

Ombudsman's Determination

Applicant	Mr N
Scheme	Hornbuckle Mitchell SIPP (the SIPP)
Respondent	Embark Services Limited (Embark)

Complaint Summary

1. Mr N complained that Embark accepted fraudulent email instructions to withdraw £20,000 from his SIPP in May 2019, and that he has incurred a financial loss as a result.

Summary of the Ombudsman's Determination and reasons

2. The complaint is upheld against Embark because:-
 - 2.1. Embark acted negligently in allowing a person impersonating Mr N (**the fraudster**) to change Mr N's bank details held on the SIPP account.
 - 2.2. This situation has caused Mr N serious distress and inconvenience for which he shall receive an award.

Detailed Determination

Material facts

3. Embark is the administrator of Mr N's SIPP. St James' Place (**SJP**) is Mr N's financial adviser (**IFA**).
4. On 9 April 2019, Mr N emailed Embark requesting the withdrawal of £20,000 from his SIPP. Mr N included a completed Investment Sale Form (**the Sale Form**) and a completed Income Instruction Form (**the Income Form**) with the email. On the Income Form, Mr N indicated that the money withdrawn should be paid into the bank account Embark had on record for him (**the original account**).
5. On 11 April 2019, there were email exchanges between Embark and Mr N concerning him signing a risk warning letter and the payment of the £20,000. On 18 April 2019, Embark emailed Mr N and confirmed that a "gross income payment of £20,000 (subject to the relevant tax) will be paid to your nominated bank account by close of business on 29/04/2019."
6. On a date after 11 April 2019, Mr N's email account was infiltrated by the fraudster. As a result, the following exchanges, detailed in paragraphs 7 to 12 and paragraphs 14 and 15 below, which Embark believed were with Mr N, were in fact with the fraudster.
7. On 23 April 2019, the fraudster, using Mr N's email account, emailed Embark and said:

"I just got a notification from my bank concerning my account.

Unfortunately there is a little problem with my bank account and i [sic] will not be able to receive any payment with the account until further notice.

In respect of that, i will like to change my nominated bank account (for the incoming payment) to my alternative bank account.

Kindly advise on how to go about it or can i send the bank details to you?"
8. On the same date, Embark replied to the email. It said that in order to change the bank details for the upcoming income payment, Mr N needed to complete and sign the attached account information update form (**the Form**). It also required evidence in relation to the new bank account (**the new account**) and asked for (i) an original bank statement (dated within one month) or (ii) a certified copy of a bank statement (dated within one month). It explained the requirements for both (i) and (ii).¹
9. On 24 April 2019, there were further email exchanges between the fraudster and Embark concerning whether regular payments from the SIPP could be paid to an

¹ This is detailed in the Appendix.

international bank account or to a third party's bank account. Embark confirmed that neither of these options was possible.

10. On 25 April 2019, at 10:44am, the fraudster emailed Embark a copy of the Form apparently signed by Mr N. On the same day the fraudster sent another email to Embark and said:

“I can get the bank statement online but i won't be able to have it certified because i am currently out of town.

If it must be certified, then the statement will not be ready till Sunday or Monday.

Will the online statement work (without certifying it) or can the payment be cancelled?”

11. On the same day:

11.1. Embark replied to the fraudster and explained that it required the bank statement to be certified if it were not an original copy. It also explained that it was unable to cancel April's income as it was already within the banking run for that month. It could change the bank details for the upcoming income payments.

11.2. Embark sent the fraudster another email, at 10:50am, reconfirming that he needed to supply an original bank statement or a certified copy of a bank statement. They both needed to be dated within one month.

11.3. The fraudster emailed Embark, at 14:02, with what purported to be a certified bank statement. It was signed and dated by an accountant.

12. On 29 April 2019, the £20,000 was paid into the original account that Embark held on file for Mr N. This was confirmed to the fraudster on the same day. Subsequently, there were email exchanges between Embark and the fraudster concerning the payment being transferred to the new bank account.

13. Mr N safely received the payment of £20,000 that was paid on 29 April 2019.

14. On 30 April 2019, the fraudster completed and returned to Embark new Sale and Income Forms. The next day, Embark emailed SJP and attached a sale request for some of Mr N's investments. It also emailed the fraudster and said:

“Thank you for submitting the Income and Investment Sale forms in order to encash £20,000 from the [SJP] investment held under the above scheme.

