Financial Ombudsman Service

Complaint

Mr X complains that Embark Services Limited (Embark) failed to carry out due diligence when he started a self-invested personal pension (SIPP) in 2010. He thinks Embark shouldn't have accepted his application as it was submitted by a non-UK based adviser and shouldn't have allowed unregulated investments to be made within his SIPP.

Background

In 2010, Mr X was residing in Switzerland. He held around £500,000 within a UK company defined contribution pension scheme. Following advice from a Swiss firm of financial advisers – I'll call it Firm A in this decision– Mr X transferred his pension into a SIPP with Embark. The pension monies were invested in an offshore investment bond with Royal Skandia. This bond was then used as a vehicle to invest in various funds over a period of around four years. The investments included two student accommodation funds that appear to have been unregulated collective investment schemes (UCIS) and other investments in funds with Castlestone that were also unregulated in the UK.

The investments in the student accommodation funds were suspended in 2013 and it appears that Mr X has suffered losses. Mr X then changed advisers in 2014 to a UK based regulated firm.

Mr X complains that Embark has treated him unfairly and is responsible for the losses he has suffered as a result of the investments made in the SIPP. He said Embark shouldn't have accepted the application for the SIPP as Firm A wasn't authorised to give financial advice and later went into liquidation in 2012. He says that Firm A re-registered in the Seychelles at that point.

Mr X also says that Embark failed to carry out appropriate due diligence on the investments made in the SIPP and had failed to prevent large fees being paid out.

Embark doesn't accept that it is responsible for Mr X's losses. It says it carried out "enhanced" checks on Firm A in 2010 and had no concerns about the company. It says it carried out appropriate due diligence on the investments by reference to the regulator's guidance and rules at the time.

One of our adjudicators looked at the complaint and didn't think it should succeed. He thought Embark had carried out adequate due diligence on Firm A before accepting the application. And he noted there was no requirement for a SIPP provider to check the suitability of advice given to an individual.

Mr X didn't agree. In summary, he said:

- Embark had obligations to carry out due diligence on Firm A and the investments in the SIPP.

- He said he found out in 2014 that Embark had made a decision to no longer deal with Firm A. It should have refused to accept introductions from Firm A from the outset.

- He also didn't think the adjudicator had considered the transactions within the SIPP which led to him investing in UCIS funds after the sale of these to individuals had been banned by the then regulator, the Financial Services Authority (FSA). As

Embark countersigned all purchase orders, it must be held responsible for these investments.

- He also noted that Embark had admitted it didn't know Firm A had gone into liquidation in 2012. Embark should have stopped dealing with Firm A after this point, in which case he wouldn't have been exposed to the UCIS funds, some of which were made after this time.

- The turnover of his pension portfolio was £1.4m in three and a half years. In many cases the funds were held for less than a year, and two of the funds held for less than four months. He now understands that Firm A's mode of operation was to use a SIPP to obtain large up-front commissions and then churn the portfolio to generate extra fees.

Embark also provided some additional comments:

- It agreed with the adjudicator's view of the complaint and didn't think this should change or be looked at again.

- The position in relation to the exercise of due diligence has to be judged at the time of Mr X's original investment, and not in relation to any later changes in regulation.

- It had undertaken enhanced due diligence because Mr X's financial adviser wasn't regulated by the then regulator, the Financial Services Authority. The measures it took represented best practice at the time.

- There was nothing unusual about Mr X, as a resident in Switzerland, appointing a Swiss-based adviser.

- Embark's duties to carry out due diligence in respect of the investments were limited to ensuring that they could legitimately be held in the SIPP and it checked HMRC guidelines to ensure the investments were permissible.

- Each time Mr X wanted to change his investments in the SIPP, instructions were received from his adviser. In general, where further investment instructions are received the vetting process is the same as that applied to new investments. That is, checks are carried out to ensure they can be held in a SIPP.

The matter was then passed to me for review. On 9 December 2019 I issued a provisional decision in which I explained why I wasn't planning to uphold Mr X's complaint. In summary, I said:

- As a preliminary issue, I was satisfied that it was right that Mr X's complaint should be subject to a final decision and shouldn't have been closed after the adjudicator's assessment.

- As a SIPP operator, Embark had regulatory duties and obligations to treat Mr X fairly. In the circumstances of this case, this meant that Embark needed to carry out due diligence on both Firm A and the investments held in Mr X's SIPP.

