

The complaint

EBS Pensions Limited trading as Embark Pensions ('EP') administers Mr J's Self-Invested Personal Pension ('SIPP'). Its Group Company is the SIPP's Scheme Trustee ('ST'). Mr J is a joint/member trustee of the SIPP. He says EP initially agreed to allow the SIPP to fund planning application work for a farmland asset held within the SIPP, then it wrongly refused such funding after architect fees had been incurred (and remain unpaid) for the planning application.

EP disputes the complaint. It says its position is based on evidence that Mr J's project is not wholly for the benefit of the SIPP, and that it is partly for his personal benefit. It says this goes against the SIPP rules, and that it has tax liability and tax sanction implications that, as ST, it cannot knowingly expose the SIPP to. Mr J disagrees with this assessment.

What happened

In November 2022 Mr J submitted an invoice, related to the project, to EP for payment. Thereafter, EP queried the overall project concerning the farmland and both parties exchanged emails on the matter.

He explained to EP that work towards submission of a planning application, to build a private residence on the farmland, was being undertaken; that no construction was intended at the time; that the objective was to submit the application and, if successful, to use the resulting planning consent/permission to boost the value of the farmland (potentially fourfold); and that the architects engaged in the matter had carried out their work in good faith, so their outstanding invoice required urgent payment.

On 16 January 2023, EP confirmed the following to Mr J – “... *the scheme can pay for residential planning permission costs. However, the land would need to be sold from the pension scheme prior to any development or works starting*”.

On 8 February Mr J contacted EP to highlight that a specific outstanding invoice had not been paid since October 2022. He also said invoices from the architects remained unpaid. Later in the same month EP replied. It said its technical specialist had reviewed the planning documentation it had received, and it had identified a major concern. It noted that the plan specifically says the project is to build a home for Mr J and his family.

It said this called into question the asset's existence in the SIPP; that the SIPP could not fund substantial planning related costs for his personal benefit without facing the risk that such funding would constitute an unauthorised payment from the SIPP; and that such funding would also require them to notify HMRC of a taxable event, with tax liability and tax sanction implications.

EP suggested that Mr J could fund the planning pursuit personally, but the land would need to be sold from the SIPP before any development works began.

Cross correspondence between the parties followed from this, including a complaint from Mr J, because he disagreed with EP's position. He said his intention, with planning consent

secured, was to sell the land to an unrelated third party or to his company for development and renting, but he did not want the resulting house in his name for a specific reason (which he stated).

He referred to the information in the planning documents about the house being built for him and his family, and said this was a claim introduced by the architects as something they thought could help *“with the presentation of the scheme”*. He also referred to his personal circumstances to say “... its [sic] *really not very likely that anything would be built for me and really the plan would be to sell the site with planning permission*”.

In addition, Mr J queried why EP had initially told him planning (and even construction work up to the point of achieving a certificate of habitation) could be funded by the SIPP, which led him to proceed with the project, only to change its position after some invoices had been paid but others remained unpaid.

EP did not uphold his complaint and retained the same position (and reasons) it had previously stated. It also said the following –

- The first invoice Mr J referenced in his February email was paid in October 2022 (the same month the invoice was raised).
- With regards to the unpaid architects’ invoice, the SIPP can fund maintenance or development work on land asset held within it, *“provided they are wholly for the benefit of the SIPP”*; the development of an existing commercial property would normally not be an issue; and the SIPP can cover costs associated with obtaining planning permission, *“provided the project aim is wholly for commercial gain on behalf of the SIPP”*.
- The verbal indication it gave at the outset, that the project’s costs could be covered by the SIPP, resulted from the project’s intentions not being fully understood during the relevant telephone conversation; the architects’ report it subsequently received explicitly confirmed that *“The house would be for [Mr J] and his family”*.
- This means the architects’ work benefits him regardless of whether (or not) the planning application is successful, that the SIPP is being asked to face planning risks on his behalf, that the costs are therefore not only for the benefit of the SIPP, and that meeting those costs (costs for a personal project) would be considered an unauthorised payment (with immediate and future tax implications).
- It does not disagree that, with successful planning permission, the farmland’s value could be increased, which should amount to a gain for the SIPP. However, if the planning application is unsuccessful there would be no such gain and the SIPP would have incurred a loss (in paying the associated costs) in pursuit of a dwelling that is intended, personally, for Mr J and his family.
- It has a duty to safeguard the SIPP from unnecessary risks, including the above planning outcome risk, and the risks of breaching the SIPP’s and HMRC’s rules it has referred to. It cannot knowingly put the SIPP in a position exposed to those risks, and a position where tax charges for an unauthorised payment will occur.
- For the above reasons, the SIPP will not pay the outstanding architects’ fees or any further fees connected with the project.