I can confirm the Investment Sale form has been countersigned by [Embark] and forwarded on to [SJP] for processing. We will issue further confirmation once the investment sale funds have been received into the scheme bank account and we have processed your income payment.”

15. On 13 May 2019, Embark emailed the fraudster and confirmed that “a gross income payment of £20,000 (subject to the relevant tax) will be paid to your nominated bank account (Nationwide) by close of business on 20 May 2019.”
16. On 21 May 2019, Mr N emailed SJP to inform it that his SIPP account was showing withdrawals amounting to £40,000 whereas he had only withdrawn £20,000 around April 2019. He asked SJP to correct its records. The next day, SJP emailed Embark and asked it to confirm to Mr N, the withdrawals made from the SIPP.
17. Between 22 May 2019 and 6 June 2019:
 - 17.1. Embark sent details of the two £20,000 withdrawals that had been taken from Mr N’s SIPP to Mr N’s email address.
 - 17.2. Using Mr N’s email address, the fraudster replied to Embark and said that the withdrawals were correct.
 - 17.3. SJP asked Embark to review the payments as Mr N maintained that he had only received one payment of £20,000.
18. On 11 June 2019, Mr N sent a further email to SJP, chasing a response to his emails about the withdrawal discrepancy. The next day, SJP replied to Mr N. It said that it had sent a further email to Embark at the end of the previous week, requesting it investigate the matter further. It would contact him when it had received a response from Embark.
19. On 1 August 2019, SJP emailed Embark and said in summary:-
 - 19.1. It appeared that Mr N’s email account had been intercepted and the fraudster had obtained £20,000 from Mr N’s SIPP in May 2019. It appeared that the fraudster had tried to withdraw a further £200,000 from Mr N’s SIPP in July 2019.
 - 19.2. It asked Embark to confirm the bank account details the payment in May 2019 had been sent to, and what account the £200,000 requested in July 2019 was to be sent to.
 - 19.3. It confirmed the withdrawals were being investigated and that Embark should only contact Mr N by telephone and not email under any circumstances.
20. Subsequently, there were exchanges between Mr N, SJP and Embark concerning putting Mr N back into the position that he would have been in, had the £20,000 not been fraudulently withdrawn from his SIPP in May 2019.
21. In August 2019, in an attempt to compensate Mr N for the loss he had incurred because of the fraud, Embark offered to pay him £12,202.20. This comprised of £8,000 for the fraudulently withdrawn funds and £4,202.20 to represent the tax liabilities Mr N would have been liable for, as a result of the fraudulent withdrawal.

22. On 28 August 2019, Mr N emailed Embark. He said that he had verbally agreed to accept its offer of compensation on the condition that SJP would cover the shortfall. As SJP had informed him that it was not going to cover the shortfall, he would not accept Embark's offer.

Mr N's position

23. Embark had accepted the fraudster's email instructions without seeking any written or telephone confirmation from him and then paid the fraudster.
24. He did not contact Embark to query the withdrawal of the £20,000 in May 2019 because he had always dealt directly with SJP in relation to any personal pension matters.
25. It is only in recent years that he has been requested to complete and submit any drawdown request by email directly to Embark. Copies of any drawdown requested by him through email were also emailed to SJP. He considers SJP to be his adviser in any SIPP matters and would therefore make direct contact with SJP first in relation to any SIPP questions.
26. He had incurred a financial loss of £15,797.80. This was the original figure of £20,000 less tax of £4,202.20 that Embark had deducted and returned to the Account.
27. He would like Embark to reimburse him for his losses, and for its internal procedures to be reviewed / enforced, to prevent any other pension holder having the same experience.

