

Ombudsman's Determination

Applicant	Mr S
Scheme	PY Self Invested Pension Plan P301261 (the Plan)
Respondent	Curtis Banks

Outcome

1. I do not uphold Mr S' complaint and no further action is required by Curtis Banks.

Complaint summary

2. Mr S has complained that the property assets held in the Plan have been mismanaged by Curtis Banks, which has resulted in a loss of rental income for the Plan.

Background information, including submissions from the parties

3. In April 2009, at age 60, Mr S resigned as a director of Gorman Evans Ltd (GEL) and sold his shareholding to a co-director, Mr G. Mr S continued to be a member of the Plan with Mr G and a Mr T. Mr S and Mr G each had a 25% share of the Plan, and Mr T had a 50% share.
4. Crescent Trustees Ltd (the Plan trustee) owned Emstrey House. This was a commercial property that was leased to and occupied by two companies: GEL and a company owned by Mr T. GEL's lease was subject to a notice period of 12 months.
5. On 25 December 2013, GEL's lease expired, but it continued to occupy the premises. There was subsequent correspondence between the Plan trustee and leaseholders about new leases, but no new leases were drafted, engrossed and signed.
6. Under the Landlord and Tenant Act 1954, GEL remained in the premises on existing terms, except that under that legislation the notice period for either party to end the tenancy was reduced from 12 months to three months.
7. In June 2015, Curtis Banks replaced Pointon York (PY) as the Plan administrator when Curtis Banks acquired PY's pension scheme clients.

8. Curtis Banks' terms and conditions included a statement that it did not accept any liability for any loss arising from a commercial property investment. PY informed Curtis Banks at that time that the Emstrey House lease had expired and was currently being held over, with the agreement of the relevant parties.
9. On 27 July 2016, PY responded to an enquiry from Mr S that:

“the lease expired in December 2013 – the tenant has been deemed as “holding over” under the Landlord and Tenant Act; there are no outstanding rent reviews.”
10. Mr S received a copy of a revised rental valuation in December 2016.
11. In 2017, Mr S was involved in correspondence with Curtis Banks regarding the need for the Plan trustee and members to appoint different solicitors before new leases could be put in place.
12. At the end of September 2017, GEL vacated Emstrey House, and merged its business with another company located elsewhere. Mr G told Mr S that as no lease was currently in force, only three months' notice was required for GEL to end the tenancy. That period of notice was then given to the Plan trustee.
13. In February 2018, Mr S formally complained to Curtis Banks that his 25% share of the Plan would lose 25% of up to nine months' rental income, unless a new tenant was found, and also business rates for Emstrey House would become payable by the Plan. He asked Curtis Banks to pay him financial compensation for what he described as “a potentially significant but avoidable loss”.
14. Curtis Banks replied that GEL had a right to remain in occupation, but had no obligation to sign another lease. Mr S replied that Curtis Banks was not acting in his interests by allowing that situation to continue.
15. On 21 February 2018, Curtis Banks sent a letter to Mr S, confirming that it would investigate his formal complaint and aim to resolve it and write again within 4 weeks. On 19 March 2018, Curtis Banks sent an identical letter to Mr S.
16. Curtis Banks issued its response to Mr S' formal complaint on 17 April 2018. Curtis Banks said that it was an execution only administrator, and commented that:

“It is not uncommon for leases to be held over allowing the existing tenant to remain in occupancy, after the end date of a lease. This can be seen as a cost saving way of maintaining occupancy, as there are no legal costs incurred to establish a new lease, and no Curtis Banks' fees to be settled for arranging this.”
17. Curtis Banks added that it could not force the occupier to sign a new lease agreement. If the lease had not been held over in 2014, the tenant would have had to vacate the premises then, so no further rent would have been payable to the Plan. Curtis Banks also said it had received no instructions for a new lease since its

appointment in 2015, so it was not its fault that the premises were unoccupied and, as a consequence, incurring expenses.