Mr J referred the matter to our service and one of our investigators looked into it. He

concluded that the complaint should not be upheld and broadly agreed with the points made by EP. He mainly said –

- Up to the paid October 2022 invoice, the SIPP had met invoices related to the project totalling around £10,300.
- The architects' report was sent to EP after its email of 16 January. The report confirms the project was to build a house for Mr J and his family. Despite his comments about how this claim arose, it was/is not unreasonable for EP to rely on the report and conclude that the project is for the purpose stated within it. That breached the SIPP's rules.
- It also potentially breached HMRC rules – breach of HMRC rules prohibiting a pension scheme from directly or indirectly acquiring taxable property (including residential property). Such breach would lead to an unauthorised payment tax charge and a scheme sanction charge against the scheme administrator. In this context, EP's refusal to allow the SIPP to pay the relevant invoices is not unreasonable.

Mr J disagreed with this outcome and asked for an Ombudsman's decision.

He maintained his core arguments. In addition, he said the investigator had quoted HMRC rules related to purchasing residential property, not to the development of land already owned by a SIPP (as in his case); that relevant HMRC rules allow a SIPP to fund such development up to when a certificate of occupation is issued, at which point the SIPP must sell the asset because it cannot hold residential property; that even if he were to buy the developed property he would have to pay full market value for it, so he obtains no benefit; that he regrets the architects' report referring to the house being for him, when it was not, but he went along with that claim at the time; and that as sole beneficiary of the SIPP everything in it is ultimately for his personal benefit, so this defeats EP's argument.

We also received the architects' evidence about the work it was engaged to perform, and its confirmation that it was never instructed to work beyond planning consent stage, so all costs incurred were related to the planning application only. They also said that reference to the house being for Mr J and his family was solely to establish a narrative and rationale for the design decisions, and to "*add credibility and detail*" to presentation of the plans at the Design Panel stage of the planning application process. They said the reference should not be given any greater significance than this.

EP was asked to comment on their evidence and, in response, it said the architects' input added weight to its position. It considered that the architects were either saying they believed the house was/is intended for Mr J and his family or that their report said so without that being the intention at all; that the former supports its position, and the latter suggests an aim to potentially mislead the local authority in the application process; and that the latter also suggests that EP is being asked to allow itself and the SIPP to become complicit in a pursuit that raises ethical concerns.

The matter was referred to an Ombudsman.

What I've decided – and why

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

Having done so, and on balance, I do not find grounds to uphold Mr J's complaint.

The issues in his case are limited to –

1. Consideration of whether (or not) the unpaid architects' fees (part of the overall planning related costs of the project) can legitimately be funded from the SIPP – *legitimacy* based on the relevant SIPP rules and HMRC rules.
2. If not, the case fails; but if so, the question that follows is whether (or not) EP, acting in its Group Company's capacity as ST, nevertheless made a reasonable decision to stop such funding from the SIPP.

Reasonableness in the second consideration (above) inevitably stands in the context of the ST's fiduciary responsibility towards the SIPP (and the SIPP only). In other words, regardless of whether (or not) the costs can legitimately be funded by the SIPP, is EP's position justified by its obligation to safeguard the SIPP's interests. This consideration is important because matters in this service are determined, in the wider sense, upon a *fair and reasonable* remit, so EP's overarching fiduciary role (in its Group Company ST capacity) towards the SIPP is important.

Can the SIPP legitimately fund the project's planning costs?

Mr J has made the point that some of these costs have already been met by the SIPP. EP does not dispute this, and the investigator summarised the total of such costs paid by the SIPP up to October 2022. It is not clear if Mr J's argument is that the payments that have been made sets a precedent that binds EP to allow further payments. If so, I disagree.