Embark's position

28. Embark provided copies of the SIPP's Trust Deed and Rules and a copy of the SIPP's Terms and Conditions (**Ts&Cs**). It said in summary:-
- 28.1. Mr N was subjected to a sophisticated fraud whereby his computer was hacked. The fraud was elaborate and was reported to the relevant authorities.
- 28.2. The Ts&Cs do not specify the process for making client withdrawals. Given the increasing technology changes, it felt it was more than acceptable that it accepted scanned copy documents.
- 28.3. Prior to the withdrawal of the fraudulent £20,000, Embark had previously received a direct request to make withdrawals from Mr N. In an email, dated 6 June 2018, Mr N had queried with SJP the forms for completion to make an income withdrawal. SJP had directed Mr N to Embark, advising that the forms needed to come from Embark. Mr N completed the forms and sent them to Embark directly by post, bypassing SJP. So, it was not untoward to receive an email directly from Mr N to query the income instruction processes and for it to provide forms in that manner.
- 28.4. The bank account details were changed by a fraudulently completed change of bank account form, and a fraudulently certified bank statement using the real

details of a professional who could be verified using information in the public domain.

- 28.5. At the time, the process followed to update a member's bank account details was for a Form to be completed. Within that Form were the requirements it needed before the account details could be updated.
- 28.6. The completed Form and the bank statement complying with the requirement were provided on the same day. The documentation was verified and updated on its system with the new bank account details, on the same day of receipt and prior to the Income Form being received. Upon receipt of a completed Form, and supporting bank statement, its process would have been to verify that the sort code for the account matched the relevant bank / building society. Where an original bank statement was not provided, and a certified copy had been received, it would then take steps to verify the individual and / or company who had undertaken the document certification. The verification process varied, depending on who certified the statement.
- 28.7. When the Income Form was received, the bank account check was to ensure those account details completed within the Income Form matched those held on file. Given that they did, the checklist was signed to verify this check had taken place. It was satisfied that its internal procedure was followed.
- 28.8. It had completed a Google search to verify that the accountant company was an active company. According to Companies House, the individual who was named as the person who certified the bank statement, was a director of the accountant company. The company was also listed as holding an Association of Chartered Certified Accounts (ACCA) accreditation.
- 28.9. After reviewing the process and the Financial Conduct Authority's code of conduct, it noted there was no guidance or steps to be followed on the verification checks to be undertaken on an individual who has verified a document. As such, it is the process a business defines that is followed for the documentation verification process.
- 28.10. Embark had a copy of Mr N's signature on file at the time that it had received the change of bank account request in April 2019. The checklist used at the time had a signature verification check. When comparing the signature against that held on the file, it concluded the signatures were similar.
- 28.11. The investment sale request submitted to SJP was countersigned by Embark following Mr N's signature. It expected that SJP would have also verified Mr N's signature and Embark's signatory, before processing the investment sale. As with its verification checks, it seemed that SJP also believed the sale instruction had been signed by Mr N. It had also compared Mr N's signature on file against the Risk Warning Letter and the Income Instruction Form and felt the signature was similar to that held on its files.

- 28.12. Mr N did not speak to it directly at any point until August 2019, so it did not know when Mr N became aware that his computer had been hacked. However, he was aware, from as early as 21 May 2019, that something was wrong, as he had informed SJP, via email, on 21 May 2019, that £40,000 had been withdrawn from the SIPP's bank account, but that he had only requested £20,000.
- 28.13. It had confirmed to SJP on 22 May 2019, that Mr N had requested two withdrawals of £20,000. This was confirmed to SJP again, on 5 June 2019, following its query two days earlier. SJP had every opportunity to identify and react to something being wrong but did not do so.
- 28.14. Funds being recovered through the banking system depends on how quickly the fraud is identified. In this case, both Mr N and SJP were aware that something was wrong with his account as early as 21 May 2019, but did not react. SJP had informed Mr N that his account was correct, no funds had been withdrawn and that there was a computer glitch. It would feel aggrieved if it were held solely liable for the loss. Mr N had also agreed, during their telephone conversation that it was not fully responsible for the loss.
- 28.15. It had listened to the telephone conversation between itself and Mr N in August 2019, and noted that his acceptance of its offer was unconditional. Mr N had even commented that he thought the offer of £8,000 was very fair given the behaviour of SJP. It was surprised when Mr N subsequently informed it that he was no longer accepting its offer. It appears that SJP continues to maintain that it is not responsible for the situation.
- 28.16. It had offered Mr N £12,202 instead of the full £20,000 that was fraudulently withdrawn because the net withdrawal was £15,797.80, rounded up to £16,000. 50% of this equates to £8,000. It offered to cover this, in addition to the tax liability on the payment, which was £4,202.20, as Mr N would not have been able to claim back the tax amount from HMRC.
- 28.17. Mr N no longer has the £4,202.20 that it had refunded to him, in the SIPP's cash account as standard fees have been deducted from that account. It is important to note that had the £4,202.20 not been credited to the SIPP's cash account, the fees would have ordinarily fallen due and would have required settlement. As such, investment sales or an alternative such as a contribution would have been required to allow for sufficient available cash in the SIPP cash account to settle those fees.

