

Ombudsman's Determination

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| Applicant | Mr Y |
| Scheme | Suffolk Life SIPP |
| Respondent | Suffolk Life |

Complaint Summary

Mr Y has complained about the administration of his Suffolk Life SIPP and issues that have arisen with the property held by it.

Summary of the Ombudsman's Determination and reasons

The complaint should be upheld in part. Suffolk Life sent inaccurate information to The Pensions Advisory Service (**TPAS**) and sent information relating to Mr Y and other clients to incorrect addresses.

The other complaints brought to this Office should not be upheld.

Detailed Determination

Material facts

1. In 2006, Suffolk Life acquired a hotel in Scotland (**the Property**), on behalf of a group of investors (**the Investors**), for £500,000. The Investors included Mr Y, who invested through his SIPP. The funds for the purchase were raised in part through a mortgage against the Property, in Suffolk Life's name, with RBS.
2. In July 2006, following the purchase of the Property, Suffolk Life entered into a 15-year lease agreement with Mr Y and another investor (**the Tenants**). The lease states:-

"2.2 Tenant's obligations

The Tenant accepts the Premises in their present condition as fit for the purposes for which they are let and undertakes:

2.2.1 without any written demand to pay to the Landlord by banker's order if the Landlord so requires (the Tenant being bound to complete and return to the Landlord all appropriate forms provided for that purpose) the clear yearly rent of Thirty Thousand Pounds (£30,000)...

...

2.2.3 on demand to pay an amount equal to the yearly sums expended by the Landlord in insuring the Premises against loss or damage by the Insured Risks in a sum equal to the Reinstatement Cost together with the Loss of Rent."

3. Shortly after the lease was agreed, the Tenants informed Suffolk Life that the Property was not fit for purpose due to its condition, licences and planning.
4. Over 2007 and 2008 a series of complications arose with the Property and the process of settling the purchase with the seller.
5. On 21 August 2008, following significant correspondence, an agreement was reached to resolve the issues on the basis of the following:
 - "Landlord, Suffolk Life to carry out agreed works now estimated at £36,000
 - Agree to accept responsibility for outstanding [architectural] fees of £15,000
 - Agree up until this deal is completed that recoverable rent and insurance is limited to £10,000".
6. Over time, the ownership structure of the Property changed.
7. On the basis of the records provided, between 2007 and 2017, irregular but substantial mortgage repayments have been paid directly to RBS (either by the Investors or the Tenants) rather than by the SIPP.

8. Over the same period no rent was paid to the SIPP and as a result, the SIPP has a growing fee debt to Suffolk Life and an overdraft; the required mortgage repayments were not being made.

9. In November 2013, Suffolk Life responded to a number of complaints brought by Mr Y. In relation to rent, it said the following:

“You have subsequently sub-let the property to another party and you are concerned that we have not collected rent from them. There is no contract in place between Suffolk Life and the sub-tenant. Our contractual relationship is with you and Mr [E] as our tenant. It is not possible for us to invoice the current occupier for rent without a lease in place to cover their tenancy. I also draw your attention to the fact that your lease has a clause which does not allow for the property to be sub-let without the landlord’s consent. As such we will not accept responsibility for any loss in rental income as a result of the occupation of the property which you have permitted.

We have never agreed to the surrender of your lease. Having entered an agreement with a sub tenant, without our consent, I would have expected you to have established terms of a sub-lease and agreed rental income with them. I would also have expected that the rent you received from the sub tenant, would have been used make your own rental payments to the SIPP.

In order for us to take any action against the sub tenant now; you and your co-investors will need to clear your overdrafts and settle outstanding fees. The cost of any legal action will need to be met from your SIPP. We therefore require funds to be available in your plan. Once this is done we will need your formal instruction as to the action you wish for us to take and details of the solicitors you would like use to appoint.”

10. In August 2015, Suffolk Life responded to further complaints raised by Mr Y, on the issues of: insurance costs; rent arrears; surrendering the lease; fees; and customer service.

11. In June 2017, Suffolk Life appointed Curle Stewart, solicitors, to handle correspondence with Mr Y. At this point Suffolk Life’s position was:

“They [Suffolk Life] would prefer to reach an agreement for the sale of the premises, but in order to do so they require the information and documentation previously requested.”

