

## Ombudsman's Determination

Applicant	Mr R
Scheme	James Hay Partnership SIPP ( <b>the SIPP</b> )
Respondent	James Hay Pension Trustees Ltd ( <b>James Hay Trustees</b> )

## Outcome

1. Mr R's complaint against James Hay Trustees is partly upheld. To put matters right, James Hay Trustees shall pay £1,000 to Mr R.

## Complaint summary

2. Mr R has complained about James Hay Trustees' actions in relation to commercial property held within the SIPP (**the Property**), for the benefit of Mr R and his former business partner, Mr S. Mr R considers that James Hay Trustees mismanaged the Property and that this has caused him a financial loss.

## Background information, including submissions from the parties

3. The sequence of events is not in dispute, so I have only set out the main points. I acknowledge that there were other exchanges of information between the parties.
4. In, or around, 1990, Mr R went into business with Mr S. Together, they operated a partnership (**the Partnership**).
5. On 19 December 1997, Mr R completed and signed an application form for the SIPP. The declaration on the form included the following statement:  
  
"I... fully understand and agree  
  
- That I am solely responsible for all decisions relating to the purchase, retention and sale of the investments forming part of the Scheme.  
  
- To hold the Trustee fully indemnified against any claim in respect of such decisions."
6. On 23 December 1997, Mr R's SIPP account was opened.

7. On 4 September 1998, James Hay Trustees purchased a 999-year leasehold interest in the Property, at a cost of £170,000, in its capacity as trustee of the SIPP. The Property was purchased for the benefit of Mr R and Mr S, with each holding a beneficial interest in a share of the Property as an asset of their respective individual SIPP accounts. James Hay Trustees then granted a sublease of the Property to Mr R and Mr S, for use by the Partnership as its commercial premises, with a term of ten years and starting rent of £21,000 per annum (**the Sublease**). The Property comprised two separate units, Unit 16 and Unit 17. Management of the Property was initially carried out by Countrywide.
8. In 2001, the Partnership was incorporated and became a limited company (**the Company**). Mr S was the director of the Company; Mr R had no designated role.
9. In, or around, 2002, Mr R sold his share of the business to Mr S. Mr R also assigned the Sublease to Mr S, Mr S' wife and Mr R's ex-wife.
10. On 20 July 2004, a memorandum was agreed between James Hay Trustees and the Company for the rent on the Property to be increased to £26,000 per annum.
11. On 14 February 2006, James Hay Trustees assigned the Sublease to the Company.
12. On 9 July 2008, Countrywide wrote to Mr R. It said the Sublease was due to expire on 4 September 2008 and steps should be taken to renew it. As part of the renewal, Mr R and Mr S should carry out a formal valuation to establish the market rate for the Property's rent, in line with Inland Revenue requirements. Countrywide said that it could carry out the valuation, or Mr R and Mr S could choose a different chartered surveyor. It also noted that neither James Hay Trustees nor Countrywide were responsible for any loss or diminution to the value of a pension fund arising from a member's decision to renew the existing lease. It asked Mr R to confirm his preferred course of action within 14 days and enclosed a form which he could use to do this. A similar letter was sent to Mr S.
13. On 17 July 2008, Mr R returned his completed form to Countrywide. A copy of the form has not been submitted as part of the complaint.
14. On 4 September 2008, the Sublease expired and was not renewed.
15. On 1 August 2009, James Hay Trustees appointed CBRE to replace Countrywide as managing agents of all commercial properties for the SIPP, including the Property. CBRE's responsibilities were set out in its 'Core Services' document. A copy of the March 2022 version of this document (**the Core Services**) has been submitted for the complaint. CBRE's responsibilities included:-
  - Demanding and collecting rent, insurance premiums and other charges due under the terms of the lease.
  - Completing an internal and external inspection of properties every two years, to confirm occupation and highlight significant repair or health and safety concerns.

- Seeking instructions from SIPP members on rent reviews, property valuations and lease expiries.
  - Providing monthly arrears reports to James Hay Trustees.
  - Liaising with members and James Hay Trustees regarding property related issues and referring or escalating matters if required.
16. On 1 August 2011, CBRE inspected the Property in accordance with the Core Services. Its record of the inspection noted that there had been no unauthorised alterations to the Property. The sections for description of the general condition of the Property, both internally and externally, were marked as 'no issues'.
17. On 7 March 2013, CBRE carried out an inspection of the Property. The section for the general condition of the Property was marked as 'no issues'.
18. On 2 September 2013, CBRE wrote to Mr R. It explained that it had reviewed some lease arrangements for the SIPP and noted that the Sublease had expired. It said that Mr R would need to take steps to formalise the tenant's occupation to protect rental income and the value of the Property. It confirmed that he would need to appoint a chartered surveyor to act for James Hay Trustees in respect of the lease renewal process. This could be carried out by CBRE or a surveyor of Mr R's choice. A solicitor would also need to prepare a new lease on behalf of James Hay Trustees. A similar letter was sent to Mr S.
19. On 24 December 2013, CBRE wrote again to each of Mr R and Mr S. The content of the letters was the same as its correspondence dated 2 September 2013.
20. During 2014, Mr R submitted a complaint to James Hay Trustees in respect of its management of the SIPP and the Property. In its response, dated 5 September 2014, James Hay Trustees said, in summary:-
- Neither it, nor CBRE, was obligated to negotiate a new lease for the Property. Similarly, it could not unilaterally appoint an independent valuer to support a rent review or lease renewal. It said it was the responsibility of all the SIPP members to reach a unanimous decision on actions relating to lease renewals. It added that it was only in exceptional circumstances that it could undertake this responsibility on behalf of members. However, James Hay Trustees accepted that it could have made it clearer that unanimous agreement was required before any action was taken. It apologised that this was not the case. It also confirmed that it accepted responsibility for the consequences of activity undertaken by its appointed property managing agents for all of its SIPP properties.