- I was satisfied that Embark carried out appropriate due diligence on Firm A at the time of Mr X's application in 2010 and that it was fair to accept his introduction by

Firm A even though it was not a UK regulated firm. I explained that Firm A didn't need to be authorised in the UK to give Mr X advice in Switzerland.

- Embark ought to have carried out ongoing and periodic due diligence on Firm A. Had it done so, I think it would have (or ought to have) identified that Firm A had gone into liquidation in 2012 and was operating as a Seychelles registered company from that point onwards. But, despite this, I didn't think this failure had had a material impact as Embark could still fairly accept instructions from Firm A even though it had re-registered.

- Embark ought to have carried out independent due diligence on all the investments that were to be held in Mr X's SIPP. Although there was no evidence that it had done this, I didn't think there was reason to believe that carrying out checks at the relevant time would have revealed grounds to refuse to accept these investments. Most of the investments were in standard funds and there was nothing about the UCIS investments which should have raised cause for alarm.

- Mr X had signed all the investment instruction forms confirming his agreement to pay fees and commissions to Firm A from the SIPP. I thought Embark could fairly proceed on the basis that Mr X agreed to payment of the fees and that any complaint about this might be better directed to Firm A or Royal Skandia.

Embark didn't have anything further to add. But Mr X has made further submissions for my consideration which can be summarised as follows:

- Mr X said that he had not known that Firm A had gone into liquidation until 2014. It was only then that he realised that there might be an issue with Firm A and discovered that large fees and commissions had been taken and that some of the UCIS funds had been suspended.

- Embark stopped accepting instructions from Firm A in 2014. This was clear evidence that it too recognised that there was a problem with that firm. Mr X (and our service) had a right to know why Embark changed its mind in 2014 and why this decision to refuse instructions from Firm A wasn't taken from the outset in 2010.

- Mr X had no recourse against Firm A which was no longer trading or against Royal Skandia – who refused to deal with him. My decision would mean that an overseas advice firm using this type of arrangement would leave consumers without any avenue for compensation.

- Castlestone had been subject to a raid by the then UK regulator and many UK investment platforms including Royal Skandia (in the UK) stopped accepting funds managed by Castlestone. This should have been a red flag to Embark.

- There was no evidence that Embark's due diligence on Firm A was "enhanced" or that it had verified the documents that had been provided by Firm A.

My findings

Embark hasn't substantively responded to my provisional findings but, for the avoidance of doubt, I remain of the view that it is right that I issue a final decision and that Mr X's complaint shouldn't have been closed after the adjudicator's assessment.

I've re-considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I don't uphold Mr X's complaint – essentially for the same reasons set out in my provisional decision. I'll explain this below.

In accordance with my duty under section 228 of the Financial Services and Markets Act 2000 (FSMA), I must determine this complaint by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. When considering what is fair and reasonable in the circumstances of this complaint, I'm required to take into account relevant considerations which include: law and regulations; regulator's rules, guidance and standards; and codes of practice. I'm also required to take into account, where appropriate, what I consider to have been good industry practice at the time.

I consider the following to be relevant considerations in this complaint.

The FCA's Principles for Businesses are of particular relevance to my decision on what's fair and reasonable in this case. The Principles, which are set out in the FCA's handbook, *"are a general statement of the fundamental obligations of firms under the regulatory system"* (PRIN 1.1.2G). Principles 2, 3 and 6 say:

> *"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."*

In *British Bankers Association, R (on the application of) v The Financial Services Authority & Anor*, Ouseley J said at paragraph 162:

> *"The Principles are best understood as the ever present substrata to which the specific rules are added. The Principles always have to be complied with. The Specific rules do not supplant them and cannot be used to contradict them. They are but specific applications of them to the particular requirement they cover. The general notion that the specific rules can exhaust the application of the Principles is inappropriate. It cannot be an error of law for the Principles to augment specific rules."*

And at paragraph 77:

> *"Indeed, it is my view that it would be a breach of statutory duty for the Ombudsman to reach a view on a case without taking the Principles into account in deciding what would be fair and reasonable and what redress to afford. Even if no Principles had been produced by the FSA, the FOS would find it hard to fulfil its particular statutory duty without having regard to the sort of high level Principles which find expression in the Principles, whoever formulated them. They are of the essence of what is fair and reasonable, subject to the argument about their relationship to specific rules."*

In the recent decision of *Berkeley Burke Sipp Administration Ltd v Financial Ombudsman Service Limited [2018] EWHC 2878* (Admin) (30 October 2018), Jacobs J said of section 228 FSMA:

> *"Under that section, it is for the Ombudsman to decide what is fair and reasonable in all the circumstances of the case. Here, [*the ombudsman who issued the decision in the case that was the subject of judicial review] *paid regard (as DISP 3.6.4R requires him to do) to the relevant regulators' rules, namely Principles 2 and 6. The decision as to how those Principles apply "in all the circumstances of the case" must be a matter for him."*

So, the Principles are relevant and form part of the regulatory framework that existed at the time. They provide the overarching framework for regulation and must always be complied with by businesses. As such, I need to have regard to them when deciding what is fair and reasonable in the circumstances of this complaint.

Rule 2.1.1 COBS is also relevant and says that:

> "*A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*"

This is a rule that was consulted on by the regulator and provides a high level standard that all firms must adhere to when transacting business with any consumer

The FSA and the FCA have made a number of publications which remind SIPP operators of their obligations and set out how they might achieve the outcomes envisaged by the Principles.

- "A report on the finding of a thematic review" by the then regulator the FSA on SIPP operators published in September 2009 (the 2009 report).
- "A report on the finding of a thematic review" by the then regulator the FSA on SIPP operators published in September 2012 (the 2012 report).
- "A guide for Self-Invested Personal Pensions (SIPP) operators" published by the FCA in October 2013 (the 2013 guidance).
- A letter from the FCA's Director of Supervision sent to the CEOs of all SIPP operators in July 2014 (the 2014 Dear CEO letter).

I think these too are relevant considerations in this complaint. I have considered them in both determining what the regulator expected of firms and also in determining what amounted to good industry practice.

I've quoted selected parts publications below which I think are of particular relevance. But to be clear, I've considered them in their entirety.

The 2009 report included the following:

> *"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 customers and treat them fairly') insofar as they are*

obliged to ensure the fair treatment of their customers. COBS 3.2.3(2) states that a member of a pension scheme is a 'client' for COBS purposes, and 'Customer' in terms of Principle 6 includes clients. It is the responsibility of SIPP operators to continuously analyse the individual risks to themselves and their clients, with reference to the six TCF consumer outcomes.

We agree that firms acting purely as SIPP operators are not responsible for the SIPP advice given by third parties such as IFAs. However, we are also clear that SIPP operators cannot absolve themselves of any responsibility, and we would expect them to have procedures and controls, and to be gathering and analysing management information, enabling them to identify possible instances of financial crime and consumer detriment such as unsuitable SIPPs. Such instances could then be addressed in an appropriate way, for example by contacting the member to confirm the position, or by contacting the firm giving advice and asking for clarification. Moreover, while they are not responsible for the advice, there is a reputational risk to SIPP operators that facilitate the SIPPs that are unsuitable or detrimental to clients.

Of particular concern were firms whose systems and controls were weak and inadequate to the extent that they had not identified obvious potential instances of poor advice and/or potential financial crime. Depending on the facts and circumstances of individual cases, we may take enforcement action against SIPP operators who do not safeguard their customers' interests in this respect, with reference to Principle 3 of the Principles for Business ('a firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems').

The following are examples of measures that SIPP operators could consider, taken from examples of good practice that we observed and suggestions we have made to firms:

- *Confirming, both initially and on an ongoing basis, that intermediaries that advise clients are authorised and regulated by the FSA, that they have the appropriate permissions to give the advice they are providing to the firm's clients, and that they do not appear on the FSA website listing warning notices.*

- *Having Terms of Business agreements governing relationships, and clarifying respective responsibilities, with intermediaries introducing SIPP business.*

- *Routinely recording and reviewing the type (i.e. the nature of the SIPP investment) and size of investments recommended by intermediaries that give advice and introduce clients to the firm, so that potentially unsuitable SIPPs can be identified.*

- *Being able to identify anomalous investments, e.g. unusually small or large transactions or more 'esoteric' investments such as unquoted shares, together with the intermediary that introduced the business. This would enable the firm to seek appropriate clarification, e.g. from the client or their adviser, if it is concerned about the suitability of what was recommended.*

- *Requesting copies of the suitability reports provided to clients by the intermediary giving advice. While SIPP operators are not responsible for advice, having this information would enhance the firm's understanding of its clients, making the facilitation of unsuitable SIPPs less likely.*

- *Routinely identifying instances of execution-only clients who have signed disclaimers taking responsibility for their investment decisions and gathering and analysing data regarding the aggregate volume of such business.*

