

## Ombudsman's Determination

Applicant	Mr N
Scheme	Suffolk Life Pension Plan (the <b>Plan</b> )
Respondent	Suffolk Life

## Outcome

1. I do not uphold Mr N's complaint and no further action is required by Suffolk Life.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mr N says that due to Suffolk Life's incompetence and neglect, it lost the guarantor to a property held as an asset of the Plan. As a consequence of this, the sale of the property was inevitable due to a breach of covenant. The sale of the property was at the time when the market slumped which resulted in his pension fund suffering a catastrophic loss.

## Background information, including submissions from the parties

4. In 2004, Mr N set up a Self-Invested Personal Pension (**SIPP**) with Suffolk Life and invested £159,769.97. On the application for setting up the Plan, he put down Nonsuch Publishing International Limited as his employer.
5. In 2006, a property (the **Property**) was purchased for £460,000 as an asset of the Plan with a mortgage of £300,000.
6. The 'Property form' which Mr N completed in 2006, advised him to read the guide to property and insurance notes before completing the form. Suffolk Life's Property Guide booklet, dated September 2010, sets out, on page 16 under the heading 'Management', the management service which it provides which includes: invoicing and collecting rent; arranging property insurance; renewing lease; making payments of loans charged on the property; arranging rent reviews and re-valuations; and providing suggestions on how to deal with legal complications with tenants. There is nothing in this guide which states that Suffolk Life is responsible for taking legal action against a tenant or a guarantor on default of rental payments.

7. Also on page 16 of the Property Guide, under the heading 'What you do', it states that the member must accept ultimate responsibility for getting the best out of the property pension investment.
8. In Section 6 of the 'Property form' under 'Authorisation' it states:

"I undertake to be bound by the provisions of the guide to the property, which I have read and understood.

...

I agree to indemnify Suffolk Life in respect of all liabilities, losses, damages and costs which they may incur in acquiring and holding this property in my pension fund."
9. In October 2010, the lease on the Property, which was held by Nonsuch (Ireland) Ltd (**NC**) was assigned to M Wearing & C Neal (the **Tenant**). NC was the guarantor for the Tenant on the Property.
10. In December 2011, the Tenant wrote to Mr N saying that it could not afford the rent for that quarter and decided to sell its business. It cancelled the direct debit for the rent. The Tenant told Mr N that the rent would be paid once the business was sold.
11. In January 2012, Suffolk Life sent the Tenant a letter informing it that as the lease was still in place it was still liable for the rent. Suffolk Life asked the Tenant to make contact so that the settlement of the arrears of the rent could be discussed as soon as possible.
12. In February 2012, Suffolk Life wrote to NC stating that it had agreed to act as guarantor when the lease for the Property was assigned to the Tenant. Suffolk Life said that this meant that if the Tenant was unable to pay the rent, Suffolk Life could rely on NC, as guarantor, to settle the rent arrears. Suffolk Life asked NC to pay the rent arrears of £6,875 outstanding for the period 25 December 2011 to 24 March 2012. Suffolk Life added that they had tried on numerous occasions to contact the Tenant, but had no response.
13. In May 2012, Mr N suggested to Suffolk Life that the Tenant should be pressed one last time for the outstanding rent and, if no payment is received, enforce the guarantee against NC.
14. In June 2012, Mr N again asked Suffolk Life to apply pressure on NC and Suffolk Life sent both the Tenant and NC a chaser for the outstanding rent.
15. In July 2012, Suffolk Life instructed solicitors, Birketts, to take legal action against NC and the History Press (**HP**) (the owners of NC).
16. Birketts responded to Suffolk Life saying that it would ask NC/HP to make payment within seven days. If they failed to pay, Suffolk Life would have to serve notice on NC

to demand payment of the rent arrears. Birketts explained that formal notice needed to be served on NC within six months of the arrears falling due in order to validly bring a claim against it, if it was necessary to commence court action; if the rent due on 25 December 2011 had not been paid, then NC could not be forced to pay those arrears because it was now more than six months after that date. For the arrears that fell due on 25 March and 24 June 2012, these were still within the six months of those dates and so the guarantor can be asked to pay those arrears and also asked to pay for the insurance.