- Nonetheless, James Hay Trustees considered that Mr R had been informed of the expiry of the Sublease and his responsibilities regarding the actions that had to be taken. It said that while Mr R had notified Countrywide, via the form he submitted on 17 July 2008, of his preference regarding the valuation for the Property, a similar instruction had not been received from Mr S. The Sublease subsequently expired but as the Property continued to be occupied, the existing provisions of the Sublease remained in place. CBRE had written to Mr R and Mr S about the expired Sublease again in December 2013, but no response was received. James Hay Trustees said that Mr R and Mr S would need to agree between themselves how to proceed and to instruct James Hay Trustees accordingly.
  - With regard to Mr R's concerns about rent collection by CBRE, James Hay Trustees acknowledged that there had been problems with collecting rent from the Company, but accounts were largely up to date. It rejected the assertion that CBRE had not sufficiently chased any outstanding rent. It said that CBRE would follow up requests for rent payment with telephone calls, emails, and/or letters, where necessary. If this was unsuccessful, CBRE could take legal action.
21. On 27 May 2015, Glenny LLP (**Glenny**) wrote to James Hay Trustees, enclosing its valuation report for the Property (**the 2015 Valuation**). The Property was described by Glenny as two adjoining units with a ground floor and mezzanine ancillary storage. It valued the Property, with vacant possession, at £475,000, and said the market rent was £35,700 per annum.
22. On 1 July 2015, CBRE emailed Mr R. CBRE confirmed that a valuation of the Property for the SIPP had been carried out by Glenny. CBRE had asked Glenny to contact Mr S, in his capacity as tenant of the Property, to discuss the renewal of the Sublease.
23. On 6 November 2015, CBRE emailed Mr R. It explained that Glenny had found it difficult to engage Mr S in relation to the lease renewal. CBRE said it had contacted James Hay Trustees in order to discuss the options if Mr S were to continue being uncooperative.
24. On 4 July 2016, Mr R emailed CBRE. He said he had not heard anything since the email of 6 November 2015. He asked for an update.
25. On 7 July 2016, CBRE emailed Mr R. It said that Glenny had inspected the Property and held discussions with Mr S. Mr S had indicated that he was prepared to commit to a five-year lease. Glenny noted that a mezzanine floor had been added to the Property by Mr S. CBRE asked Mr R for more information about this. CBRE also explained that the work paid for by the tenant would not normally be taken into consideration when calculating an appropriate rent for the Property, and on this basis, Glenny assessed that the rental value would be £27,000 per annum. However, if the mezzanine was retained, the rental value would increase to £35,700 per annum. CBRE said it hoped to complete the lease renewal process in the near future.

26. On 11 July 2016, Mr R emailed CBRE. Mr R said that the mezzanine floor had been installed in the Property while he was still involved in the business. He agreed that it should not be considered when calculating the rent. He confirmed that he was happy to accept the proposed rent of £27,000 per annum and proposed that it be backdated to 1 January 2016, given the time that had elapsed. He asked whether he had to cover the cost of the solicitor.
27. On 25 July 2016, CBRE emailed Mr R. CBRE said it asked Glenly to contact Mr S to propose the extension of the Sublease, on the basis of the rent being £27,000 per annum and backdated to 1 January 2016.
28. On 9 May 2017, Brown & Brand wrote to James Hay Trustees, enclosing a valuation report for the Property (**the 2017 Valuation**). Brown & Brand valued the Property at £550,000, with a market rent of £35,750 per annum.
29. On 30 May 2017, Mr R emailed CBRE and James Hay Trustees. He confirmed that the Company had gone into administration. He requested information about the rent outstanding on the Property.
30. On 20 June 2017, the Company entered Creditors Voluntary Liquidation.
31. On 24 November 2017, there was an exchange of emails between James Hay Trustees, CBRE, and Mr R. The details were as follows:-
  - James Hay Trustees emailed Mr R and CBRE. James Hay Trustees confirmed that there were rent arrears of £30,286.47 on the Property. It acknowledged that Mr R had highlighted, in his email of 30 May 2017, that the Company had entered administration. It said that CBRE subsequently tried to contact Mr S, but he had not responded. James Hay Trustees asked CBRE to establish whether the Property was vacant and provide details regarding the inspection of the Property.
  - CBRE emailed Mr R and James Hay Trustees. CBRE said it had received no notice from the liquidators of the Company that the Sublease on the Property was to be disclaimed. CBRE therefore considered that it was still in place. It explained that in order to market the Property for sale, it would need the consent of Mr S. It said that James Hay Trustees' preference was generally that SIPP members should resolve such matters between themselves. However, in this case, CBRE confirmed that it was prepared to assist.
  - James Hay Trustees emailed CBRE and Mr R. James Hay Trustees said, given that Mr S had been uncooperative, it was prepared, as owner and landlord of the Property, to market the Property. It did not need Mr S' consent to do this.

32. On 3 December 2017, Mr R emailed James Hay Trustees. He said he had visited the Property and noted that Mr S had knocked through the wall to the adjacent property (**the Party Wall**), which Mr R understood was also owned by Mr S. Further, Mr S appeared still to be trading from the Property. Mr R's position was that the Property should be returned to its original condition and marketed for a new tenant as soon as possible. He was concerned that the delays were affecting the value of his pension benefits.
33. On 12 December 2017, James Hay Trustees emailed Mr R. James Hay Trustees said that the removal of the Party Wall by Mr S was a structural alteration to the Property which had been carried out without its consent. Normally it would take action against the Company, but it was not possible to take action against a company in liquidation. It said that the Sublease remained in place and had not been disclaimed, so the SIPP was not liable for rates at that time. On that basis, James Hay Trustees did not intend to chase the liquidator for unpaid rents owed until a new lease was agreed.
34. On the same day, Mr R emailed James Hay Trustees with the following questions about the management of the Property:
- who owned and managed the Property;
  - who was responsible for ensuring rents and insurance premiums were paid on time;
  - why rent arrears in excess of £30,000 had been allowed to accrue;
  - who was responsible for managing the Property and its tenants;
  - when the last Property inspection took place; and
  - whether James Hay Trustees considered it acceptable that Mr S was trading from the Property and paying no rent, why nothing had been done about it and what James Hay Trustees intended to do.
35. On 13 December 2017, the liquidators of the Company disclaimed the Sublease.
36. It is not clear when the Company ceased to occupy the Property. However, information provided for the complaint shows that another company (**Company 2**), also operated by Mr S, proceeded to occupy the Property.
37. On 14 December 2017, James Hay Trustees responded to the questions Mr R had raised in his email dated 12 December 2017. In summary, it said:-
- James Hay Trustees was the legal owner of the Property. CBRE were appointed by James Hay Trustees to manage its portfolio, which included the Property.
  - CBRE was responsible for collecting rent and insurance premiums for the Property. However, CBRE could not indemnify the SIPP against rent arrears resulting from an insolvent tenant.

