL* and the *Options* cases. In both cases the approach taken by the Ombudsman concerned was endorsed by the court. A number of different arguments have therefore been considered by the courts and may now reasonably be regarded as resolved. As such, I don't think it is necessary for me to quote extensively from the various court decisions.

The Principles for Businesses

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"* (see PRIN 1.1.2G). The Principles apply even when the regulated firm provides its services on a non-advisory basis, in a way appropriate to that relationship.

Principles 2, 3 and 6 are of particular relevance here. They 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 am satisfied that I am required to take the Principles into account (see *BBSAL*) even though a breach of the Principles does not give rise to a claim for damages at law (see *Options*).

The regulatory publications and good industry practice

The Regulator issued a number of publications which reminded 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 Report included:

"We are concerned by a relatively widespread misunderstanding among SIPP operators that they bear little or no responsibility for the quality of the SIPP business that they administer, because advice is the responsibility of other parties, for example Independent Financial Advisers…

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."

I have considered all of the above publications in their entirety but it isn't necessary for me to quote more fully from the publications here.

The 2009 and 2012 Thematic Review Reports and the *"Dear CEO"* letter aren't formal guidance (whereas the 2013 Finalised Guidance is). However, all of the publications 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 is 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 (as did the Ombudsman whose decision was upheld by the court in *BBSAL*).

Points to note about the SIPP publications include:

- The Principles on which the comments made in the publications are based have existed throughout the period covered by this complaint. So, even though some of the publications post-date the events that took place in relation to Mr A's complaint, that doesn't mean that the examples of good practice they provide weren't good practice at the time of the relevant events.
- The comments made in the publications apply to SIPP operators that provide a non-advisory service.
- Neither court in the *Adams* cases considered the publications in the context of deciding what was fair and reasonable in all the circumstances. As already mentioned, the court has a different approach and was deciding different issues.
- What should be done by the SIPP operator to meet the regulatory obligations on it will always depend upon the circumstances.

Overall, in determining this complaint I need to consider whether Embark complied with its regulatory obligations as set out by the Principles to act with due skill, care and diligence, to take reasonable care to organise its business affairs responsibly and effectively, to pay due regards to the interests of its customers (in this case Mr A), 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 have done to comply with its regulatory obligations and duties.

Due diligence checks on the introducer

Embark received Mr A's SIPP application from Firm A. On receipt, Embark checked that Firm A was regulated and authorised to provide advice on pensions and investments. I think Embark could take a degree of comfort from Firm A's regulated status and that Mr A had received advice on opening the SIPP.

Mr A was opening a SIPP in order to make a personal contribution. Mr A's SIPP application form included Firm A's details and noted that he didn't want to appoint an investment manager. No details were given about the investment Mr A wished to make. However, Embark made it clear to Mr A in the SIPP application form that Embark would not provide investment advice. And it said Mr A could nominate a financial adviser or investment manager to direct the manner in which his funds would be invested. So, I think Mr A would've understood he could appoint an investment manager, or take advice, in respect of the investments he would go on to make but that Embark wouldn't provide him with any advice.

Having considered this, I don't think Embark had any grounds to refuse the SIPP application form or the contribution Mr A wanted to make to the SIPP. Mr A wasn't looking to transfer any existing pensions to the SIPP and Embark wasn't provided with any details of the investments Mr A was intending to make. As such, I don't think Mr A's SIPP application presented with any concerning features or anomalies such that further independent checks were required before the SIPP was opened.

I haven't seen any evidence to persuade me that Embark ought to have refused to accept Mr A's SIPP application. And I'm presently minded to conclude it was reasonable for Embark to open the SIPP for Mr A and accept his personal contribution into it.

But Embark also needed to carry out appropriate due diligence checks on the investments to be held in its SIPPs. So, I've thought about the due diligence checks that Embark ought to have carried out on the investments before it should've accepted them. And whether the information it ought to have gathered should have led it, if acting in line with the Principles and guidance, to decline to accept the investments into the SIPP.