EP did not have a problem in approving the SIPP payments when it understood that they related to the project as a commercial enterprise. Its position changed when it learnt about information which, it concluded, confirmed the project was a personal enterprise. The payments that were made happened prior to this discovery and its refusal to approve payments from the SIPP happened thereafter, so there was a pivotal change in circumstances that defeats the argument that EP was/is bound, by its past action, to continue the payments.

EP's position changed between January and February 2023, when it received and reviewed the architects' report for the project. Relevant to the matter of legitimacy, its email of 16 January said "... *the scheme can pay for residential planning permission costs. However, the land would need to be sold from the pension scheme prior to any development or works starting*". This was stated clearly to Mr J and was not challenged by him at the time because it was all he needed. The reason being that, as he and the architects have confirmed, the project only went as far as pursuing planning consent. It did not, at the time, extend to development/construction work.

He has argued that he was verbally told by EP that the SIPP could also cover development/construction work. He has also cited HMRC rules in this respect. For the same reason given above – that is, his project did not extend to construction work – I do not consider this argument to be relevant. Furthermore, as I mention below, the scheme's rules include a clear statement on such work.

EP also accepts that the SIPP could/can fund planning related work for the farmland, provided that it was/is only in the SIPP's interest. This is in line with the fiduciary duty that I have mentioned, and is in line with the SIPP terms. Section 4 of the terms document sets out key rules about investments within the SIPP. Mr J makes a valid point that his case is about costs associated with a land asset that is already within the SIPP, not about a fresh property investment in it. However, there are provisions within this section which are relevant to the

fiduciary duty inherent in his case. A notable example is section 4.1, which gives a reminder of the duty owed by the SIPP's trustees to "... *act prudently, conscientiously and honestly when making decisions in respect of your SIPP*" and "... *at all times act in the best interest of your SIPP in your capacity as a trustee and not in any other capacity ...*".

I have noted Mr J's argument that he is the beneficiary of the SIPP, so everything done in it ultimately benefits him personally. He is indeed the SIPP's beneficiary. However, that does not dilute or remove the fact that, as far as the SIPP's trustees' responsibilities are concerned, *only* the SIPP's interests are to be served. As quoted above, Mr J was required to serve only this interest in his capacity as member trustee, and he could not act in any other capacity (including that of beneficiary).

The SIPP scheme's guidance document on commercial property works and development includes the following –

"There should be a clear and genuine benefit to the scheme in carrying out the works. This would generally be by way of an uplift in the market value and rental value of the property, but may also include making a property more marketable for sale or let."

"The Government has recently simplified the planning process relating to the conversion of commercial to residential property. However, the pension regulations have not changed. Consequently, Embark does not permit residential development or conversion as this would be deemed taxable property and attract penalties."

These scheme requirements are clearly reflected in the position that EP set out to Mr J. His project had to be only for the interest of the SIPP and EP's statement that the land needed to be sold 'prior' to any development work matched the second quote above. Mr J's point about successful planning consent increasing the farmland's value and benefitting the SIPP is not in dispute. EP appears to have approved the SIPP payments on grounds inclusive of this element.

However, the SIPP's rules require that the project serve only its interest. Whilst it remained a purely commercial pursuit for planning consent that would potentially increase the value of the SIPP's farmland asset, this requirement was met. Between January and February 2023 EP became aware of evidence, directly from the architects, that showed otherwise.

EP's most recent point about the architects' overall evidence is an important one. As it suggests, there appears to be no reading of that evidence that lends support to Mr J's case. The architects' report clearly states that the house was/is intended for Mr J and his family. Either the architectural plans for the project were/are truthfully and specifically for building Mr J's and his family's home, or the report's statements in this respect were seemingly intended to mislead the planning application process.

I do not consider it necessary to determine which was/is the case, because both create problems for Mr J's complaint. I will address the first in this section, and then the second in the section below (dealing with the reasonableness of EP's action).

The premise is that the architects' report was/is an official document produced by professionals as part of a formal planning application process for the project. On this basis, it is reasonable to conclude that its contents about the project can serve as reliable evidence. The report says the house was intended for Mr J and his family.