12. The information and documentation requested was:

“1. confirmation as to the identity of the party in illegal occupation of the premises and a copy of any sub-lease or licence;

2. a statement of rents collected from any party in occupation of the premises during the term of the lease to date;

3. a schedule of all improvement works carried out at the premises, together with receipted [sic] vouching and confirmation as to the classification of each item as: (i) repairs under the lease; (ii) tenant's improvements; or (iii) works which are heritable in nature and could be regarded as landlord's works;
4. confirmation as to the identity of the proposed purchasers;
5. proof of funding for the purchase; and
6. a copy of the proposed joint remit to F G Burnett (or any other agreed valuer) including a request for comment on the condition of the premises pursuant to the lease and any works carried out since commencement of the lease if that is to have a bearing on the overall deal.

As previously confirmed, any sale will need to take account of rent arrears existing at the date of such sale, together with aggregate amounts on overdraft of the SIPP accounts amounting to approximately £38,000 and aggregate fees to be debited amounting to approximately £27,000."

13. Over this period TPAS sought to assist with resolving the complaint. In the course of this, Suffolk Life told TPAS that rent owed, as at 15 July 2017, was £330,000, a figure that Mr Y disputes.
14. On 1 January 2018, Mr Y submitted a schedule of complaints to The Pensions Ombudsman.
15. On 9 May 2018, RBS was granted a possession order by the Sheriff.

Summary of Mr Y's position

16. I have grouped together Mr Y's points of complaint below. Suffolk and SL are references to Suffolk Life.

Rent and Charges:-

- The primary issue is that Suffolk Life has failed to collect rent and Mr Y has been charged in order for it to provide this service.
- By not taking action to recover the rent, Suffolk Life has not acted in the best interests of Mr Y or the Investors.
- The issue of the lease is not a matter between Mr Y as a SIPP member and Suffolk Life as the SIPP provider. It is a matter between Mr Y as a tenant and Suffolk Life as landlord. This is a fundamental distinction. Any reference to the lease is irrelevant to the complaint as the complaint has been raised by Mr Y as a SIPP member.

- “Is it the case that SL have invoiced the Contributors annually and that primarily for collection of rents?
- Is it the case that SL have never ingathered any rents?
- Is it the case that in a mail of 6th March 2017 at 15.36.37 GMT Messrs Curle [Suffolk Life’s appointed solicitor] indicated that their sole involvement was to deal with the arrears of rent?
- Is it the case that since 6th March 2017 at 15.36.37 Messrs Curle have done nothing to deal with the arrears of rent?”

Distribution of information:

- “Is it the case that Suffolk have on several occasions sent details of some of their other client’s portfolios to Mr and Mrs [Y] two of the contributors?
- Is it the case that Messrs Curle sent a recorded delivery letter to [Mr Y] addressed to his former dwelling house? This letter was opened by the occupier and contained confidential information relating to a calling up notice for the Hotel by RBS.
- Is it the case that in relation to H [the above complaint] above Suffolk had years before refused to accept a phone call intimating a change of address for [Mr Y] and instead insisted on getting written confirmation of the address change? This was duly given by return and acknowledged by Suffolk on 6th July 2015 ...”

The loan:-

- Suffolk Life’s inability to provide a statement of the amount to be deducted from a sale of the Property has prevented the settlement of the outstanding issues and it makes it impossible for the Investors to move forward.
- Pragmatism in this situation is necessary, but Suffolk Life has deliberately refused to allow the situation with the loan to be regularised. The investors will meet any costs associated with regularising the loan in order to prevent a forced sale which is in nobody’s interest.
- Suffolk Life are exploiting the situation to its perceived advantage in order to receive the net proceeds. With Suffolk Life’s consent, an agreement with the lender could be reached and a controlled sale could go ahead, which is in the interests of all the investors.
- Crowd funding was in place to purchase the Property, but this fell through because Suffolk Life did not clarify the amount that would be paid out to the investors
- “Is it the case that Suffolk/Messrs Curle have repeatedly asked the contributors for details of the RBS loan over the property? Such information being clearly only available to the borrower Messrs Suffolk.