- *Identifying instances of clients waiving their cancellation rights, and the reasons for this."*

The 2012 report included the following:

> *"Principle 2 of the Principles for Business, states 'a firm must conduct its business with due skill, care and diligence'.*
>
> *Some SIPP operators were unable to demonstrate that they are conducting adequate due diligence on the investments held by their members or the introducers who use their schemes, to identify potential risks to their members or to the firms itself. In some firms this was made worse by an over-reliance on third parties to conduct due diligence on behalf of the operator. In some cases this has resulted in taxable investments being inadvertently held, and monies invested in potentially fraudulent investments."*

The 2013 guidance included the following:

> *"This guide, originally published in September 2009, has been updated to give firms further guidance to help meet the regulatory requirements. These are not new or amended requirements, but a reminder of regulatory responsibilities that became a requirement in April 2007.*
>
> *All firms, regardless of whether they do or do not provide advice must meet Principle 6 and treat customers fairly. COBS 3.2.3(2) is clear that a member of a pension scheme is a "client" for SIPP operators and so is a customer under Principle 6. It is a SIPP operator's responsibility to assess its business with reference to our six TCF consumer outcomes."*
>
> *"Examples of good practice we observed during our work with SIPP operators include the following:*
>
> - *Confirming, both initially and on an ongoing basis, that introducers that advise clients are authorised and regulated by the FCA, that they have the appropriate permissions to give the advice they are providing; neither the firm, nor its approved persons are on the list of prohibited individuals or cancelled firms and have a clear disciplinary history; and that the firm does not appear on the website listings for un-authorised business warnings.*
>
> …

"Although the members' advisers are responsible for the SIPP investment advice given, as a SIPP operator the firm has a responsibility for the quality of the SIPP business it administers. Examples of good practice we have identified include:

…using non-regulated introducer checklists which demonstrate the SIPP operators have considered the additional risks involved in accepting business from non-regulated introducers.

Due diligence

Principle 2 of the FCA's Principles for Businesses requires all firms to conduct their business with due skill, care and diligence. All firms should ensure that they conduct and retain appropriate and sufficient due diligence (for example, checking and monitoring introducers as well as assessing that investments are appropriate for personal pension schemes) to help them justify their business decisions. In doing this SIPP operators should consider:

• ensuring that all investments permitted by the scheme are permitted by HMRC, or where a tax charge is incurred, that charge is identifiable, HMRC is informed and the tax charge paid

• periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme

• having checks which may include, but are not limited to

• ensuring that introducers have the appropriate permissions, qualifications and skills to introduce different types of business to the firm, and undertaking additional checks such as viewing Companies House records, identifying connected parties and visiting introducers;

• ensuring all third-party due diligence that the firm uses or relies on has been independently produced and verified

• good practices we have identified in firms include having a set of benchmarks, or minimum standards, with the purpose of setting the minimum standard the firm is prepared to accept to either deal with introducers or accept investments, and

• ensuring these benchmarks clearly identify those instances that would lead a firm to decline the proposed business, or to undertake further investigations such as instances of potential pension liberation, investments that may breach HMRC tax-relievable investments and non-standard investments that have not been approved by the firm"

The 2014 *Dear CEO* letter provides another reminder that the Principles apply and is an indication of the FCA's expectations about the kinds of practical steps a SIPP operator might reasonably take to achieve the outcomes envisaged by the Principles. The Annex to the letter included the following:

"Due diligence on non-standard investment business

Principle 2 of the FCA's Principles for Business requires all firms to conduct their business with due skill, care and diligence. SIPP operators should ensure that they conduct and retain appropriate and sufficient due diligence, for example, assessing that assets allowed into a scheme are appropriate for a pension scheme. Our thematic review found that most SIPP operators failed to undertake adequate due diligence on high-risk, speculative and nonstandard investments despite being aware of the Financial Sen/ices Authority (FSA) guidance originally published in 2012 which clarified our expectations of firm conduct.

Our review assessed due diligence processes in these five key areas:

- *correctly establishing and understanding the nature of an investment ensuring that an investment is genuine and not a scam, or linked to fraudulent activity, money-laundering or pensions liberation*

- *ensuring that an investment is safe/secure (meaning that custody of assets is through a reputable arrangement, and any contractual agreements are correctly drawn-up and legally enforceable)*

- *ensuring that an investment can be independently valued, both at point of purchase and subsequently, and*

- *ensuring that an investment is not impaired (for example that previous investors have received income if expected, or that any investment providers are credit worthy etc.)*

Please note that the due diligence necessary for individual investments may vary depending on the circumstances, and the five areas highlighted above are not exhaustive.