Due diligence checks on the investments

According to Firm A's suitability report, Mr A intended to select his own investments, so Firm A's advice was restricted to the choice of SIPP to which Mr A would make his contribution.

While Embark may have believed that Firm A would also be providing Mr A with advice on his investments, SIPP operators were and are permitted to accept business directly from retail customers such as Mr A (not just sophisticated or experienced investors) without the involvement of a regulated advice firm. So, even if Embark had understood that Firm A was not advising Mr A on the investments he would go on to make, that doesn't mean that it should have refused to permit the investments Mr A selected to be made within the SIPP.

Nevertheless, as the Regulator has made plain, SIPP operators have a responsibility for the quality of the SIPP business that they administer. So, SIPP operators should undertake appropriate independent enquiries about the nature or quality of an investment proposed before determining whether to accept or decline it into its SIPP, which would mean making independent checks into the investment. That's even the case where the investments are being facilitated by a third-party platform, such as the investments Mr A made through IG Markets here, where those parties also have obligations to consumers.

Mr A says that he was advised to open the CFD account, and this wasn't appropriate for him, but I don't think the evidence I've seen supports this. Based on an email sent by Firm A to Embark in May 2008, it's evident that Mr A was interested in investing in some specific shares in an AIM-listed company. Embark told Firm A that Mr A could make this investment using a Stockbroking account within the SIPP. Firm A passed this information on to Mr A, so that he could make his own decision about which Stockbroker to use. Mr A then contacted IG Markets directly himself. IG Markets provided Mr A with an application form, and Mr A subsequently chose to open a CFD account.

Although investing in CFDs would generally be considered to be high-risk strategy for pension investments and not suitable for most retail clients, Embark wasn't required to carry out a suitability assessment here. And Embark made it clear to Mr A that it couldn't provide him with advice on the suitability of any investments he wished to make, but that he could take advice from a regulated adviser or appoint an investment manager.

Although higher-risk investments, CFDs are permitted to be held in SIPPs, and Mr A was using a reputable regulated Stockbroker in IG Markets. Mr A was also driving the investment choices himself – there was no indication that an unregulated firm was involved or influencing Mr A's decisions. Furthermore, it appears Mr A sent just under £14,000 to his CFD account, representing around 22% of his total pension funds, for investment. So, he wasn't investing a substantial part of his pension in higher-risk investments, such that Embark ought to have considered it anomalous. The options Mr A purchased were also in publicly traded companies.

Overall, I haven't seen any evidence to persuade me that Embark ought to have declined to accept Mr A's application to invest in CFDs or refuse to permit the investments he went on to make.

Around the same time the account was opened with IG Markets, Mr A decided to invest £25,000 in Blackrock funds. Again, this was a direct investment made by Mr A without any involvement of Firm A. For similar reasons, I don't think Embark had any reason to refuse those investments. That's particularly the case given they were standard regulated investment funds and Mr A had spread his investments between four different funds, such that his investments were relatively diverse.

Following Mr A's CFD account being closed, Mr A then went on to make further investments in two additional Blackrock funds and a further investment in a fund he'd already invested in, bringing the total amount of funds invested in Blackrock funds to £49,000. Again, I don't think Embark had any reason to refuse those investments for the reasons already given.

Summary

Overall, I'm satisfied that Embark carried out some due diligence checks before accepting Mr A's applications. And I think Embark could take comfort from the fact that a regulated adviser and stockbroker were involved and that the majority of investments Mr A went on to make were standard regulated funds.

I think Embark needed to carry out further checks in accordance with the Regulator's rules, Principles and good industry practice before accepting the SIPP application and the investments in the SIPP. But even if Embark had carried out further independent checks, I haven't found anything at the time that ought to have led Embark to refuse the investments to be made within its SIPP.

So, I'm not upholding Mr A's complaint. I appreciate this will be very disappointing for him to hear.

My final decision

For the reasons set out above, I'm not upholding Mr A's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 10 April 2025.

Hannah Wise
Ombudsman