Conclusions

29. There appears to be no dispute that Mr N was subject to fraud that resulted in him losing £20,000 from his SIPP account. It is left for me to consider if Mr N's loss was caused by Embark (and, importantly, the complaint before me is against Embark alone).

30. I consider the Ts&Cs govern the contractual relationship between Mr N and Embark. Clause 31.3 of the Ts&Cs restricts the liability of Embark. It states:
- “Other than as a direct result of our negligence, wilful default or fraud, neither we nor the independent trustee accept any liability or obligation for any or all losses, costs, actions, proceedings, claims and demands arising directly or indirectly that are incurred by, or brought or made against us or the independent trustee.”
31. This clause does not restrict Embark’s liability if loss has been caused as a direct result of its negligence². So, if I find that Mr N has suffered a loss because of Embark’s negligence, Embark will be responsible for putting Mr N in the position that he would have been in, but for its negligence.
32. For a claim of negligence against Embark to be successful certain elements need to be established. The first element is whether Embark owed a duty of care to Mr N. In establishing whether a duty of care exists, it was confirmed in *Robinson v Chief Constable of West Yorkshire Police* (Rev 1) [2018] UKSC 4 that the correct approach is to consider whether there is already established precedent for a duty of care to apply in a particular situation. If there is, that precedent should be followed. If there is not, the correct approach is to consider the closest analogies in the existing law and to weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable.
33. Taking the relationship between Embark and Mr N at a general level, Embark undertook as a professional pension scheme administrator to carry out administration services for Mr N, upon which Mr N relied. It was held in *Hedley Byrne & Co. Ltd v Heller & Partners Ltd*. [1964] AC 465 that where a party possessing a special skill undertakes to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. So, I consider that Embark owed Mr N a duty of care. However, to the extent that the relationship between Embark and Mr N could be regarded as a novel one not previously considered by the courts, following *Robinson*, I will consider each of the foundations upon which a duty of care is based, which were set out in *Caparo Industries v Dickman* [1990] 1 All ER 568:
- 33.1. Damage which is foreseeable;
- 33.2. A sufficiently proximate relationship between the parties; and
- 33.3. For it to be fair, just and reasonable in all the circumstances to impose a duty of care.

² Similarly, I note that Clause 7.3 of the Ts&Cs also looks to allow Embark to rely on an instruction “... which purports to have been given by [the member] without further enquiry...” and to accept that instruction “without the need for further investigation as to the ... identity of the person giving it ... provided that the instructions have been received without negligence”. Again, it is clear that this does not provide protection to Embark if there has been negligence.

34. Applying the first limb, I consider that the loss suffered by Mr N is a foreseeable consequence of Embark replacing his bank details with those of the fraudster and flows directly from that action.
35. Applying the second limb, there is a clear proximate relationship between the parties. For example, there is a contractual relationship between the parties, in which Embark agrees to provide services in respect of Mr N. Embark is the party responsible for maintaining adequate records. In *NHS Business Services Authority v Leeks & Ors* [2014] EWHC 1446 (Ch), it was held that the administrator ought to have had in place adequate systems to administer the scheme in a manner that would ensure accurate record keeping. Its failure to do so amounted to maladministration. I consider that there was a sufficiently proximate relationship between Mr N and Embark to satisfy the second limb of the test.
36. In applying the third limb, I consider that it would be fair, just and reasonable to impose a duty of care on Embark. Embark is, in return for a fee, providing services that Mr N is relying upon, and is in the position where its actions, policies and procedures determine the security of Mr N's pension benefits. The contractual wording between Mr N and Embark specifically carves out from its exclusion of liability, loss which is caused by negligence, wilful default or fraud. I find this shows it recognises its duty to the members, and as a result goes on to attempt to limit the circumstances in which liability can arise in respect of that duty.
37. Further, the test set out in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 asks whether a respondent has undertaken a responsibility towards the applicant to exercise reasonable care and skill. As I set out above, I consider that under the terms of the contract, Embark effectively acknowledges that it has a duty to act with reasonable care and skill, as it has explicitly carved out negligence from its exclusion of liability.
38. The second element is whether Embark, in permitting the fraudster to amend the bank account into which payments from the SIPP were made, failed to act with the skill and care of a reasonably competent administrator.
39. Although I have sympathy for the position Embark was confronted with, I find that it did not act with reasonable skill and care.
40. The fraudster, purporting to be Mr N, emailed Embark on 23 April 2019, and informed it that he had been notified by his bank that there was a problem with his bank account, and he would be unable to receive any payments into that account until further notice (see paragraph 7 above). Subsequently, on 24 April 2019, there were further exchanges between the fraudster and Embark concerning: (i) the process to change the bank account for payments from the SIPP to be made to; (ii) if the funds could be paid into an international bank account; and (iii) if payments from the SIPP could be paid into a third party's bank account.
41. On 25 April 2019, the fraudster provided a copy of what purported to be a certified Nationwide bank statement. Embark accepted this evidence, did not contact the