- It was investigating with CBRE how the rent arrears of approximately £30,000 had been built up.
  - CBRE was responsible for managing the Property and its tenants in line with the Core Services. It did not provide a full property management service to James Hay Trustees.
  - All properties were inspected annually. There was no specific due date for inspection. A copy of the most recent internal and external inspection report was attached (I note the reply did not state the date of this report).
  - James Hay Trustees did not find Mr S' actions acceptable. It appeared Mr S was using the Property to hold stock while actively trading from the adjacent property. It had informed Mr S that this was not acceptable and that he should move the stock immediately.
  - Under normal circumstances, CBRE would have been notified by the liquidator that the Company had entered into liquidation, which would have prompted further action. Mr S had informed the liquidator that the Sublease had expired. This was incorrect because the Sublease was holding over under the Landlord and Tenant Act 1954. It was not possible for the liquidator to have known this without carrying out further investigations. As a result, they did not contact CBRE. The liquidator was now aware of the position, due to James Hay Trustees carrying out checks via Companies House as to the status of the Company.
  - It intended to reinstate the Party Wall, which would be at a cost to the SIPP. The Property would then be put on the market for sale, subject to Mr R's agreement to instruct the local agents suggested in the email.
  - Having been advised of the identity of Company 2, it would also seek mesne profits from Company 2 equal to the rents and other charges due on the Property, from 6 June 2017 up to the date the Party Wall was reinstated.
38. On 18 December 2017, Mr R emailed James Hay Trustees. He reiterated his concern about the loss of value to his pension benefits, the cost of reinstating the Party Wall, and that Mr S was able to use the Property without paying rent. He also noted that Company 2 was now operating from the Property and asked how that would affect the collection of mesne profits.
39. On 2 January 2018, CBRE wrote to Mr R to notify him that the Sublease held by the Company had been disclaimed on 13 December 2017. It also provided a 'Void Letter' and 'Vacant Property Guide' for Mr R's information, and confirmed that it had sent the same information to Mr S. It said James Hay Trustees would respond to Mr R's outstanding queries in due course.

40. On 3 January 2018, CBRE wrote again to Mr R to say it had contacted Mr S, who had confirmed he was still in possession of the keys for the Property. CBRE asked Mr S to hand the keys over to a local agent, which Mr S had agreed to. CBRE asked Mr R to confirm which local agent he would like to instruct to hold the keys and later market the Property. Once the keys were handed over to an agent, Mr R would be able to inspect the Property himself.
41. In a further email dated 4 January 2018, CBRE noted "In the circumstances, it is essential that this situation is regularised correctly and we therefore await the input of the Legal and Technical Team at James Hay. All parties involved are treating the matter urgently and we hope to be in a position to respond by close of business today."
42. On the same day, Mr R responded to say that "everything should be handled as per any rules & regulations and [I] fully support this". He also said he would be in the area of the Property the next day and would like to arrange to meet the appointed agent at the Property. He would go ahead and arrange this in anticipation of CBRE's approval.
43. On 8 January 2018, Mr R emailed James Hay Trustees. He said he had recently visited the Property with the agent and noted that Mr S still appeared to be using it to conduct business, although there were signs that some of the activity was gradually being wound down. Mr R set out his understanding of the remedial work required to restore the Property to its previous state, so that it could be rented or sold. He added the agent had details of the Property readily available and would send valuations and recommendations that day with a view to putting the Property on the market the following day. Mr R said he had told the agent to only take instructions from James Hay Trustees and not from himself or Mr S.
44. On 26 March 2018, Mr R informed James Hay Trustees that an offer of £350,000 had been received for Unit 17. This offer was subject to reinstatement works being completed. Mr R also said he had been told that the ground rent was approximately £13,000 in arrears.
45. On 5 April 2018, Mr R emailed CBRE. He asked if the Property was still occupied and what action was to be taken regarding this matter. He also asked about the arrears that had accumulated.
46. On 10 April 2018, CBRE emailed Mr R. It said Mr S had indicated that he was prepared to reinstate the Party Wall. CBRE also noted that Mr S was still in occupation of the Property. It said this was unauthorised and would be dealt with prior to the sale of the Property.
47. On 4 June 2018, CBRE emailed Mr R. It said it had undertaken further discussions with James Hay Trustees and James Hay Trustees' expectation was that Mr R and Mr S, as SIPP members, were responsible for progressing matters in relation to the Property and considering any offers that had been submitted. James Hay Trustees also considered that the cost for reinstating the Party Wall should be borne by the SIPP. CBRE asked that Mr R and Mr S arrange the reinstatement of the Party Wall.



48. On 21 June 2018, Pitmans Law, solicitors acting on behalf of Mr R, sent a formal 'letter of claim' to James Hay Trustees in accordance with the pre-action protocol for professional negligence claims under the relevant sections of the Civil Procedure Rules (**the Letter of Claim**). The Letter of Claim set out the basis of a claim against James Hay Trustees for alleged breach of fiduciary duties and professional negligence.
49. The Letter of Claim alleged that James Hay Trustees (whether by itself or through CBRE as its agent) had, in breach of its duties as trustee of Mr R's SIPP:-
- Failed to take any (or any appropriate) steps when the Sublease expired in September 2008.
  - Failed to take any action until November 2017, despite being notified of the insolvency of the Company on 30 May 2017. The action it then took was ineffective and displayed no recognition of the 'significant, ongoing losses the situation was causing' to Mr R's SIPP.
  - Allowed significant rent arrears to accrue before the Company's liquidation, without reporting those arrears to Mr R or taking steps to address them, and further failed to provide any explanation of those circumstances following the holding response of 14 December 2017.
  - Failed to pursue the liquidators of the Company for rent to be paid as an expense of the liquidation, for the period between the Company entering Creditors Voluntary Liquidation and the date the Sublease was disclaimed.
  - For over a year, failed to pursue Mr S for unpaid rent, damages for his use of the Property, nor mesne profits. Further, James Hay Trustees did not take steps to regain control of the Property from Mr S, reinstate the damage caused to the Property or recover the cost of such works.
  - Failed to monitor ground rent payments, resulting in arrears of approximately £13,000 and risk of forfeiture of the head lease, and failed to explain how this had come about.
  - Conducted annual inspections of the Property which failed to identify the significant work undertaken to modify the Party Wall. The work was carried out without authorisation and in breach of the Sublease.
  - Provided "inconsistent, incomplete and materially false information and advice" to Mr R as to its power to act without Mr S' consent, despite Mr S' breach of the Sublease and trespass following the Company's insolvency, and failed to exercise its powers despite it "being obvious in the circumstances that such action was (and remains) necessary and appropriate."

