DRN-5501528

The complaint

Mrs G, as beneficiary of the late Mr C's Self-Invested Personal Pension ('SIPP'), complains that Embark Services Limited didn't undertake sufficient due diligence on an investment that the late Mr C made within his SIPP or the business that introduced him to Embark.

Mrs G says Embark should have refused to permit the investment in Mr C's SIPP, which has caused a substantial loss to the pension.

What happened

Mrs G explains that in early 2007, Mr S, the owner of a property business I'll refer to as 'RGP', introduced Mr C to the idea of investing in an overseas property development. Mrs G said that Mr S was known to Mr C through work and Mr C considered Mr S to be a good friend whom he trusted. Mr C had an existing SIPP at this time.

RGP was not regulated by the Financial Services Authority ('FSA' – later the Financial Conduct Authority 'FCA').

Mr S sent Mr C an email from his RGP address on 22 March 2007, providing Mr C with internet links to information about the estate Mr C was investing in. Mr S said he would help with the SIPP paperwork if Mr C wanted him to.

Mr C applied for a new SIPP with a business (which is now administered by Embark) on 23 March 2007. Mr C stated in the application form that he didn't have a financial adviser and that he didn't want to appoint an investment manager. Mr C indicated that he wanted to transfer around £300,000 into the Embark SIPP from his existing SIPP.

Just over £302,000 was received into the SIPP in April 2007 and Mr C subsequently invested in an overseas property investment in the Bahamas in May 2007. Mr C's SIPP purchased two plots of land for a combined purchase price of $322,626 (just under £176,000).

Mrs G explains that Mr C's understanding of the investment was that he'd purchased two adjacent parcels of land in the Stella Maris estate together with a right to purchase additional marina frontage property at a discount (subject to certain conditions). Mr C was led to believe that the development was going to go ahead very soon with the initial development of the marina, which would then enhance the value of the properties held by the SIPP, such that one or both could be sold to recoup the initial investment and the profit could be taken by the SIPP.

Mr C withdrew a tax-free cash amount of £74,311.46 from the SIPP on 26 September 2007.

Mr C sadly passed away in April 2013.

On 7 September 2013, Mrs G wrote to Embark to enquire about the options available with regard to the properties held within the SIPP and whether they could be sold. Mrs G said:

"I understand that development of the Stella Maris resort has stalled following the global recession and although Port St George Investments Ltd and their advisers may be taking a positive view on the value, I suspect that the real open market value may be little or nothing. In other words I am not sure that there is any market at all for these properties in the current climate…"

Mrs G obtained a grant of probate naming her as Executor of the late Mr C's estate on 19 November 2013.

In April 2015, Embark informed Mrs G that it had established she was the sole beneficiary of the late Mr C's SIPP. It explained it had been reviewing the investment in the Bahamas to ascertain how it could be disposed of, but there was no market for it. As such, it said the only option available to it was to re-register the property to Mrs G personally. It said before doing so it would need to obtain an open market valuation, but it hadn't yet been able to engage a surveyor. Embark added that tax was due to be paid for the land. Embark explained the costs involved in re-registering the property to Mrs G. In the meantime, it said it would open a beneficiary pension for Mrs G in order to comply with the two-year deadline for paying out the SIPP death benefits so as to avoid HMRC's 45% tax charge. The beneficiary SIPP was established on 23 April 2015.

As I understand it, in January 2016, Mr S was arrested for fraud in relation to other matters connected with a different SIPP investment arrangement operated by a company owned or controlled by Mr S.

Mr S's fraud trial started in September 2016 and in October 2016 the jury failed to reach a verdict and a retrial was ordered. Mr S was convicted of fraud at that retrial in July 2017. He was sentenced to six years imprisonment and disqualified from acting as a company director for eight years.