We found that most firms do not have the expertise or resources to assess this type of business, but were still allowing transactions to go ahead. This increases the risk that a pension scheme may become a vehicle for high risk and speculative investments that are not secure assets, many of which could be scams. It is not acceptable for firms to put consumers at risk this way.

Although our thematic review focussed on non-standard investments, it is important to note that guidance on due diligence applies to all investments.

Findings from our review included firms failing to:

- *understand the nature of an investment, especially contracts for rights to future income, and sale and repurchase agreements*

- *check that money was being paid to legitimate businesses, and*

- *to independently verify that assets were real and secure, or that investment schemes operated as claimed*

We found that, typically, firms had difficulty completing due diligence for non-standard overseas investment schemes where firms did not have access to local qualified legal professionals or accountants. Also, since the last review of SIPP

> *operators, we noted an increase in the number of opaque investment structures, such as special purpose vehicles and limited companies, created to pool investment monies and finance other businesses.*
>
> *Firms had difficulty establishing where money was being sent, and whether underlying investment propositions were genuine.*
>
> *We also found that many SIPP operators accepted investments into their schemes without adequate consideration of how investments could be valued or realised.*
>
> *Finally, we found many firms continuing to rely on marketing and promotional material produced by investment providers as part of due diligence processes, despite previous guidance highlighting the need for independent assessment of investments."*

The documents I've set out above highlight a range of non–exhaustive examples of what the FCA considered to be good industry practice for SIPP operators to adopt to safeguard their customers' interests and illustrative of what SIPP operators could do to meet their obligations under the Principles.

I appreciate that the 2009 and 2012 reports and the 2014 *Dear CEO* letter aren't formal *"guidance"* whilst the 2013 guidance is formal guidance. But this doesn't mean their importance should be underestimated in my determination of what is fair and reasonable. They provide a reminder that the Principles apply and give examples of the kinds of things a SIPP operator might do to ensure it is treating its customer 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.

I know that Embark says it should be judged by the regulatory position at the time it accepted Mr X's application. But it's important to point out that although some of the publications I've listed above were made after the events subject to complaint, the Principles that underpin them existed throughout. So, a business must always *"conduct its business with due skill, care and diligence"* (Principle 2) *and "take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems"* (Principle 3) *and "pay due regard to the interests of its clients and treat them fairly"* (Principle 6).

As Mr X has said, it is also clear from the text of the publications that the regulator expected SIPP operators to have incorporated the recommended good practices into the conduct of their business already. So, whilst the regulators' comments suggest some industry participants' *understanding* of how the standards shaped what was expected of SIPP operators changed over time, it's clear the standards themselves did not change and applied at the time of the events Mr X has complained about.

In any event, this doesn't mean that in considering what is fair and reasonable, I will only consider Embark's actions with these publications in mind. The reports, letter and guidance gave non-exhaustive guidance. They did not say the suggestions given were the limit of what a SIPP operator should do. As the annex to the *"Dear CEO"* letter notes, what should be done to meet such regulatory obligations is dependent on the circumstances. It was for a business to decide for itself how to meet its regulatory obligations – it should not have been reliant on the regulator to tell it what to do.

Having said all of the above, I reiterate the starting point is that I'm required to make a decision on what's fair and reasonable in all the circumstances of this complaint.

did Embark act fairly and reasonably by accepting Mr X's introduction by Firm A?

Mr X's business was introduced to Embark by Firm A in 2010. At the time, Embark's general policy was to not accept business from financial advisers outside the UK and it later stopped accepting all such introductions in 2014 on a blanket basis. It says it took the latter step because it became difficult to verify the regulatory status of overseas firms. However, it appears that the general policy was subject to some exceptions in 2010 and that Embark did accept some referrals and instructions up until 2014.

I understand why Mr X might think that Embark should have adopted a blanket refusal in 2010. But, I don't think it would be fair and reasonable for me to uphold this complaint on that basis. The policy that was put in place by Embark was a matter that I consider to be within its legitimate commercial discretion. There was (and remains) nothing to say that Embark *must* not accept referrals from overseas advisers. And it follows that it was within Embark's discretion to make exceptions to that policy in 2010 – provided of course that Embark otherwise looked at Mr X's referral having regard to the relevant considerations I've mentioned above and conducted adequate due diligence on Firm A.