50. The Letter of Claim also alleged that Mr R had suffered a loss to the value of his SIPP due to James Hay Trustees' negligence, although it was not possible to quantify the loss at that time as the alleged breaches were ongoing. It noted any failings on the part of CBRE were a matter for James Hay Trustees and CBRE, as Mr R was not responsible for engaging CBRE as the managing agent for the Property.
51. On 18 July 2018, James Hay Trustees responded to the Letter of Claim (**the Response Letter**). The Response Letter denied all allegations of negligence and breach of duty, and disputed the claim "for at least the following reasons" which, in summary, were:-
- James Hay Trustees held the Property on trust for the SIPP for Mr R and Mr S. As a self-invested pension, it was Mr R and Mr S' responsibility to make unanimous investment decisions for the Property. In his SIPP application Mr R had acknowledged and declared his sole responsibility for investment decisions relating to the Property. James Hay Trustees had not given Mr R any investment advice in respect of the SIPP, including on the Property and the choice of under tenant.
  - It was incorrect to say James Hay Trustees had taken no action on the expiry of the Sublease in 2008. Renewal of the Sublease could only have been instigated on the unanimous and unambiguous instruction of both Mr R and Mr S. Those instructions were sought by Countrywide (in 2008) and CBRE (in 2013), but no instructions were given.
  - Mr R had submitted a previous complaint in December 2014 in respect of the management of the Property. This complaint was resolved and a compensatory sum agreed by and paid to Mr R. At the same time, James Hay Trustees had reiterated to Mr R that it needed the unanimous decision of both Mr R and Mr S on the terms of a renewal of the Sublease or the sale of the Property, and made clear it could not undertake these member responsibilities (even in the case of disagreement between members). Any aspect of the Claim which pre-dates December 2014 must therefore be disregarded.
  - In July 2017, at Mr R and Mr S' request, a surveyor was instructed to undertake a rental valuation and agree renewal terms for the Property. The surveyor had noted Mr S was "difficult to engage" and was uncooperative with the renewal process. James Hay Trustees reiterated that it could not adjudicate on disputes between members and could only act on clear and unanimous instructions from both Mr R and Mr S.
  - Any potential loss in value for the SIPP, should have been mitigated by an uplift in the capital value of the Property. This was due to the installation of mezzanine floors and the generally rising property market. Comments provided as part of the 2017 Valuation indicated that there were no adverse features observed which would be likely to deter a potential buyer, based on a visual inspection of the Property.

- CBRE was instructed by email, on 16 July 2018, to collect mesne profits from the connected occupier, for the period 13 December 2017 to the date of the letter (which was 18 July 2018). This was at a rate equal to the rental value in the 2017 Valuation of £35,750 per annum, plus VAT.
  - The cost of any reinstatement works was yet to crystallise and would depend on whether an offer was made subject to reinstatement conditions. As such, any loss to Mr R's SIPP was speculative and uncrystallised and it was not possible (at that time) for Mr R to claim his SIPP is or has been exposed to risk of loss.
  - The ground rent and service charges for the Property were up to date.
52. The Response Letter noted that an offer had been made for the Property. The offer was not conditional on internal reinstatement works being carried out, but did require vacant possession being obtained, and the Party Wall between the Property and the adjacent unit to be reinstated. If Mr S did not cooperate on this matter, James Hay Trustees would seek legal advice on the removal of Mr S, and any other occupants, from the Property.
53. On 28 August 2018, Pitmans Law replied to the Response Letter. It noted that there did not appear to be any dispute on the key facts of the matter, but claimed the Response Letter did not answer Mr R's main criticisms or directly offer to make good the loss he had suffered. In summary, it said:-
- James Hay Trustees had sought to place responsibility for investment decisions on Mr R and Mr S. However, Section 33 of the Pensions Act 1995 prevents trustees from contracting out of liability for negligence. Further, the relevant Deed of Amendment for the SIPP, dated 20 June 2012, gave James Hay Trustees effective power to override decisions made by a non-trustee member.
  - James Hay Trustees referred to correspondence sent to Mr R, dated 9 July 2008 and 2 September 2013, in which it requested instructions regarding the renewal of the Sublease. Two letters over a period of several years was not sufficient to have regularised the position.
  - No action was taken by James Hay Trustees from 30 May 2017, when Mr R confirmed that the Company had entered administration, until the end of November 2017. It was during this period that the majority of Mr R's financial loss was accrued.
  - It was not reasonable to assert that Mr R's loss was mitigated by a generally rising property market. He would have benefited from this in any event, in addition to the rent that should have been collected.
  - It was unacceptable that CBRE was only instructed to chase the mesne profits from Mr S on 16 July 2018, two days before the Response Letter.