- Is it the case that Messrs Curle on being informed that their client was the only party who could access the Account realised their mistake and sought to get that Account information from RBS?
- Is it the case that Messrs Curle then thought they had obtained such information from RBS in an attachment to an email from that Bank?
- Is it the case that Messrs Curle then forwarded that attachment to Messrs Stronachs [solicitors acting for Mr Y] without reading it?
- Is it the case that the contributors have still not been provided with the details of the RBS loan from its inception?
- Is it the case that the RBS loan has rarely been reported accurately to the contributors in the Annual Statements supplied by Suffolk?
- Is it the case that SL have deliberately sought to thwart any attempts to secure a temporary extension to the loan with RBS which was designed to allow time to resolve some of the clear issues between the parties?
- Is it the case that RBS proceeded with their court action very reluctantly but directly as a result of SL's failure to agree to any temporary loan extension?
- Is it the case that SL/Messrs Curle were fully aware that failure to agree a temporary loan would result in an implementation of the Calling Up notice and a consequent forced sale position? This resulting in further considerable losses not only to the contributors but also the other owner of the property.
- Is it the case that decree has now been granted and still SL are still unwilling to enter any discussion with regard to finding a solution to the problem?"

Lack of communication:

- "Is it the case that Suffolk have refused to communicate with the contributors or the other owner of the property since early 2017 other than through Messrs Curle?
- Is it the case that ... SL in an email to [Mrs Y] of 8th Nov 2017 (17.32) confirmed both X and Y hereof and stated that a response would be issued through SL's solicitors?
- Is it the case that such a response took weeks?
- Is it the case that even then the response in no way addressed the matters which require to be cleared up?"

Sale of the Property:

- "Is it the case that SL withheld consent to the first proposed sale of the Hotel on the primary ground that arrears of rent existed?

- Is it the case that arrears of rent are a matter as between SL as landlords and the tenants? Nothing to do with the contributors or any sale?
- Is it the case that SL have consistently withheld information from the contributors about their financial intromissions which was another reason the sale could not take place? This including details of an RBS loan to which they only had access. This subject to the caveat that they gave an ‘approximation’?”

Incorrect information provided to TPAS:

- “Is it the case that SL have deliberately given false information to the Pension Advisory Service? This particularly in relation to arrears of rent which they stated as being £330,000 when they were more than aware ---Letter from ... a Director refers!”

Insurance

- Comparable insurance arrangements have been provided to Suffolk Life as examples that its block insurance policy is overpriced, but it has provided no details of what its policy covers. Premiums for similar properties are half those charged by Suffolk Life.

Summary of Suffolk Life’s position

- The fees charged to the SIPP are appropriate and in line with the fee schedule.
- Mr Y is a lessor of the Property, obliged to pay rent of £30,000 each year. This rent, had it been paid, would have met the loan repayments. The lease had never been surrendered.
- Whilst Mr Y, having signed the lease, concluded the Property was not fit for occupation, the lease confirms that the Property was accepted “in its present condition as fit for the purposes for which they are let.” On the basis of this Mr Y is obliged to pay rent to the SIPP. By not paying rent into the SIPP, Mr Y, as a connected party, has put the SIPP at risk of potential tax penalties imposed by HMRC.
- Rent arising from the lease remains due whether Suffolk Life invoices for it or not. That is a condition of the lease and Mr Y has been aware that rent has been due.
- If the rent is not paid, and the lease is formally surrendered in line with valuation advice, then there is a significant risk that HMRC would view the rent arrears due under the lease as a value shift and an unauthorised payment.
- Mr Y has sub-let the Property against the terms of the lease to an unknown party and Mr Y is not forthcoming on information about them. As there is no contract between Suffolk Life and that tenant, Suffolk Life cannot request rent from them. As

such Suffolk Life will not accept responsibility for any losses arising from this situation.