17. In August 2012, Birketts served formal notice against the Tenant and NC.
18. In September 2012, Birketts confirmed to Suffolk Life that court proceedings would be issued against the Tenant and NC. Birketts also said that the Tenant owed rent arrears of £21,954, being the rent that fell due on 25 December 2011, 25 March 2012 and 24 June 2012 together with the insurance that fell due on 10 May 2012.
19. In October 2012, Birketts informed Suffolk Life that NC had gone into liquidation within days of submitting papers to the court. Birketts advised Suffolk Life to apply to the liquidators of NC, although it was doubtful that the application would be successful.
20. In June 2014, the Property was sold for £368,000. After deducting auction and legal fees of £11,802.90, the amount outstanding on the mortgage, the overdraft and Suffolk Life's fees, the value of Mr N's fund was £100,120.
21. Mr N made a complaint to Suffolk Life. On 20 November 2013, Suffolk Life responded saying that its role in the everyday management of property held in respect of investors' SIPP's is as set out in the Property Guide. It is the legal owner of the Property (on behalf of the investors' SIPP's) and it takes on the legal responsibilities of ownership. Although it does not act in the capacity as a formal property manager, it provides many of the recognised property management services such as invoicing rent, collection of rent etc. This does not include any costs incurred in taking action to recover rent; legal advice in connection with any tenancy issues or relating to the property itself; and physical inspections. It was sorry that it had not chased the Tenant or NC sufficiently, and as a result there was a delay in commencing legal action to try and recover the arrears. Consequently, it offered Mr N compensation of a refund of a full year's property management fees of £735 and enclosed a cheque for £150 for the concern it had caused him.
22. Mr N's comments are set out below.
  - The Plan was his sole investment – he did not have any other investment to fund the Property. He had lost £150,000 on his investment as a result of Suffolk Life's delay and inaction in this matter. He is claiming compensation of £239,000, which is £150,000 plus 6% interest;
  - He is extremely familiar with NC as it is a company he had formed.

- Under the Landlord and Tenant (Covenants) Act 1995 liability of the tenant and its guarantor ends on any lawful assignment of the lease. Neither the Tenant nor NC had assigned the lease so both remained liable.
- The Tenant had written to him, Suffolk Life and NC to say that it could not pay the rent. Therefore liability immediately fell on the guarantor. Suffolk Life, as legal owner of the Property should have continued to press the Tenant. Suffolk Life had a property department with people skilled in property matters, it should have asked NC to pay the rent and, if no payment was received, it should have gone through the normal collection routine.
- On learning that Suffolk Life had not approached NC, he asked it to do so. Eventually, but not immediately, HP asked Suffolk Life for more information but Suffolk Life did not respond.
- He had by telephone urged Suffolk Life to take action to collect the rent due. In the meantime, from January 2012 onwards HP had started a chain of actions which ended with the liquidation of NC in October 2012. Suffolk Life's incompetence had given HP the necessary time it needed.

23. Suffolk Life's comments are set out below.

- It does not guarantee the collection of rent from any tenant or guarantor. Its fees for property management is for invoicing and chasing for rent from a tenant. There was a period between January and June 2012 where it failed in its responsibility to chase rent effectively, and refunded to Mr N a full year's property management fees of £735.
- The delay may have affected the time taken to pursue the guarantor, but it cannot accept responsibility for NC going into liquidation. Considering the financial position of NC, there was no guarantee that it would have been in a position to make any payment. The claim made for the rent arrears through the liquidator was also unsuccessful.
- Its ability to take action beyond writing letters requesting payment is limited by the funds available in Mr N's SIPP. Legal action through a solicitor can be considerably costly. Mr N had no funds and refused to make any available to take appropriate action.
- It rejects Mr N's claim that he lost £150,000, for which he believes that it is responsible. The Property was sold because he refused to make funds available to settle the monthly mortgage payments. With no paying tenant in place, it supported his SIPP for two years by paying the loan via an overdraft. It did this to prevent the bank from taking possession of the Property with a view of selling it at a rate that would only clear the amount owed to the bank.