- James Hay Trustees had not provided sufficient detail about the ground rent and service charges for the Property. It was unclear as to whether these had been paid up to date.
  - Based on the statement of account provided with the Response Letter, it appeared that, between the date of liquidation of the Company and the date the Sublease was disclaimed, liabilities for the use of the Property totalled £17,000.86. If it was being used for the purpose of liquidation, then this sum should have been payable as an expense, ahead of the liquidator's fees.
  - It agreed Mr R's loss would not fully crystallise until the Property was sold, but it was the fault of James Hay Trustees that this had not yet happened. CBRE had informed Mr R that the total tenant arrears for the Property, for both the Company and Company 2, were £79,283.62. This was a loss to Mr R and a useful indicator of the quantum of the loss.
54. On 21 September 2018, solicitors acting on behalf of James Hay Trustees, Gordons LLP, emailed Pitmans Law. In summary, Gordons LLP said:-
- The SIPP Deed of Amendment, dated 25 August 2011, included a clause exonerating James Hay Trustees from any breach of trust or duty except for those knowingly and deliberately committed. In any event, James Hay Trustees denied any breach of trust or duty including any knowing or deliberate breach of trust or duty. This exoneration clause was distinct and separate from section 33 of the Pensions Act 1995, which only related to a trustee's investment functions.
  - For the losses alleged to have accrued between 30 May 2017 and the end of November 2017, there was no guarantee that the Company in liquidation would have adopted the Sublease, had notice to adopt or disclaim been given under Section 178 of the Insolvency Act 1986. If such a notice had been issued, the likelihood was that the liquidators would have served notice of disclaimer earlier than 13 December 2017.
  - While James Hay Trustees was an unsecured creditor of the Company, for the rent arrears accrued up to the notice of disclaimer, Section 5 of the liquidators' report, dated 8 August 2018, said that no dividend was available for unsecured creditors. There was no evidence that the position for unsecured creditors, including James Hay Trustees, would have been any different had the claim for ongoing rent been pursued sooner, following the appointment of the liquidator.

- It asked for more information about when Mr R believed Company 2 had begun trading from the Property and what evidence there was to support this belief. The liquidator's report did not state when the assets of the Company were sold to Company 2. It was possible the claim for mesne profits from Company 2 could commence prior to the date the liquidator disclaimed the Sublease, but this would need clear evidence of Company 2's occupation of the Property before this date. Otherwise, assuming Company 2's occupation began on 13 December 2017, the mesne profit claim at the time of writing stood at £43,811.95, including VAT, based on an annual market rental value of £37,750, before VAT. However, it was unclear whether Company 2 would be able to satisfy the mesne profit claim.
  - It did not consider that any loss, as alleged by Mr R, had been crystallised, nor that it had been established that James Hay Trustees was responsible for the breaches alleged or the alleged loss suffered.
55. On 28 September 2018, Gordons LLP wrote to Company 2 on behalf of James Hay Trustees, requesting the payment of mesne profits of £54,536.95 for its occupation of the Property from 13 December 2017 to the date of the letter. It explained its understanding that on the liquidation of the Company, Company 2 had acquired the assets of the Company and no dividend for unsecured creditors had become available; that Company 2 had been in occupation of the Property since at least 13 December 2017 and was trading during this time; and that Company 2 was therefore liable for the payment of mesne profits in lieu of rent at the market rate of £35,700 per annum, in line with the 2017 Valuation. The letter included a statement, prepared by CBRE, detailing Company 2's liabilities for its occupation of the Property since 13 December 2017, which amounted to a total of £54,536.95. This comprised an amount equal to the rent arrears for the period since 13 December 2013, the quarterly mesne profit payable in advance that would fall due on the following day and the annual insurance premium for the Property.
56. Gordons LLP also highlighted the issue of the Party Wall, noting it had been removed without James Hay Trustees' knowledge or consent and was due to be reinstated. It understood that Mr S had accepted responsibility for reinstatement of the wall but had claimed that the necessary bricks were not available. It said that, given an offer had been made for sale of the Property, the wall needed to be reinstated as soon as possible. Gordons LLP asked Company 2 why the work was yet to be carried out, when it would be completed, and whether Company 2 would continue to occupy the Property until it was sold.
57. On 20 December 2018, the Property was sold for £654,000, inclusive of VAT. The sale price net of tax was £545,000.
58. Following the referral of the complaint to The Pensions Ombudsman (**TPO**), the parties made further submissions which are summarised below.

**Mr R's position**

59. CBRE did not identify the significant alterations Mr S had made to the Property, including the removal of the Party Wall. This meant that the Property was sold in an inferior condition and at a lower price than could otherwise have been achieved.
60. He is unsure when Mr S removed the Party Wall, nor of the eventual cost of reinstatement. His understanding was that James Hay Trustees and CBRE were responsible for managing these issues.
61. James Hay Trustees did not take action to ensure that the Sublease was renewed. It also failed to collect rent that was due, meaning that arrears accrued.
62. James Hay Trustees was slow in responding to notification that the Company had gone into liquidation and removing Mr S/Company 2 as tenant from the Property. It did not take action to obtain mesne profits or to recoup any financial losses from Mr S or Company 2.
63. He estimates that his financial loss is in the region of £80,000. The breakdown of this figure is: £60,000 in lost rent, based on his assessment of the market rental value of the Property, which was £54,000 per annum, rather than the £26,000 per annum that was being paid. Secondly, £30,000 in rent arrears and £45,000 in rent that should have been collected while Mr S continued to operate from the Property. Finally, £25,000 loss in the sale value of the Property, due to reinstatement work required. The total loss was approximately £160,000, of which he should be redressed half in line with his share of the beneficial interest in the Property.

**James Hay Trustees' position**

64. CBRE was required to carry out inspections of the Property every two years. Its inspections were ground level, visual inspections. It would only report an issue such as disrepair, urgent repairs required, or health and safety.
65. CBRE did carry out inspections of the Property in 2011 and 2013, but there is no record that it carried out inspections in either 2015 or 2017. Although there were surveyors' inspections undertaken in 2015 and 2017, as part of the valuations of the Property, these were separate and not part of CBRE's core duties.
66. It does not know when the Party Wall was removed, when it was reinstated, nor the cost of reinstatement. The surveyor's valuation reports for the Property that it holds on file, dating from 2015 and 2017, do not mention anything about the removal of the Party Wall.
67. No rent reviews were undertaken by CBRE, because the original Sublease to the Company expired on 4 September 2008. The rent reviews prior to this date were carried out by Countrywide.