- In order for Suffolk Life to take action against the sub-tenants, Mr Y and the co-investors need to clear the overdrafts and pay the outstanding fees as the SIPP will need funds to cover the legal costs. Once corrected, Suffolk Life will begin legal proceedings.
- The Property has not been repossessed due to the ongoing communications with Mr Y and the cost of legal action. In addition, Mr Y has not provided details of the sub-tenants and it is difficult to obtain possession of a hotel which operates around the clock. It has been thwarted from taking action due to the lack of funds and the circumstances. The investors have had the money to pay the rent, but have not paid them into the SIPP, stopping Suffolk Life from paying the mortgage.
- Mr Y and his co-investors have made direct payments toward the loan, which should have been made by Suffolk Life.
- Suffolk Life had received legal advice in relation to RBS' court action to allow it to sell the Property. Suffolk Life was advised that without clearing the balance on the loan, there was no reasonable defence from the legal proceedings.
- Suffolk Life could not actively market the Property for sale because there are no funds available within the SIPP to pay third parties. Since 2010, fees have accrued separately to the overdraft.
- Suffolk Life would be prepared to approach its insurer to discuss a possible price match if Mr Y was able to find a cheaper quote on the same basis. Mr Y has never provided a quote in order to consider a price match.

Conclusions

17. Mr Y has expressed his concern that any determination should establish the facts prior to reaching a decision. I am satisfied that I have. Mr Y has been given the opportunity to comment on all the arguments presented by Suffolk Life, and he has provided substantial representations which have all been reviewed. In reaching my decision I am not relying solely on Suffolk Life's account and have reached the findings below on the basis of all of the evidence provided.

Rent and Charges:

18. Mr Y has questioned the fees applied by Suffolk Life and whether it has been fulfilling its duties in return for them. I can see from the statements that Suffolk Life has applied various charges to the SIPP; an Annual Property Facility Fee; an Annual Fee; an Overdraft Fee; and, a Property Management Fee.

19. Mr Y highlights that Suffolk Life has never collected any rent, which it ought to have been doing in return for its fees, in particular, the Property Management Fee. The implication is that Suffolk Life is being paid to gather rent and ought to have been taking active steps to do so.
20. Whilst I can see Mr Y's point, the lease of which Mr Y is a signatory, and which I cannot ignore despite Mr Y's stance that I should, does not require invoices to be issued and the responsibility is with the Tenants (Mr Y and his business partner) to proactively pay to the SIPP the necessary rent.
21. Additionally, the Property Management Fee also includes other responsibilities such as insuring the Property and liaising with the tenant over other matters. Although Suffolk Life has not been actively invoicing Mr Y (as the tenant), it is clear that it has been communicating with him about the rent over a number of years and more recently it has appointed a solicitor to communicate with him on the issue.
22. In this context, I consider the fees, which in the absence of any liquidity within the SIPP have just accrued as a debt, are justifiable.
23. Further, given Mr Y has been aware of the lease, and could at any time have taken steps to address the rent situation, it seems doubtful that an invoice would have changed the position.
24. Mr Y has questioned Suffolk Life's solicitor's inability to deal with the arrears of rent, but that stems from his refusal to answer the questions put to him or pay the rent due to the SIPP. Despite Mr Y's assertion that the solicitor has done nothing to deal with the arrears of rent, I can see that the solicitor was in contact with him on this specific issue, and, in fact, it appears to be Mr Y who has done nothing to deal with the arrears of rent.
25. Mr Y has said that if the solicitor had communicated to him as a tenant, and at his address, then he would have responded comprehensively. Mr Y has not disputed that he received the solicitor's correspondence. He has chosen to distinguish between his capacity as a tenant and as a SIPP member. I consider that if Mr Y received the correspondence, as a responsible tenant and with his interest in the matter as the SIPP member, he ought to have responded to the issue.
26. It is arguable that Suffolk Life ought to have started legal proceedings against Mr Y, as a tenant, earlier in order to recover the rent arrears, a route I understand it is now pursuing. However, the SIPP has had no cash reserve and has for many years been overdrawn, met none of the fees accruing or made mortgage repayments. There have been no funds available for the SIPP to pursue this route. If Mr Y wished to pursue himself as the tenant through the courts, he needed to fund the SIPP to enable it to do so, but he did not.
27. Suffolk Life has also highlighted the difficulty of evicting tenants from a hotel that is open every day of the year, with paying clients. Any legal action would be costly and

would also involve evicting the sub-tenant that Mr Y has said to this Office was put in place to manage the hotel.