I've therefore considered what actions Embark took and the circumstances of the introduction.

There is no dispute that the advice from Firm A and the referral of Mr X to Embark took place in and from Switzerland. So although the pension switch took place in the UK, there was no requirement for Firm A to be granted authorisation to provide financial advice by the UK regulator. I also agree with Embark that it wouldn't be unusual for a consumer based in Switzerland to seek advice from a Swiss based adviser.

Embark says it carried out the following "enhanced" due diligence before accepting the referral.

- It reviewed the FSA website to ensure that Firm A didn't appear on the list of overseas companies whose business shouldn't be accepted;

- It ensured that Firm A completed a questionnaire about its advice model and reviewed Firm A's responses to that questionnaire, ensuring that they were satisfactory;

- It obtained a copy of Firm A's Professional Indemnity Insurance Certificate;

- It obtained a copy of Firm A's code of conduct;

- It confirmed the identity of the individual adviser at Firm A dealing with Mr X's affairs and obtained a copy of his Chartered Insurance Institute qualification;

- It obtained a copy of Firm A's insurance details;

- There was a formal agreement between Embark and Firm A setting out the respective obligations of the parties;

- It contacted Polyreg, the Swiss money-laundering regulator, to ensure that Firm A was a member.

I know that Mr X thinks that Embark should have verified some of this information independently. But I've not seen anything to suggest that further checks would have revealed that the information provided by Firm A was incorrect.

There is some confusion about the Polyreg status of Firm A. Mr X says that, at the time, Firm A had a limited regulated status for anti-money laundering purposes rather than wider regulated status. I'm not clear about the exact position. But, as part of our investigation, our adjudicator asked the Swiss financial regulator (FINMA) about its requirements for businesses offering financial advice including advice about pensions. The regulator told us that at the time of the events, there was no requirement for a business to obtain authorisation in order to give this kind of financial advice.

We rarely see cases that involve Swiss financial regulations. So I've relied on the information that our adjudicator obtained and, following my provisional decision, I gave Mr X an opportunity to review this too. Mr X hasn't provided me with anything to suggest my understanding of the Swiss regulatory position is wrong. So, I've concluded that there was nothing in the Swiss regulatory system that meant that Firm A shouldn't or couldn't give financial advice in these circumstances.

The certificate from the Chartered Financial Institute for the adviser at Firm A relates to an Financial Advisers International Qualification. I think that it's fair to say that this is a relevant qualification from a reputable organisation. And I think Embark could be satisfied that from what it had seen that the adviser was someone that was competent in financial matters.

I agree with Mr X that the description by Embark of the checks as "enhanced" doesn't seem quite right. These are the kind of checks that I think any SIPP operator should have undertaken of an overseas adviser in these circumstances. But whether they were enhanced or not, the key point is that I think the checks were reasonable and consistent with Embark's duties to conduct its business with due diligence and in Mr X's best interests.

So, based on what it discovered, I don't think Embark had any reasonable cause to decline Mr X's application as submitted through Firm A in 2010. I've seen no evidence that Embark could or should have identified that Firm A was involved in inappropriate or fraudulent activity. Embark could be satisfied that Firm A wasn't breaching any regulatory rules in advising Mr X and was a genuine business run by individuals capable of providing competent investment advice.

<u>should Embark have ceased to accept investment instructions from Firm A?</u>

Mr X says that Firm A went into liquidation in November 2012. He says that after this it continued doing business in the guise of a new company registered in the Seychelles. Whilst I can see from open source material that Firm A did go into liquidation in Switzerland in November 2012, I've not been provided with evidence about Firm A being re-registered. But I've proceeded on the basis that Mr X is right about the re-registration of Firm A in the Seychelles.

Embark wasn't aware of the liquidation until Mr X brought this to its attention in 2014 when he discovered this for himself after receiving some correspondence from the adviser he was dealing with. Mr X says Embark ought to have known about the fact of the liquidation and that facilitating investments (presumably investments made after the liquidation) on the basis of instructions from Firm A in these circumstances was unfair.

I think it's worth pointing out here that only two of the investments that Mr X is unhappy about (the Castlestone investments made in 2013) were made after Firm A was re-registered in the Seychelles). But I've considered Mr X's arguments very carefully. Having done so, I don't think these issues highlight grounds for me to uphold this complaint for the following reasons.