68. It was asked about CBRE's attempts to chase the missed rent payments. It has submitted an extract from CBRE's system, which gives details of activities undertaken by CBRE between August and October 2018.
69. It holds details of the account history for the Property, dating back to June 2009 (**the Account History**). This begins with the Company's tenancy and includes the period where Company 2 occupied the Property. The Account History shows financial transactions, including the rent charges and payments received, as well as other charges such as insurance.
70. The Company went into liquidation and the lease continued to hold over until it was disclaimed on 13 December 2017. Company 2 subsequently occupied the Property and the Company's rent arrears were written off, as it was insolvent. The Company was dissolved on 30 April 2020.
71. A statutory demand was issued to Company 2 for payment of mesne profits, but no response was received. CBRE considered whether to petition for the winding up of Company 2 as a way of releasing its assets for the recovery of the mesne profits. However, CBRE noted that Company 2 appeared to be a dormant company with no assets, so it decided not to proceed on this basis. As the Property was then sold on 20 December 2018, it agreed to write off the claim for mesne profits.
72. It has submitted a copy of the SIPP Terms & Conditions, dated February 2024 (**the T&Cs**). The T&Cs state the following:
- “We produce guides on commercial property, unquoted shares and loan investments or other relevant guides from time to time which set out our requirements. You can obtain copies of these guides from our Website. These guides do not form part of these Terms and Conditions and are for information only although we expect you to take note of them.”
73. It has also submitted a copy of its 'Commercial Property Purchase and Maintenance Guide' (**the Guide**), dated June 2023, for the SIPP. It said this is the relevant document covering the management of commercial property held within the SIPP.

## Adjudicator's Opinion

74. Mr R's complaint was considered by one of our Adjudicators, who concluded that there was maladministration. The Adjudicator's findings are summarised as follows:-
- James Hay Trustees' role as landlord of the Property was to hold and manage the Property, for the benefit of Mr R and Mr S, in accordance with its duties as Trustee of the SIPP.

- None of the accompanying documentation for the SIPP, including the T&Cs and the Guide, established any duty on James Hay Trustees of direct relevance to Mr R's complaint. The Guide confirmed that James Hay Trustees accepted no direct liability for the financial circumstances of the tenant(s) of any properties held within the SIPP.
- The SIPP was therefore generally liable for any shortfall in rent on the Property and had to bear associated losses. This was an inherent risk of investment in commercial property. However, if it was found that maladministration by James Hay Trustees and/or CBRE was the cause of a financial loss, then redress may be appropriate.
- James Hay Trustees has accepted liability for the actions of CBRE, as its appointed managing agent for the Property. It said there was no record that CBRE carried out the inspections which were due in 2015 and 2017. In the Adjudicator's view, this amounted to maladministration, but even if CBRE had carried out inspections in 2015 and 2017, it was unlikely to have been able to prevent the alterations that Mr S made to the Property. Therefore, any loss which may have arisen from the alterations cannot be attributed to this maladministration.
- The Guide set out that CBRE should have been notified of any proposed alterations to the Property. Mr S did not appear to have adhered to this requirement and removed the Party Wall without agreement from James Hay Trustees. It was the actions of Mr S and no other party which led to the cost of reinstatement of the Party Wall, and Mr S is not a party to the complaint.
- On balance of probabilities, the Party Wall was likely removed at some point between 9 May 2017, the date of the 2017 Valuation, and 3 December 2017, the date Mr R noted that this alteration had been made.
- The Adjudicator was not persuaded that even if CBRE had carried out the property inspections that were due in 2015 and 2017, it would have identified the alteration to the Party Wall. There was insufficient evidence to conclude that the 2017 inspection would have fallen at such time as to have identified the alteration, believed to have occurred between 9 May and 3 December 2017.
- Given that the wall was likely removed after the Company started having financial difficulties, earlier identification would not have mitigated any loss caused by Mr S' actions. The Company paid the required rent for the Property to February 2017. The first missed payment was in March 2017, although payments were then made on 10 April and 10 May 2017. From June 2017 (when the Company went into liquidation), no further rent payments were received from the Company. In addition, no payments were ever received from Company 2 during its occupation of the Property. So, it was unlikely that the cost of reinstatement of the Party Wall could have been recovered from either the Company or Company 2.



- CBRE's actions in relation to the collection of missed rent payments were insufficient and this amounted to maladministration. The Core Services stated that CBRE will demand and collect rent, provide monthly arrears reports to James Hay Trustees, liaise with SIPP members and James Hay Trustees about property-related issues, and escalate those issues if necessary. It was not clear that CBRE had adequately fulfilled these duties prior to August 2018, which was some time after the Company had vacated the Property.
- However, even if CBRE and/or James Hay Trustees had taken more prompt action once the Company's financial issues began to emerge, it was unlikely that any additional rent would have been collected. The liquidators report indicated that the Company did not have the funds to make such payments. Neither the T&Cs, the Guide, nor the Core Services were prescriptive about action that should be taken in relation to the potential eviction of a tenant, or under what circumstances this might be expected to take place.
- Following the liquidation of the Company, James Hay Trustees did not permit Company 2 to become a tenant of the Property and treated its occupation as trespass. As there was no landlord-tenant relationship between James Hay Trustees and Company 2, there was no basis on which James Hay Trustees could claim rent from Company 2. It therefore sought to recover mesne profits in lieu of rent. The Account History showed that while mesne profits were recorded as having been charged to Company 2, no funds were recouped, and the claim was eventually written off.
- James Hay Trustees' attempt to recover mesne profits from Company 2 was reasonable. After making a formal claim for mesne profits, James Hay Trustees issued a statutory demand for payment, to which Company 2 failed to respond. The only remaining option was to petition for the winding up of Company 2, which James Hay Trustees considered unlikely to yield a positive result, because of Company 2's financial position at that time.
- Mr R suffered serious distress and inconvenience due to CBRE's failure to carry out inspections of the Property in 2015 and 2017, as well as a lack of prompt action on the missed rent payments. James Hay Trustees should pay Mr R £1,000 in recognition of his distress and inconvenience.
- Mr R alleged that the rent being charged in the latter period of the SIPP's ownership of the Property was below the market rate. The Adjudicator's view was that this was not the responsibility of James Hay Trustees. The Sublease was not renewed following its original expiration in September 2008, and no subsequent contractual agreement was reached on the rent to be paid for the Property. Rent continued to be paid at the existing level of £26,000 per annum, which had been in place since July 2004.

- Mr R had previously complained to James Hay Trustees about the failure to renew the Sublease. James Hay Trustees' response, dated 5 September 2014, explained that renewal of the Sublease required action from, and the unanimous agreement of, Mr R and Mr S. A complaint to TPO on this point was out of time on the grounds that it was outside the three-year time limit from when Mr R would reasonably have been aware of the issue.