accountant stated on the bank statement to confirm that he had verified the document, and made the payment of £20,000 into the fraudster's bank account.

42. Having reviewed the certified bank statement the fraudster had provided to Embark, I consider it is clear, on the face of the bank statement, that the certified copy wording had been physically scanned at low resolution, and then most likely copied and pasted as a separate image onto the copy statement. The rest of the copy statement is at visibly higher resolution.
43. It is also clear that the bank statement itself had not been physically printed and then subsequently scanned. Further, Mr N's address is in Northumberland, the branch address of the Nationwide bank account is Wood Green in London and the address of the accountant who purportedly certified the copy is in Birmingham. Taking these features of the document together, it is clear that the copy bank statement was extremely unlikely to be a truly "certified copy." I say this because it would have required the accountant to have seen the physical original bank statement, make a scanned copy and write onto that copy that he certified it as true. In my view, it is clear from the physical characteristics of the document that this is not what had happened.
44. In itself, while the physical features of the bank statement are suspicious, this may not have been determinative. However, in the context of the preceding emails from the fraudster, and the fact that it was a second withdrawal within a matter of days, I find that an administrator, acting with reasonable skill and care, would have been prompted to carry out additional checks.
45. The fraudster asked for money to be paid to an international bank account. Following Embark's refusal to do this, the fraudster then rapidly requested money to be transferred to a third party's bank account. I consider it is inherently unlikely that a genuine beneficiary would make these unusual requests in quick succession.
46. I also consider it is unlikely that there would be an unexplained "little problem" with a UK bank account which would mean that it could not accept deposits. Furthermore, having said on 23 April 2019 that the bank account (i.e. Mr N's actual account) "*will not be able to receive any payment with the account until further notice*", the payment genuinely requested by Mr N was paid into that account, successfully, on 29 April 2019 (even though the fraudster had said that this would not be possible).
47. Further, the email was written in intelligible but obviously flawed English.
48. Taking the email exchange and bank statement together, although it is obvious in hindsight that the information provided by the fraudster was suspicious, I find that this exchange ought to have prompted concern by Embark at the time. Where there are, or should reasonably be, suspicions, in my judgment it becomes necessary to take additional steps. While I will not be prescriptive as to what those steps or further enquiries should be, these might include calling the member directly to ensure the instructions are genuine or contacting the individual who 'certified' the bank statement.

49. Embark stated that it relied on the fact that it was able to verify that the accountant was a genuine accountant based at the address given in the certified copy wording. This was, as Embark said itself, information that could be easily obtained publicly, and so the fraudster would have been able to obtain it in the same way. However, the next step, particularly where a reasonable person has suspicions, is to verify that the professional did indeed see the original document in the form it is being presented and certified the document accordingly. This view is supported by the fact that Embark required certified copy wording to include a telephone number and address for the professional, presumably for this very purpose.
50. It may be in this case that the mobile number given in the wording actually belonged to the fraudster (although in my view, as with when one is asked to contact a high street bank, the prudent approach would be to contact the individual through the accountancy firm's publicly available main switchboard number). But, the fact that Embark made no outbound attempt to confirm that the instructions were genuine, falls below the standard of reasonable skill and care.
51. Embark, in these circumstances, should have contacted the individual stated on the copy bank statement for confirmation that he had certified the document, prior to it changing the bank account details and making the payment.
52. I consider that Embark's failure to do so resulted in it negligently allowing the fraudster to change Mr N's bank account and withdraw £20,000 from the SIPP.
53. The third element is that the negligence caused loss. Here, it is not in dispute that Mr N has suffered a loss as the fraudster withdrew £20,000 from the SIPP.