28. Overall, I view the rent situation as less than ideal, Suffolk Life could have done more to recover the rent due earlier. But the evidence shows that it has been in regular communication with Mr Y on this issue and he, as the tenant, is aware of his obligation to pay rent, which he has not been doing. I have seen no evidence that the lease has been terminated, and whilst there was an agreement to cap recoverable rent in 2008 to £10,000, that was only applicable to the rent due at that point.
29. Since 2008, on the basis of the lease, the SIPP has been due a pro rata share of £30,000 rent per year. Mr Y may feel aggrieved that this has not been chased more vigorously, but to do so would only ultimately have cost him more and as it stands, I cannot see that he has suffered a financial loss. At any point Mr Y has been able to wholly mitigate against the potential costs by meeting his obligations as set out in the lease.
30. In the meantime, Mr Y has had the benefit of the income from the Property that ought to have been paid into the SIPP. I consider it unreasonable for Mr Y to complain that Suffolk Life has taken too long to pursue a debt against him when he is the debtor and could have brought the rent arrears under control at any time.
31. Also, as the recovery of the debt is now subject to a limitation defence, Mr Y may overall be better off as the recoverable rent is capped.

Distribution of information:

32. Mr Y has said that he received details of other Suffolk Life client's portfolios in error and correspondence addressed to him has been sent to an old address of his. He has highlighted that this correspondence contained confidential and commercially sensitive information.
33. These do appear to be errors on Suffolk Life's part, and are likely to have caused distress and inconvenience, this matter is addressed in paragraph 38 below.

The loan:

34. Mr Y has questioned Suffolk Life's approach to the mortgage against the Property, asking why it has not engaged with his proposal to extend the borrowing. He has highlighted the implications of this, being that the loan was called up.
35. Mr Y had been seeking to temporarily extend the borrowing to allow time to resolve some of the issues and avoid the bank issuing a calling up notice on the Property. Mr Y says that Suffolk Life thwarted his attempt to achieve this and as a result, the bank went ahead with the calling up notice and now has a repossession order.
36. I have considered what Mr Y has said, but I cannot see why Suffolk Life would agree to extend the borrowing where it has been entirely unable to pay the current

mortgage commitment due to the lack of rent, or any indication that the rent arrears would be made good. The SIPP Terms and Conditions state:

“10.17 We reserve the right to refuse to arrange a loan if:

- a. we consider that the rental income from your SIPP's share of the property is insufficient to cover ongoing costs...”

37. There was therefore, no obligation on Suffolk Life to extend the borrowing given the rent situation.
38. Mr Y has also complained about inconsistent information provided by Suffolk Life as to the amount owed and apparent uncertainty over who has access to the loan account. The inconsistent information about the actual loan amount is likely to stem from the fact that the annual statements issued by the bank to Suffolk Life were not aligned with the annual statements issued by Suffolk Life to Mr Y. Therefore, Suffolk Life would be basing the outstanding loan on an out of date mortgage statement, and in the meantime, Mr Y (or others) appear to have been making unilateral payments towards the mortgage without Suffolk Life's knowledge.
39. Given Suffolk Life was not making the repayments, although it ought to have been, and as far as I am aware, Mr Y was not informing it of any interim payments he (or others) were making, it does not surprise me that the information on which it was acting did not reflect the correct position. Given the unorthodox way Mr Y was paying off the mortgage, and also paying no rent to the SIPP, there were always going to be inconsistencies in what Suffolk Life was aware of and could communicate in its annual statements.
40. Mr Y has recently reiterated that his objective, along with the other investors, is to refinance and regularise the mortgage in order to avoid a forced sale. Whilst I appreciate this is Mr Y's objective, Suffolk Life has been consistent that this issue cannot be progressed whilst the wider issues with the SIPP remain outstanding. Given the circumstances, I find that Suffolk Life's position is reasonable.