75. Mr R did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr R and James Hay Trustees both provided further comments which are summarised below. I have considered these comments, but they do not change the outcome. I agree with the Adjudicator's Opinion.

### **Mr R's comments**

76. The efforts to chase missed rent were ineffectual and legal action was not taken. CBRE failed in its duty to collect rent and insurance premiums when the Company was solvent.
77. When it confirmed the Sublease had been disclaimed, CBRE implied the Property was vacant, but on a subsequent visit he noted that it was still in use. CBRE should have given a more accurate report.
78. He does not understand why no action was taken when he informed James Hay Trustees that the Company was going into liquidation. James Hay Trustees failed to ensure that the Property was vacated so that a new tenant could be found, or the Property could be sold.
79. Rent increases for the Property were not implemented. The market rate should have been payable, but the rent had not increased since 2004. James Hay Trustees had a responsibility to enforce this.
80. CBRE's inspections of the Property were not carried out in either 2015 or 2017, yet he still had to pay the SIPP charges.
81. No further action was taken after the statutory demand for mesne profits was issued. Company 2 was not dormant and continued to trade, so mesne profits could have been pursued as the business grew. Writing off the loss was simply the easy way out.

### **James Hay Trustees' comments**

82. It accepts the Adjudicator's Opinion.
83. Rent reviews under the Sublease were due in 2003 and 2008, before CBRE's appointment as managing agents. Countrywide acted as agent at that time, but no further information is available from them on this point.
84. CBRE advises SIPP members to visit any commercial property held, once a company becomes insolvent, to confirm if it is still occupied.

85. It undertook its core duty via correspondence with solicitors and the insolvency practitioner, in relation to the liquidation of the Company. The legislation does not allow a landlord to take further action when a tenant business is insolvent.
86. It did not charge an additional fee to Mr R's SIPP account for CBRE's Property inspections due in 2015 and 2017. Such inspections are included within the core annual fee for the SIPP. However, a valuation fee was paid by the SIPP during those years as valuations had been undertaken for the purposes of the SIPP.
87. A statutory demand for mesne profits was served to Company 2 when it failed to pay the amount due. CBRE and James Hay Trustees took legal advice when Company 2 did not respond to the statutory demand and relied on that legal advice in reaching its decision to write off the mesne profits.

### **Ombudsman's decision**

88. Mr R has complained about James Hay Trustees' and CBRE's management of the Property. In his Opinion, the Adjudicator concluded that there had been maladministration by CBRE, both in its failure to carry out inspections of the Property in 2015 and 2017 and to take adequate steps to collect rent, report arrears and liaise on matters relating to the Property (as required by the Core Services). James Hay Trustees has not disputed this finding and accepts responsibility for the actions of CBRE as its agent. Where I refer below to the actions and responsibilities of James Hay Trustees, I include the actions and responsibilities of CBRE acting as agent on its behalf unless otherwise stated.
89. I agree with the Adjudicator's finding of maladministration, for the reasons given in the Opinion. I therefore make no further comment on this point, except to note my view that the distress and inconvenience Mr R suffered from the maladministration was largely due to James Hay Trustees' failure to adequately communicate what it was able to do, what it was doing, and why, after Mr R had advised it of the Company's liquidation.
90. I also agree the Adjudicator's finding of maladministration does not necessarily mean the maladministration caused the financial losses Mr R claims, such that James Hay Trustees should be held liable for them. The Adjudicator's view was firstly that James Hay Trustees was not under any duty to prevent the losses Mr R claims to have suffered, and secondly that even if it was, nothing it did or failed to do caused or contributed to those losses.
91. In respect of the losses Mr R claims to have suffered: any loss to the value of Mr R's SIPP arose from missed rent payments, unpaid mesne profits following the Company's liquidation, loss in sale value due to the removal of the Party Wall (and other alterations), and the cost of reinstatement works that were borne by the SIPP. These losses all arose through acts or failures of Mr S (either personally or as director of the Company and of Company 2) in breach of his obligations under the terms of the Sublease. Under the Sublease, and the assignment of it to the Company, Mr S had covenanted:

- to pay the rents due under the Sublease;
  - to perform and observe the covenants and conditions of the superior lease and indemnify James Hay Trustees (as landlord) against any claims or demands arising from any breach or failure to observe those conditions and covenants; and
  - not to part with possession of the whole or part of the Property or permit another to occupy the whole or any part of the Property.
92. Mr S breached the covenant to pay the rents required under the Sublease and, by continuing to trade from the Property through Company 2 after the Sublease was disclaimed, breached the covenant not to permit another party to occupy the Property. I have not seen a copy of the superior lease, but from the correspondence it appears his alterations to the Party Wall were also likely in breach of the covenants and conditions of the superior lease and therefore also the Sublease, for which Mr S would have been liable to indemnify James Hay Trustees. I also note it was Mr S (and/or Company 2) who failed to pay mesne profits for its unauthorised occupation of the Property after the Sublease was disclaimed.
93. All losses were therefore caused by breaches by Mr S of the terms of the Sublease and his failure to pay the mesne profits claimed for Company 2's unauthorised use of the Property after the Sublease was disclaimed. To the extent James Hay Trustees were under a duty to prevent these losses arising, I consider it had discharged those duties by ensuring the above terms were included in the Sublease and its assignment to the Company. That Mr S failed to observe the covenants given was not within James Hay Trustees' control. I agree with the Adjudicator's finding that James Hay Trustees, either directly or through CBRE, could not have prevented any of Mr S' actions or failures. However, neither Mr S, nor the Company and Company 2, are party to this complaint, so I cannot make directions in relation to them.
94. Although I find that James Hay Trustees did not cause, and could not have prevented, the acts or failures which led to the losses claimed (and to the extent it was under a duty to prevent those losses, had discharged them), it was nevertheless under a duty to do what it could to mitigate any harm caused by Mr S' breaches of covenant under the Sublease. I agree with the Adjudicator's view that James Hay Trustees did what it reasonably could to mitigate that harm and that on the balance of probabilities, CBRE's maladministration did not have any impact on the extent to which the harm could have been mitigated.