If the house was/is intended for Mr J and his family that automatically creates a personal interest. It does not matter that, at a future point, he would buy it from the SIPP at market value. At the point(s) that he needed the SIPP to cover the project's costs he would have

been asking the SIPP to cover the costs of a project that potentially benefitted the SIPP in terms of the prospect of an increase in its farmland's value, but *also* benefitted him personally because he was using the SIPP's money to take a chance on what was essentially a personal (not commercial) planning application.

This means the project was not only for the benefit of the SIPP. It was partly for the SIPP's benefit and partly for his (personal) benefit. As EP says, if the application failed only the SIPP would have borne the risks of such failure, and the costs. Mr J (personally) would have faced neither, yet there would have been a direct personal benefit to him if the application succeeded because he would have gained planning consent for what was to be his family home.

Overall, and for all the above reasons, I conclude that Mr J's SIPP could not legitimately fund his project costs after it became clear to EP, based on evidence it was entitled to rely upon, that the project was/is not only for the interest of the SIPP (and was partly for his personal benefit).

Did EP act reasonably in stopping funding for the project from the SIPP?

Based on my finding above, the straightforward answer to this question would be 'yes'. In other words, it was reasonable for EP to stop the SIPP from funding Mr J's project costs because the SIPP could not legitimately fund those costs. Even if this conclusion is wrong, which I do not consider it is, the findings below refer to other reasons why it was still reasonable for EP to stop the SIPP from funding the project's costs.

First, I address the second implication of the architects' report.

If, as Mr J has argued, the home was never intended for him and his family and if, as the architects' recent evidence appears to concede, the report misleadingly stated otherwise, then this creates an additional reason why association with the project was/is not in the SIPP's interest.

As ST, EP and its Group Company were obliged to "*act prudently, conscientiously and honestly*" [my emphasis] when making decisions about the SIPP. The indication of potential dishonesty existed and was brought to EP's attention even before the architects' recent evidence. Mr J's emails to EP in February contained broadly the same indication – whereby he denied and dispelled the notion that the house would be for him personally, and said this was known in the project but it was the architects' idea to make that claim in the report.

As such, even if EP had decided to ignore the claim in the report – which, as I addressed above, it relied upon and was entitled to rely upon – it would have then been entitled to act on concern about the report potentially misleading the planning application process and concern about the SIPP being complicit in that. On this ground, it would have been reasonable for it to safeguard the SIPP's position and to distance the SIPP from the project. This would have happened around the same time that it stopped funding the project.

The planning risk mentioned above is another element that makes EP's decision reasonable. The idea of undertaking the risk of loss in an unsuccessful planning application (that is, loss in the sense of costs incurred) in return for the prospect of a benefit that serves only the SIPP is one thing. The idea of undertaking such risk where the potential benefit serves both the SIPP and Mr J (personally) is another. The personal potential benefit to Mr J in this respect is as I explained earlier. I understand his argument that EP could (or should) have focused on the potential benefit to the SIPP (the farmland's increased value) as being enough to justify funding of the project's costs. However, on balance, it was not unreasonable for it to make a judgment call on the matter – in its ST capacity – and to

decide that it was not prepared to expose the SIPP to such risk, especially where Mr J stood to benefit personally but was not exposed to the same risk.

The same applies to the risks of a tax penalty and tax liability, where the SIPP's funding of the project is determined to have been an unauthorised payment and a taxable event. I am mindful of Mr J's challenges in this respect. He says such funding is permitted under HMRC rules, so no such risks exist. Even if the proposition is not as certain as EP says it is – because HMRC action (presently or in the future) cannot always be predicted with certainty – the same can reasonably be said about Mr J's assertion that *there's nothing to worry about* [in simplified terms].

At the very least, given evidence in the architects' report showing a personal interest in the project, the SIPP's continuation of its funding after such awareness created risks of the tax implications that EP referred to. HMRC cannot reasonably be expected to ignore evidence of the SIPP's funds being used for purposes outside the SIPP – or being used for an interest other than the SIPP's.

As EP said, it could not knowingly put the SIPP in a position exposed to all the above risks. They were risks it could foresee and determine at the time and risks it reasonably decided could not be justified, so they were avoidable risks that it had a fiduciary duty to protect the SIPP from – and that it helped the SIPP avoid. Overall and on balance, I do not consider it did anything wrong or unreasonable in its conduct.

My final decision

For the reasons given above, I do not uphold Mr J's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 14 December 2023.

Roy Kuku
Ombudsman