On 14 March 2019, Mrs G made a complaint to Embark. She said she didn't believe that Embark had undertaken sufficient due diligence on the underlying assets that were placed into the SIPP or those appointed to provide the professional services to undertake the transaction. Mrs G added that the investment was being promoted by an unregulated advisor, Mr S, who was subsequently sentenced for fraud involving pension monies. Mrs G said she didn't think that this kind of speculative development land in a remote Bahamian Island was appropriate for a pension scheme and that Embark should have refused to execute the instruction.

Mrs G added that the assets had still not been transferred to the beneficiary SIPP set up for her following Mr C's death and nothing could be done about the investments until the assets were moved to her own SIPP. She said the costs of running both SIPPs were high and she would encounter other significant fees to be able to re-register and dispose of the investments. Mrs G sought certainty so she could plan her own retirement.

Embark issued a final response letter on 2 April 2019, in which it told Mrs G that she had made her complaint too late. It said the investments were made more than six years ago and she'd complained more than three years after she became aware of the problems with the investments. Embark referred to Mrs G's letter of 7 September 2013 where she said she understood the investments may have little or no value.

Mrs G responded, asking Embark to reconsider. She said whilst she had concerns about the value of the investments in 2013, her questions were posed in the context of the distribution of the late Mr C's estate. She said she didn't have any concerns about the suitability of the investment for a pension until she appointed a new financial adviser, who made her aware of the unsuccessful judicial review challenge in *R (Berkeley Burke SIPP Administration Ltd) v*

Financial Ombudsman Service [2018] EWHC 2878) ('BBSAL'), which was published on 30 October 2018. Mrs G said the ruling was a material change and was the first time she became aware that she could challenge Embark's acceptance of the investment in the SIPP.

Embark maintained the complaint was time-barred. It added that Mr C's SIPP application noted he was an actuary and the FCA register confirmed he was a suitably qualified Registered Individual. Embark thought it was reasonable to expect that Mr C had full knowledge of the investment and associated risks. Embark confirmed that the investments had since been re-registered to her beneficiary SIPP.

Mrs G referred the complaint to the Financial Ombudsman Service in September 2019. Mrs G told us that Mr C hadn't previously been interested in making this particular investment before Mr S introduced the idea to him. She explains that Mr C knew there were risks but he was led to believe that the chances of making a profit were much greater.

In November 2019, Embark wrote to Mrs G to explain that it had arranged for a valuation of her property investments. It informed her that the two plots of land that her SIPP was invested in were each valued at $7,500. Embark acknowledged that Mrs G was likely to be disappointed with the valuation and suggested she speak with her financial adviser. It added that a yearly tax of 1% was due which hadn't been paid.

In April 2021 the Court of Appeal rejected Mr S's appeal against conviction and sentence.

In addition to its belief that the complaint had been made too late, Embark told us it received Mr C's SIPP application on 23 March 2007, which was before SIPP regulation. As such, it did not consider the complaint could be investigated by the Financial Ombudsman Service as it did not relate to a regulated activity.

Our Investigator told Mrs G that she had made two complaints here; the first about the due diligence checks Embark had completed when Mr C applied for the SIPP and investments, and the second about the difficulties Mrs G had faced with her beneficiary SIPP and re-registering the property investments. The second complaint was referred to Embark in the first instance and Embark provided a final response letter on 13 March 2023.

Our Investigator considered whether Mrs G had referred her complaint about Embark's due diligence checks within the time limits set out in the FCA's Dispute Resolution ('DISP') rules. The Investigator concluded that the complaint had been made in time. He didn't think the late Mr C, or Mrs G would have been aware that any problems with the investments could be attributed to any act or omission of Embark. The Investigator acknowledged that Mrs G said she understood this to be the case after she appointed a new financial adviser in 2018. As Mrs G had complained within three years of this date, he thought she'd complained in time.

The Investigator did not address Embark's concerns about the complaint being made about matters that were not regulated activities at the time.

Embark didn't respond to the Investigator's view, so the complaint was passed to me to determine whether or not we have jurisdiction to consider the merits of it.