95. In respect of the Party Wall and the cost of reinstatement that was borne by the SIPP, the Adjudicator's view was that, on the balance of probabilities, the Party Wall had been removed at some point between 9 May 2017 and 3 December 2017. I agree this is a reasonable assumption. I therefore agree that, even if CBRE had inspected the Property in 2015 and 2017, the Party Wall would most likely not have been removed by the time of the inspections and therefore could not have been identified. Alternatively, if the Party Wall had been removed before any 2017 inspection was made and the inspection had identified the alteration, the outcome in terms of loss of value to the Property and/or the cost of reinstatement would most likely have been the same. The Company was already in financial difficulties by May 2017 and had already defaulted on some rent payments by this time. On 20 June 2017, it passed a resolution to commence winding up and appoint liquidators. It is very unlikely that any attempt to recover costs from the Company for reinstating the Party Wall would have been successful, even if CBRE had identified its removal sooner.
96. In respect of the collection of rent, the Company was in arrears for the rent payments due under the Sublease at the time it went into liquidation in June 2017. However, the Account History shows that the Company did continue to make rent payments (albeit inconsistently and often late) up to May 2017, shortly before it went into liquidation. Given the imminent insolvency of the Company, I do not consider any additional action by James Hay Trustees, up to and including May 2017, would or could have secured the payment of rent arrears over and above those that were actually paid.
97. Once the Company resolved to wind up and appoint a liquidator in June 2017, the appointed liquidator would have taken control of the Company's assets and assessed them against its liabilities to determine which debts could be paid. The liquidation report shows no assets were available to pay outstanding debts owed to unsecured creditors. This would have included James Hay Trustees as landlord of the Property. There was no possibility of recovering rent from the Company once it had entered liquidation.
98. I find that James Hay Trustees acted reasonably and in accordance with its powers and duties as landlord of the Property and trustee of the SIPP in its attempt to recover rent arrears owed when the Company became insolvent. However, if and to any extent it did not act in accordance with its duties in collecting rent or arrears of rent at that time or previously, I consider it did not affect the amount of rent arrears that was, or could have been, recovered from the Company.
99. In respect of the collection of mesne profits from Company 2, Mr R has asserted that James Hay Trustees could and should have done more to collect mesne profits from Company 2, and that it was too quick to write off its claim. Mr R said James Hay Trustees was wrong to conclude that Company 2 was dormant. Company 2 was in fact trading and mesne profits could have been pursued as Company 2 grew.

100. I acknowledge that James Hay Trustees could have taken a different approach to the mesne profits, and by doing so might have recovered at least part of the mesne profits claimed for the benefit of the SIPP. However, this is speculative, and the fact it could have taken a different approach does not mean it breached any duty it owed to Mr R by taking the approach it did. As with any decision made in its capacity as trustee of the SIPP, when deciding to write off the claim for mesne profits, James Hay Trustees was required to act reasonably, taking into account the information available to it at the time.
101. I find that James Hay Trustees did act reasonably and was not 'too quick' in its decision to write off the claim. The decision was not made until April 2019, after the Property had been sold in December 2018. By this time, James Hay Trustees had made a formal claim for mesne profits, followed by a statutory demand for payment. Company 2 failed to respond to either. James Hay Trustees then considered petitioning for the winding up of Company 2 as the only remaining means of forcing payment. However, it noted that Companies House records listed Company 2 as a dormant company and the accounts filed at that time showed it had no assets. On the basis of the information available at the time, James Hay Trustees considered it was unlikely that winding up Company 2 would result in any payment to the SIPP. On legal advice, it concluded that petitioning to wind up Company 2 was not a suitable course of action, and the only remaining option was to write off the claim.
102. I consider James Hay Trustees' decision was within the range of reasonable decisions it could make, having taken advice and considered relevant information available to it at that time. I find that James Hay Trustees did not breach its duties as trustee of the SIPP by deciding to write off its claim for mesne profits from Company 2, and it is not liable for any financial loss caused to Mr R's SIPP as a result of its decision.
103. Separately, Mr R has noted in his response to the Opinion that he continued to pay fees on his SIPP account, despite CBRE's failure to inspect the Property in 2015 and 2017. James Hay Trustees has explained that Property inspections were included as part of its core SIPP fee and no additional fee was levied for the inspections which did not take place. However, additional fees were levied in 2015 and 2017 for valuation reports in respect of the Property, which were carried out in each of 2015 and 2017, and which fell outside the core service fee. As no charge was deducted from Mr R's SIPP for the missed inspections, I find there is no redress payable to him over and above the award of £1,000 in recognition of the non-financial injustice he has sustained.

104. Lastly, Mr R has raised concerns over the lack of rent increases for the Property after July 2004. This was (in part) the subject of the complaint Mr R raised with James Hay Trustees in 2014, and to which James Hay Trustees responded in its letter dated 5 September 2014. In that letter, James Hay Trustees explained that rent was payable in accordance with the terms of the Sublease, which expired in 2008. Without the unanimous agreement of, and instructions from, Mr R and Mr S to renew the Sublease or renegotiate its terms, James Hay Trustees had no power to initiate any renewal or renegotiation, or any market rate valuation of the Property. The Sublease therefore continued by operation of law on its existing terms, by virtue of the Company's continued occupation of the Property.
105. The Adjudicator explained to Mr R that TPO was unable to consider this aspect of his complaint. This was because Mr R became aware of the issue by no later than September 2014, more than three years from the date he brought his complaint to TPO (in November 2019). I therefore make no finding on this part of Mr R's complaint.
106. In respect of the Adjudicator's finding of maladministration, I agree the failures on CBRE's part outlined in the Opinion amount to maladministration, for which James Hay Trustees is liable. I also agree with the Adjudicator that Mr R has suffered non-financial injustice (commonly referred to as distress and inconvenience) as a result of the maladministration and he should be awarded the sum of £1,000 in recognition of this. I find that James Hay Trustees shall pay this sum to Mr R.
107. I partly uphold Mr R's complaint.

## **Directions**

Within 28 days of the date of this Determination, James Hay Trustees shall pay £1,000 to Mr R in recognition of the serious distress and inconvenience he has suffered.

**Camilla Barry**  
Deputy Pensions Ombudsman  
13 January 2026