- Mr N took no action during this period to make funds available and often acted in an obstructive manner. When the Property was marketed for sale, he inflated the asking price by £100,000. Unsurprisingly, no buyers could be found for the Property.
- At the point where it decided that it could no longer support the payment of the loan, the Property was sold through auction. Mr N owed it £62,704.22 in overdraft and a further £2,505 in outstanding fees, making a total debt of £65,209.22.
- At the point the Property was sold, the unpaid rent was £55,000. Therefore, even if the Tenant had paid the rent, there would still have been a considerable short fall in funds which would have led to the sale of the Property.

## Adjudicator's Opinion

24. Mr N's complaint was considered by one of our Adjudicators who concluded that no further action was required by Suffolk Life. The Adjudicator's findings are summarised briefly below.

- Suffolk Life could have been more proactive in chasing NC and the Tenant. However, there is no evidence to show that if Suffolk Life had chased the Tenant and NC more than it did, the outstanding rent would have been paid.
- The rent was not paid because the Tenant could not afford to pay it. To add to this, NC went into liquidation in October 2012 which meant that the rent arrears could not be paid. There is no evidence to show that even if Suffolk Life had started legal proceedings earlier, NC would have paid the rent arrears before it went into liquidation.
- Suffolk Life could only have taken legal action to recover the outstanding rent with Mr N's agreement and provided there were sufficient funds to pay for the legal cost. As there was no rental income, the monthly mortgage payments were paid via an overdraft. Suffolk Life say that Mr N did not make any funds available, therefore there were no funds to cover any legal costs. Birketts legal fees were paid from the proceeds of the sale of the Property.
- Mr N claims compensation of £239,000, which he says is a loss of investment of £150,000 plus 6% interest. However, Mr N's loss is due to: (1) the amount owed in outstanding rent and insurance was £21,954; (2) the fact that the Property was sold for £92,000 less than the price for which it was purchased; and (3) the fact that after the Property was sold a total deduction of £267,878 was made to cover the auction and legal fees, the outstanding mortgage, the overdraft and Suffolk Life's fees. Suffolk Life cannot be blamed for the Property being sold for less than the purchase price; or for the payment of the auction and legal fees, the outstanding mortgage, the overdraft and Suffolk Life's own fees after the Property was sold.

- Even if it can be shown that Mr N had suffered a loss as result of the delay by Suffolk Life to chase the Tenant and NC for the rent arrears, the 'Property form' he signed in 2006 shows that he indemnifies Suffolk Life against all liabilities, losses, damages and costs.
- Suffolk Life has refunded £735 in respect of one year's property management fees on Mr N's SIPP and has paid £150 compensation for the non-financial injustice he has suffered. This is a reasonable offer and the Ombudsman is unlikely to award anything further.

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

## Ombudsman's decision

26. Mr N's comments on the Adjudicator's Opinion are set out below.

- There is nothing in the Property Guide which states that Suffolk Life is not responsible for taking legal action against a tenant or guarantor on default of rental payments. In the absence of a positive or negative element in this matter, the standard guidance is contained in the Royal Institute of Chartered Surveyor's (RICS) Practice Standards which states:

"A key role is the collection and management of sums owing by occupiers relating to rent, service charges, insurance, and any other sums due under the lease. It is important that a property manager has an established process in place to arrange for the efficient collection of these monies. This means that a property manager will:

...

(g) have a mechanism in place to notify of any default in payment or a dispute over any payment and promptly report this to the landlord in the manner agreed about such a default;

(h) have a process in place to pursue occupiers for defaults in payments;

...

4.4.1 It is recommended that the property manager agrees with the landlord how default occupiers should be dealt with; in particular, when the landlord wants to be alerted to a default. As a recommended minimum, property managers should inform the landlord as soon as the property manager feels it is sensible to instruct debt collection agencies, to take

legal proceedings to recover monies owed, or to take steps to repossess the property under the lease terms.