18. On 23 April 2018, Mr S asked whether there was evidence to show that the Plan members had agreed to the lease being held over. Mr S also complained that Curtis Banks had service level problems, and had issued an incorrect valuation.
19. Curtis Banks acknowledged Mr S' letter and said it would let him know its findings. Mr S sent reminders to Curtis Banks on 31 May and 29 June 2018, but it did not respond.
20. Mr S then contacted us. He mentioned that he did not have any particular expertise in leases.
21. Curtis Banks wrote back to Mr S on 16 August 2018, enclosing emails dating from 2016, which referred to the expired leases, and a proposal that a new lease should have started with effect from 1 January 2014. Curtis Banks also said that Mr S had been copied in to emails with relevant estate agents in 2016.
22. Curtis Banks also sent this office a copy of its property guide for the Plan. Section 1 points out the risks of property investment, including:

“While a regular stream of rent can help increase or maintain the fund value this is not guaranteed as tenants may vacate, fail or you may have to accept a lower rate of rent if the market has fallen. If you have difficulties with the tenants (e.g. if your tenant ceases trading or goes into administration or liquidation or breaches the terms of the lease) your pension scheme may incur considerable costs associated with the recovery of rent or may ultimately have to bear the loss of this income.”
23. No new tenant was found and no further rent was received in 2018 in respect of the part of Emstrey House that GEL had vacated.

Adjudicator's Opinion

24. Mr S' complaint was considered by one of our Adjudicators who concluded that no further action was required by Curtis Banks. The Adjudicator's findings are summarised below:-
 - Curtis Banks had taken over the administration of the Plan in 2015, after the GEL lease had expired, but it was not responsible for acts or omissions by PY before then.
 - Mr S considered that Curtis Banks should compensate him for his share of nine months' lost rental income in 2018, following the ending of GEL's lease. However, GEL was a third party not controlled by Curtis Banks. Therefore, it could not compel GEL (or any other third party) to enter into a new lease at Emstrey House. Without a new lease, the 12 months' notice period did not

apply. A notice period of three months applied instead, and rent had been paid to the Plan correctly for that period. After that period expired, no further rent was due as the premises were vacated.

- As was explained in Curtis Banks' property guide, vacancies leading to non-payment of rent were an inherent risk of any property investment. Curtis Banks' terms and conditions precluded any liability for loss relating to a commercial property.
- If Mr S was unaware of the legal implications of holding over the lease until Mr G explained the position to him in 2017, that was not Curtis Banks' fault. Mr S could have sought professional advice on the matter, but did not do so. As an execution-only administrator, that was not Curtis Banks' responsibility.
- In the Adjudicator's view, the time that Curtis Banks had taken between April and August 2018, in responding to Mr S' complaint was too long, and amounted to maladministration. However, he did not consider it to be of such a significance as to justify awarding financial compensation to Mr S.
- It was therefore the Adjudicator's opinion that this complaint should not be upheld.

25. Mr S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr S provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr S for completeness.

26. In summary, Mr S complained that after its appointment in 2015 Curtis Banks should have been more pro-active in progressing the completion of new leases, and it should not have allowed the holding over to continue indefinitely as he said there was no evidence that all parties were happy with the position. He also commented that delays in implementing a transfer from the Plan to his new pension arrangement in 2019, were symptomatic of the poor level of service provided to him by Curtis Banks.

Ombudsman's decision

27. Mr S said that Curtis Banks should have been more pro-active. However, it was an execution-only administrator. Curtis Banks was reliant on receiving instructions from the Plan trustee and members to obtain property valuation advice and pay solicitors to draft and engross a lease for execution. It could not remedy the position unilaterally.

28. Our investigation is evidence-based. Mr S has not produced any persuasive evidence that Curtis Banks failed, through its own fault, to finalise a new lease for GEL.

29. Looking back, the reason that there was no rental income for the Plan in 2018 was that there was no tenant. That was because the Plan trustee and members had been unable to find one after GEL decided to vacate the premises, giving the appropriate

length of notice under the relevant legislation. If GEL had decided to remain on site the rental income would have continued to be payable. Curtis Banks cannot be held responsible for these factors.

30. In my view there was an insufficient link between Curtis Banks' acts and omissions since 2015 and the financial loss that Mr S is claiming.
31. Mr S also said that there was no evidence to show that the holding over position was considered satisfactory by the Plan Trustee, tenant and members. However, as the applicant, it is for Mr S to provide evidence to support his case. He has not submitted evidence to show that Curtis Banks were instructed on a new lease and failed to carry out its instructions. Until such time as a new lease was executed, the three months' notice period continued to apply and Curtis Banks could not unilaterally change that. Even if a new lease had been prepared, there is no guarantee that the parties would have signed it before GEL vacated the premises.
32. Therefore, I do not uphold Mr S' current complaint. If Mr S wishes to submit a formal complaint about the time taken to transfer from the Plan earlier this year, that is a separate matter and he will need to go through the usual complaint procedure.

Anthony Arter

Pensions Ombudsman
20 August 2019