I accept that Embark should not have relied solely on the due diligence it carried out in 2010 and should have periodically undertaken due diligence on Firm A in the time that followed. This is clear from the 2013 guidance which I've mentioned above which says that SIPP operators should be:

> *"periodically reviewing the due diligence the firm undertakes in respect of the introducers that use their scheme and, where appropriate enhancing the processes that are in place in order to identify and mitigate any risks to the members and the scheme"*

Periodic due diligence doesn't mean that Embark needed to have conducted due diligence every six months or every year. But I think it's fair to say that Embark needed to have carried out due diligence more than just at the outset of its relationship with Firm A and I think it's fair and reasonable to say that it should have done so again after 2012. Had Embark carried out periodic due diligence, it likely would or ought to have identified that Firm A had gone into liquidation. So I think Embark failed to meet its obligations in this respect.

However, just because there's been a failure to meet some obligations – it doesn't necessarily follow that I should uphold the complaint. I have to look at what would and ought to have happened had Embark done everything it should have done.

In the particular circumstances of this complaint and having reference to the relevant considerations I've highlighted above, I don't think it's fair and reasonable to say that Embark should have refused instructions from Firm A after its liquidation and should now be responsible for Mr X's losses. That's because I don't think there was an obvious risk of consumer detriment for the following reasons:

- Even after the liquidation and apparent re-registration in Seychelles, it appears that those operating Firm A were still doing so from the same office in Switzerland and Mr X was dealing with the same advice and administration team. The advice was still being given from Switzerland to Mr X who was resident in Switzerland and there was no requirement for Firm A to be regulated in the UK or Switzerland. So, there was no breach of regulatory rules by Firm A.

- Mr X signed all investment instructions and appeared to have an established relationship with those operating Firm A. So I think it's likely that any enquiries that Embark would have made of Mr X about his relationship with Firm A relating to the liquidation would likely have resulted in Mr X informing Embark that he was happy with the service being provided. Things of course changed when the student accommodation funds were suspended in 2013 – but that had nothing to do with Firm A's liquidation and re-registration.

- The investments held within Mr X's bond were broadly of the same risk profile and diversity from the commencement of the bond through to the time that Mr X changed advisers in 2014. If for example, Mr X, based on Firm A's advice, was proposing to radically change tack and invest the majority of his funds in one particular UCIS after 2012, I might expect Embark to conclude that Mr X was at risk of consumer detriment in his dealings with Firm A and recommend that he seek regulated advice from a UK based adviser. But that wasn't the case here.

- Firm A's advice to Mr X was being given in the context of investments held within an investment bond with Royal Skandia – generally considered to be a large, reputable investment management company. The recommendations that Firm A was providing were for investments that were approved by Royal Skandia (I'll expand on this below). I think this would reasonably have given Embark some comfort that Mr X was being provided with appropriate advice relating to the bond on an ongoing basis and that there was no significant risk of consumer detriment.

So, although Embark didn't carry out periodic due diligence on Firm A and identify that Firm A had gone into liquidation in 2012, I don't think it's fair and reasonable to say that this means that Embark should have refused to accept investment instructions from Firm A from that point onwards and should now be responsible for all of Mr X's losses as a result.

<u>did Embark treat Mr X fairly by facilitating the SIPP investments?</u>

Embark says that its due diligence duty in respect of the investments made by Mr X was limited to ensuring that they could legitimately be held in the SIPP and not a scam – and so it focused on these issues. But that is only partially in line with the regulations and what I think was good industry practice at the time. As I've made clear above, SIPP operators have a responsibility for the quality of the SIPP business that they administer. SIPP operators should undertake enquiries about the nature or quality of an investment proposed before determining whether to accept or decline it into its SIPP.

There's no evidence that Embark made any independent enquiries of any of the investments made by Mr X in the SIPP. But, despite this, I don't think in the circumstances of this complaint, it would be fair and reasonable for me to conclude that it treated Mr X unfairly and facilitated investments that it otherwise should not have done. My reasons are as follows:

- The main investment wrapper was a bond with Royal Skandia. As I've said above, Royal Skandia is considered a large and reputable investment manager. It was a UK regulated business at the time of the transfer of Mr X's pension to Embark in 2010 and continued to be so until 2013. After that time, it remained regulated by the Isle of Man Insurance and Pensions Authority. So, I don't think there was any reason for Embark to have been concerned about accepting the bond structure that Mr X was using.