I issued a provisional decision on 30 January 2025 in which I determined that Mrs G was eligible to complain about Embark's due diligence checks in her own right as beneficiary of the late Mr C's SIPP. That said, I didn't think I could consider a complaint about the SIPP being established as Mr C had applied for the SIPP and it was opened before the administration of SIPPs became a regulated activity on 6 April 2007. However, I was satisfied I could consider the complaint about the due diligence checks Embark performed

on the investment before accepting it into Mr C's SIPP as the investment wasn't made until May 2007.

Both Mrs G and Embark accepted this, so I went on to consider the merits of the complaint about the due diligence checks Embark performed before accepting Mr C's investment in the Stella Maris estate into his SIPP. I issued a provisional decision on 9 April 2025, explaining that I wasn't minded to uphold the complaint. Whilst I noted that Embark hadn't been able to locate its due diligence file for the investment, I hadn't seen sufficient evidence to persuade me that the investment was inappropriate for the SIPP.

Mrs G disagreed; she said that given pension providers understand the importance of retaining information, the absence of a due diligence file suggested that no due diligence was actually carried out. Mrs G added that proper due diligence would've revealed that the value of the investment was dependent on the proposed marina and hotel complex being developed. And this would've shown the investment was very high risk and speculative, meaning it wasn't safe or secure. It was therefore not suitable for a SIPP, regardless of Mr C's professional background. Furthermore, the fact that Mr C was only a year away from being able to take his pension meant it wasn't an appropriate investment for his 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.

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 FCA (previously the 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 C 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 all of the publications post-date the events that took place in relation to Mr C'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 C), 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.

Mr C's relationship with Embark and other connected parties

Embark provided the SIPP to Mr C on an execution-only basis. As Embark didn't provide any advice here, it didn't have an obligation to consider the suitability of the investment for Mr C. Nevertheless, I think Embark was required (in its role as an execution only SIPP provider) to consider whether the investment he went on to make was acceptable to make within its SIPP. And overall, I think Embark's duty as a SIPP operator was to treat Mr C fairly and to act in his best interests.

What did Embark's obligations mean in practice?

In this case, the business Embark was conducting was its operation of SIPPs. While Embark was not responsible for considering the suitability of the investment for its clients, it was still responsible for the quality of the SIPP business it administered. And for the reasons set out above in the "relevant considerations", it is my view that in order for Embark to meet its regulatory obligations (under the Principles and COBS 2.1.1R) when conducting its operation of SIPPs business, it should have undertaken sufficient due diligence checks to consider whether to accept/reject introductions from a particular business and accept/reject applications for particular investments, with its regulatory obligations in mind.

The Regulators' reports and guidance provided some examples of good practice observed by the FSA and FCA during its work with SIPP operators. This included being satisfied that a particular introducer is appropriate to deal with and that a particular investment is appropriate to accept. That involves conducting checks – due diligence – on introducers and investments to make informed decisions about accepting business. Its obligations and duties in this respect weren't prescriptive and depended on the nature of the circumstances, information and events on an ongoing basis.

As I set out in my earlier decision, I can't consider a complaint about the due diligence checks Embark performed when it received Mr C's SIPP application form and his request to transfer his existing SIPP to a SIPP with Embark. That's because this took place before the administration of SIPPs became a regulated activity. But I can consider the due diligence checks Embark performed before it accepted Mr C's instruction to invest in Stella Maris.

Due diligence checks on the introducer

Embark says Mr C approached it directly having already decided to invest in Stella Maris, so there wasn't an introducer here. However, Mrs G says that Mr S of RPG promoted and introduced the investment to Mr C.

I've reviewed the evidence provided carefully. While I think it's likely that Mr C was introduced to the idea of investing in Stella Maris via the Embark SIPP by Mr S, I don't think that is something Embark knew at the time.

Based on the evidence I've seen, Mr C submitted his SIPP application form and arranged the investment with Embark directly. And I haven't seen any evidence to demonstrate that Embark was in contact with Mr S or any other employee of RPG when the investment was arranged. So, I don't think it could've been aware of Mr S's involvement in introducing the investment to Mr C.