Lack of communication:

41. Mr Y has questioned Suffolk Life's appointment of a solicitor to handle its communication with him. Having considered the history of the relationship between the parties, I am of the view that it was reasonable for Suffolk Life to appoint solicitors to communicate on its behalf. The relationship had clearly broken down and Suffolk Life's direct appeals to Mr Y were not successful.
42. Mr Y has questioned a delay on the part of the solicitor in responding to an email his wife had sent. Mr Y says it took some weeks for a response to be received. If Mrs Y has a complaint about the lack of response to her email, she can address that to Suffolk Life or the solicitor. I am not going to comment on a potential complaint from a separate individual (a distinction Mr and Mrs Y have in the past sought to maintain) as a part of Mr Y's complaint.

43. Notwithstanding that, even if there was a delay, Mr Y has not incurred a financial loss as there appears to have been no movement on the situation since then.

Sale of the Property:

44. Mr Y has complained about the lack of progress towards selling the Property and blames Suffolk Life for stopping this from proceeding. Under the Terms and Conditions of the SIPP, Suffolk Life states:

“10.73 Where a tenant is a connected party and there are arrears under the tenancy agreement, we will only start the sale process if the arrears are settled or the buyer has agreed to purchase the arrears. Where a transfer to another pension scheme is requested we will notify that pension scheme of arrears relating to the property.”

45. Given this, and the fact there are rent arrears, I can see no reason to find that Suffolk Life is obliged to sell the Property.

Incorrect information provided to TPAS:

46. Mr Y has queried the level of rent arrears that was communicated to TPAS whilst it was involved in the complaint. Suffolk Life informed TPAS that rent arrears were at £330,000, but Mr Y disputes this. From what I can tell, the rent arrears quoted to TPAS were in excess of the amount they could possibly be, but nevertheless, I cannot see how this has caused Mr Y any financial loss. Whilst Mr Y has suggested that by not providing the correct information a delay has been caused, which will ultimately result in a financial loss, I cannot see how this matter would have been resolved earlier if accurate information had been given to TPAS. I consider it more likely than not that Mr Y's dissatisfaction and decision not to pay the rent arrears would not have been different, even if a more accurate figure of arrears had been provided to TPAS. Therefore, I do not find that it is a direct contributory factor in the length of time it is taking for the issues to be resolved.
47. Mr Y has also argued that Suffolk Life's decision to object to my consideration of the case, on the basis of jurisdiction, was a deliberate attempt to delay the resolution of matters. Whilst I appreciate that process was frustrating for Mr Y, I have to be mindful of whether I have jurisdiction over the complaints brought to me as a matter of statute. It is legitimate for a respondent to object to my consideration of a case if it has reason to think my remit is being exceeded, even if that adds to the overall time it takes for a case to be determined.

Insurance

48. Suffolk Life provided Mr Y with details of the price matching criteria for the current block policy, in a letter dated 20 August 2015, and this matter was discussed in earlier correspondence. Suffolk Life has invited Mr Y to provide comparable valid quotes to demonstrate that insurance could be arranged at a better price elsewhere,

and its insurer has confirmed that it would price match a quote made on the same basis.

49. However, whilst Mr Y has given anecdotal accounts of cheaper insurance on similar properties I have seen no evidence that formal quotes have been sourced by Mr Y or provided to Suffolk Life. I therefore do not agree that there has been any maladministration on the part of Suffolk Life on this issue. If Mr Y wishes for an alternative price for insurance to be considered I do not think it is unreasonable for him to provide the formal quotes as requested.

Distress and inconvenience:

50. Of the complaints submitted by Mr Y, a couple stem from errors made by Suffolk Life. Post has been incorrectly addressed and TPAS was given incorrect information as to the extent of the arrears. These errors did not cause Mr Y a financial loss but may have caused some distress and inconvenience. Where distress and inconvenience has been significant, I typically award £500 in recognition of this.
51. In Mr Y's case, even taking account of the confidential and commercially sensitive information contained in the correspondence, I am not persuaded that the distress and inconvenience caused meets the criteria of significant non-financial injustice, and an apology is an appropriate redress.
52. I uphold Mr Y's complaint in part only.

Directions

53. Within 21 days of the date of the Determination Suffolk Life shall issue a letter of apology to Mr Y acknowledging the following errors:-
- Sending information relating to another client to Mr Y;
 - Sending Mr Y's information to his old address; and
 - Sending TPAS an inaccurate figure with regard to the rent arrears.

Anthony Arter

Pensions Ombudsman
30 April 2019