- Similarly, I think Embark could take comfort from the involvement of Royal Skandia in the investment management process. All the investments held within the bond had to be ones which were permitted by Royal Skandia. I'm aware that Royal Skandia offered no assurances about the investments, but the terms and conditions do say that the checks would be done to ensure that investments were acceptable for Isle of Man regulatory purposes.

- Most of the investments held within the bond were in funds offered and sold by FCA regulated investment companies such as Threadneedle, Miton, Invesco, Odey, Lyxor. There is nothing to suggest that such funds were inappropriate for a SIPP or would otherwise be detrimental to Mr X.

- Mr X is unhappy about the investments in Brandeaux Student Accommodation, International Mansion Student Accommodation and Castlestone funds. He says these were UCIS funds and the investments in them shouldn't have been facilitated by Embark – especially after the FCA said in 2013 that these types of investments couldn't be sold to ordinary retail investors.

  Whilst the FCA did indeed prohibit the promotion of UCIS for retail investors - the ban came into effect on 1 January 2014. The investments that Mr X made in the Brandeaux, International Mansion and Castlestone funds all took place before this time. And in any event, it's important to make a distinction between the promotion/advice of UCIS and Embark's role in this transaction. Embark didn't promote or advise Mr X about any of the investments in the bond and its role was not to ensure that the investments were suitable for him.

  Nevertheless, as I've said above, Embark ought to have carried out due diligence on all the proposed investments.

  I haven't been presented with a lot of evidence about these investments. It appears the student accommodation funds were UCIS and ran into problems in 2013 because of liquidity and market conditions. There's no evidence to suggest that there were underlying problems with the nature of the investments and how they were being run that Embark would have uncovered with further enquiries. There appear to have been proper management structures in place and they weren't part of a fraud or scam. And at the time of Mr X's investments, they were both the subject of wide-scale investment.

  Although in my provisional decision I said that the Castlestone funds were likely to be UCIS, I'm not sure about this. But in any event, given what I've said above about UCIS generally I don't think that is significant. The Castlestone funds appear to be higher risk and were unregulated in the UK. But they were being managed by a firm which had been established for over 15 years and which was registered with the British Virgin Islands Financial Services Commission (BVIFSC). The funds were focused on Gold Bullion and a range of diverse commodities. They were liquid and widely traded.

  I note that the BVIFSC did investigate the management company's fees and expenses in 2012. And, as Mr X has highlighted to me, the FSA had conducted a search of Castlestone in the UK in 2011. The latter appears to have been as a result of potential regulatory inadequacies. But I'm not aware of any adverse findings which followed either of these investigations or that these investigations highlighted an obvious risk of consumer detriment associated with these funds.

So, although Mr X's fund included some higher risk investments I'm not persuaded that any due diligence conducted by Embark would have given it cause to decline to accept them into his SIPP at the relevant times.

<u>did Embark treat Mr X unfairly in respect of the commission and fees paid to Firm A?</u>

Mr X has also questioned the commission and fees paid from his fund to Firm A. I understand that £37,000 was paid to Firm A by Royal Skandia. It's likely that Firm A also received fees when he switched funds within the bond.

I note that Mr X has tried to complain to Royal Skandia about the fees in the past without success. I'm afraid that I can't comment on this further than I have already done as neither Royal Skandia nor Firm A are businesses within our jurisdiction.

But I remain of the view that Embark are not at fault. The arrangement by which Royal Skandia would pay commission and fees was a matter between itself and Firm A. It wasn't something in which Embark was involved and nor was it something over which Embark had any control or say.

Mr X signed all investment switch instructions sent to Embark via Firm A saying that *"I am aware of the fees payable within this investment and that these fees exist partly to meet promotion and distribution expenses of the fund, including commission paid to my fund adviser".* I think Embark could take comfort from these signed instructions that Mr X was fully aware of the ongoing fees and costs being deducted from his investments.

Embark also sent all statements, correspondence and policy documents about the Skandia bond to Firm A as per the terms and conditions of the SIPP. I think Embark was entitled to reasonably conclude that Firm A was passing this information to Mr X. So I don't think there was any failure by Embark to keep Mr X updated about the value of his SIPP.

Overall, I don't think Embark treated Mr X unfairly in respect of the commission and fees paid to Firm A.

My final decision

For the reasons I've explained above, I don't uphold Mr X's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr X to accept or reject my decision before 19 June 2020.

Abdul Hafez
ombudsman