Contributory negligence and / or breaking the chain of causation

54. I note Embark's comments concerning SJP not acting sooner or that it had had no direct contact with Mr N concerning this issue until August 2019. Embark suggested, in its formal response, that it might have been possible to recover the funds had Mr N and SJP informed it quickly of the additional payment. Its point seems to imply that Mr N failed to mitigate his loss and that there was contributory negligence by Mr N and SJP.
55. Taking the mitigation point first, Mr N only had to act reasonably to mitigate his loss. I consider that Mr N acted reasonably in the circumstances. Although the precise date is not clear, he raised the issue as a query with SJP promptly once he became aware that his statement showed a second withdrawal, and in any event before 22 May 2019. With hindsight, it would also have been prudent for him to have raised the issue with Embark at the same time, but SJP being his IFA, it was reasonable for him to have raised the issue with SJP. Mr N also actively chased SJP to investigate the issue on 3 June 2019.
56. SJP forwarded the query to Embark on 22 May 2019. Embark responded directly to Mr N with a screenshot of the second withdrawal. It is not clear whether Mr N saw this as the fraudster replied on 23 May stating "The withdrawals are correct, it [sic] took

£40,000 in total.” At this point, it ought to have been obvious to Embark that there was some disconnect between the fraudster’s email on one hand stating that the records were correct, and the forwarded query from SJP, from Mr N, which had stated explicitly that he had only requested one withdrawal of £20,000.

57. Mr N then contacted SJP again on 3 June 2019, to repeat his query. SJP appears at this point to have conducted an internal investigation and on 5 June 2019, confirmed that a second payment had been withdrawn. SJP then asked Embark to investigate the discrepancy, and Embark confirmed that Mr N (believing at this point that the 23 May 2019 email from the fraudster was genuine), had requested a second transfer. This appears to have been a reasonable course of action for SJP to take, to ensure that the issue was not internal to its systems. Again, I consider it ought to have been obvious to Embark at this point that it was receiving apparently inconsistent messages from Mr N.
58. Although it might have been possible to reverse the transfer had the fraud been immediately identified, there was no guarantee that this would have been possible. I do not consider that Mr N failed to mitigate his loss, or that Mr N and SJP’s conduct amounted to contributory negligence.
59. I find the loss Mr N has incurred flows directly from Embark’s negligence – but for Embark’s negligence there would have been no loss.

Directions

60. Within 28 days of the date of this Determination, Embark shall re-imburse into Mr N’s SIPP the sum required to ensure that he has the same number of units as before the fraudulent sale, minus the number of units that would have been disinvested in any event, to pay the fees incurred between the fraudulent transfer and now.
61. Pay Mr N £1,000 for the serious distress and inconvenience this situation has caused him.

Dominic Harris

Pensions Ombudsman
29 September 2023

Appendix

The requirement for an original bank statement (dated within one month) and a certified copy of a bank statement (dated within one month).

“Printed bank statements showing the name and address the account is held in will be acceptable. For a UK resident, copy documents must be certified with an original signature from one of the following: Chartered Accountant, Bank Official, Building Society Official, Barrister, Civil Servant, Commissioner

of Oaths, Financial Adviser (regulated by the Financial Conduct Authority), General Practitioner / Consultant or Medical Professional, Justice of Peace, Member of Parliament, Officer of the Armed Services, Police or Customs officer, Postmaster or Solicitor. Certification by retired professionals will not be accepted.

The certification wording should include "This is a true copy of the original document that I have seen". Each certified document should be stamped by the certifying body (where applicable), and must state the name, address and telephone number of the certifier as well as their profession, signature and date. The date of the certification must be within the past 12 months."