4.4.2 It is important for the property managers, if they do instruct a solicitor and/or a debt collection agency on behalf of the landlord, to ensure it is made clear to the debt collection agency/solicitor that the property manager is acting on behalf of the landlord and that all liabilities and costs arising from the instructions will be for the landlord's account."

- As Suffolk Life has a property management department, and has a property director, then if there is nothing in the Property Guide contrary to the RICS's Practice Standard, it must be assumed that the latter was adhered to as 'best practice'.
- The member's ultimate responsibility is not the issue. The issue is that Suffolk Life entered into a contract and failed to maintain even a modicum of reasonable practice in its management of the contract.
- With regard to indemnifying Suffolk Life for its losses, it did not suffer any loss.
- On receipt of the Tenant's letter of December 2011, Suffolk Life should have written to HP straight away about the Tenant's default on the rent and claimed payment of the outstanding rent.
- Birketts signed the formal notice against the Tenant and NC on 31 August 2012. This notice did not arrive at the Irish registered office until 12 September 2012.
- HP ran rings around Suffolk Life. If Suffolk Life had acted, as it should have acted, and issued the formal legal demand, then HP would have been stuck. If the formal claim had come through, HP's solicitors would not have taken the risk of attempting to liquidate NC. HP's solicitors only managed to do so because they could legally make the declaration that there was no claim against NC.
- NC was a viable guarantor. If HP's plan to liquidate NC had not come off, NC would have continued paying the rent even if it meant that it had to put a sub-tenant in at a lower rent.

27. I have carefully considered Mr N's points and set out below my comments.

- The Property Guide sets out the services provided by Suffolk Life in respect of the fees charged. The services do not include responsibility for taking legal action against a tenant or a guarantor on default of rental payments. Suffolk Life say that although it is the legal owner of the Property, it does not act as a formal property manager. I can see no evidence in the documentation setting up the Scheme to suggest that the services provided by Suffolk Life extend beyond those set out in

the Property Guide. I therefore cannot agree that Suffolk Life has to adhere to the RICS Practice Standards.

- The fact that Suffolk Life have a property management department does not necessarily mean that it is a formal property manager.
- Suffolk Life wrote to the Tenant for the outstanding rent, in January 2012, about a month after the latter had stated that it could not make payment. The Tenant had told Mr N that the rent would be paid once the business was sold. Therefore, at this point in time, there was no reason for Suffolk Life to believe that the outstanding rent would not be paid. A month later, in February 2012, Suffolk Life wrote NC for payment of the outstanding rent.
- Suffolk Life has admitted that it did not chase the Tenant or NC sufficiently, but this was in respect the delay to chase the Tenant and NC until June 2012. There is no evidence to show that even if Suffolk Life had chased the Tenant and NC earlier than it did, the outstanding rent would have been paid.
- The fact that Birketts signed the formal notice against the Tenant and NC on 31 August 2012 and that the notice did not arrive at the Irish registered office until 12 September 2012, is not Suffolk Life's fault.
- I cannot comment on Mr N's claims about HP's plans to liquidate NC or what would have happened if these plans had not come off. However, there is no evidence to show that NC would have paid the outstanding rent before it went into liquidation.
- Even if NC had paid the outstanding rent, it does not mean that the Property would not have been sold. The reason for the sale of the Property was because there was no rental income to cover the mortgage payments and Suffolk Life's fees. The outstanding rent, plus insurance, was £21,954. The main reasons for Mr N's loss are because the Property was sold for £92,000 less than it was bought for and the deductions that were made, totalling £267,878, to cover the auction and legal fees, the outstanding mortgage, the overdraft and Suffolk Life's fees. It was not Suffolk Life's fault that the Property was sold or that it was sold for £92,000 less than it was bought for.

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

**Karen Johnston**

Deputy Pensions Ombudsman  
31 May 2017