Furthermore, in his SIPP application form, Mr C stated that he didn't have a financial adviser. So, overall, I think it was fair for Embark to treat this as a direct application from Mr C to invest in Stella Maris.

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 Stella Maris before it should've accepted it. 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 investment

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.

The FCA has made it clear that the due diligence checks required on SIPP investments will vary depending on the nature of the intended investments. But I think Embark ought to have carried out checks, in line with good industry practice for a SIPP operator at that time, which would've included being satisfied in respect of the following points:

- the nature and legal structure of the investment;
- that the investment was a genuine asset and was not part of a fraud or a scam or pensions liberation;
- that the investment was safe/secure;
- that the investment could be independently valued and that it wasn't impaired.

Unfortunately, due to the passage of time and the fact that Embark did not originally administer Mr C's SIPP, Embark says it cannot locate its due diligence file for the Stella Maris investment.

Mrs G says this suggests that no due diligence checks were performed on the investment given that pension providers understand the importance of keeping such information.

I've considered this carefully, but I don't think the absence of the file is indicative that no checks were carried out by Embark on Stella Maris. SIPP providers must ensure that they do not accept investments that are classed as taxable property into SIPPs as it can result in tax penalties for SIPP providers and members. So, I think it would've likely carried out some checks into the nature and structure of the investment to ensure compliance with these rules. And given that this all took place almost 20 years ago and the SIPP is being administered by a different business, I think the most likely explanation is that the file has been lost.

Having reconsidered the specific circumstances of this case and taken account of Mrs G's comments, I still don't think it was unreasonable for Embark to accept Mr C's investment in Stella Maris into his SIPP. I appreciate this will be disappointing for Mrs G.

I say this because despite the absence of evidence, the investment in the Stella Maris estate appears to have been a genuine investment in land and Mr C's SIPP obtained the appropriate title. I appreciate that Mr S has since been convicted of fraud and that Mrs G would understandably have concerns that there was fraud involved in Mr C's investment. However, I haven't seen any evidence to persuade me that Mr C's investment in the Stella Maris estate was fraudulent. The land exists and was valued in 2019.

I haven't seen evidence that an independent valuation was carried out on the investment, but I think it's likely an independent valuation could've been obtained given that Mr C had made a direct investment in land. I appreciate Mrs G's point that the value of the investment was dependent on the proposed development going ahead, but ultimately I think that was part of the risk profile of the investment. If the development went ahead Mr C could stand to achieve a return on his investment, but if the development was delayed or didn't go ahead then he could experience a loss.

I recognise that the investment was high-risk and was illiquid, and that it wouldn't be suitable for most retail customers in high proportions. But a SIPP provider isn't required to consider whether the investments are suitable for their customers. And just because an investment is high-risk, that doesn't mean it's an inappropriate investment for a SIPP, even if the customer is approaching an age where he could start to take benefits. In my view, that would form part of a suitability assessment, which Embark wasn't required to undertake for Mr C.

I'm also still of the view that Mr C's investment experience and knowledge, given his past role as an investment adviser for a regulated firm, is relevant here. Although Mr C was working as an actuary at the time he made the investment, I think his previous role is significant, and I note that he took up a regulated advisory role again in 2008. So, I think this would've provided Embark with a degree of comfort and it would've reasonably considered that Mr C was capable of evaluating the suitability of the investment for himself and that he understood the risks involved.

It's evident, given the significant reduction in the valuation of Mr C's investment in Stella Maris, that the investment hasn't performed as expected. However, it seems to me that this is the result of major economic downturn in the area as a result of the global financial crisis and serious weather events, rather than anything untoward such as fraud.

In summary, I haven't found anything that would've been discoverable to Embark at the time that ought to have led it to refuse Mr C's Stella Maris investment to be made within its SIPP.

My final decision

For the reasons set out above, I'm not upholding Mrs G's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs G to accept or reject my decision before 21 May 2025.

Hannah Wise
Ombudsman