

Ombudsman's Determination

Applicants	Mr and Mrs N
Scheme	James Hay Personal Pension Plan (the Plan) Policy Numbers 22892 & 23794
Respondent	James Hay Partnership (James Hay)

Complaint Summary

1. Mr and Mrs N complain that James Hay, in their capacity as trustees of the Plan and intermediate landlord of the commercial property held in it:
 - failed to act in their best interests by ensuring that the service charges payable to the superior landlord, MW (NI) Ltd until its dissolution and subsequently to Shaftesbury Court Management Company Ltd (**Shaftesbury Court**) from the Plan were reasonable and fair and accurately billed to the scheme.; and
 - failed to charge the tenants of the commercial property the correct rent.
2. In order to put matters right, they would like James Hay to (a) arrange for any unjustified service charges paid to the superior landlord to be refunded (b) reduce their annual administration fees to £250 pa for each policy in the Plan (c) repay the survey fees incurred (d) maintain the rental payment at £41,000 pa (exclusive of VAT) and (e) arrange a free transfer of the Plan to another provider.

Summary of the Ombudsman's Determination and reasons

3. The complaint should be partly upheld against James Hay because they provided incorrect information about both the service charges and rent payable in connection with the scheme's commercial property asset.
4. I therefore partially uphold Mr and Mrs N's complaint against James Hay and direct that James Hay shall pay £500 in compensation to each of Mr and Mrs N.

Detailed Determination

Material facts

5. Mr N is a member of the Plan which is a Self-Invested Personal Pension (**SIPP**). James Hay is the Trustee and holder of all the Plan's assets. The main asset of the Plan is a lease on a commercial unit at floor 2 Venture Gate, a property occupied by Mr N's business.
6. Mr N occupied the commercial premises as tenant prior to setting up the Plan. He signed a 15 year lease for a commercial property with MW (NI) Ltd on 19 November 2004 (**the Lease**) and his business has occupied this property ever since. The Lease set out Mr N's rights, obligations and responsibilities as tenant of the property. It made provision for Mr N to pay an annual rent of £41,000 exclusive of VAT (until review) and a service charge calculated in accordance with "the terms of the sixth schedule of the... Lease...within 14 days after the landlord gives written notice of payment." The sixth schedule concerned the "costs, expenses, outgoings and matters in respect of which the tenant is to contribute and terms and conditions relating to payment and accounts."
7. In particular, this schedule said that:
 - the expenses incurred by the landlord in carrying out its obligations under the Lease should be reasonable;
 - the landlord should "keep proper books of account" showing the expenditure incurred under this schedule and the contributions received from the tenants which should be made available for inspection; and
 - if any dispute arose between the parties concerning this schedule, it could be referred to "an independent surveyor acting as an expert and not an arbitrator" whose "determination shall be final and binding on the landlord and tenant"
8. The Plan has held a long leasehold interest in this commercial property since 29 March 2006. Mr N entered into a sub-lease with James Hay who became the intermediate landlord of the property. Under the terms of the Deed of Variation which is supplemental to the Lease;
 - the interest of MW (NI) Ltd (now Shaftesbury Court) in the Lease was now vested with James Hay as landlord; and
 - James Hay and Mr N agreed to vary the terms of the Lease and in particular,
 - a) the term of the Lease would be extended to run until 29 March 2026;

- b) the rent review date in the Lease would be amended to the fifth, tenth and fifteenth anniversaries of the date of the Deed of Variation; and
 - c) the Lease would be “varied so that the rent until the date of this deed shall be the initial rent and from the date hereof until the 5th anniversary of this Deed of Variation, the rent shall be £49,200 pa”
- 9. A lease for the commercial property between MW (NI) Ltd as the landlord, The Salvation Army Trustee Company Ltd as the superior landlord and James Hay as the tenant (**the Indenture**) was also made on 29 March 2006.
- 10. The Indenture stated that:
 - a) its term would be for 999 years;
 - b) MW (NI) Ltd had agreed to grant a lease to James Hay “at the rent and on the terms and conditions contained in this lease”;
 - c) Shaftesbury Court was “incorporated for the purpose of “managing and maintaining” the building and the property;
 - d) MW (NI) Ltd intended on the sale of the last of the apartments or units in the building to assign its leasehold interest in the property to Shaftesbury Court;
 - e) James Hay would become a member of Shaftesbury Court; and
 - f) it was granted “subject to but with the benefit of” the Deed of Variation between Mr N and James Hay

The sixth schedule attached to the Indenture was identical to the one appended to the Lease. Paragraph 7 above therefore also applied to the relationship between MW (NI) Ltd (now Shaftesbury Court) and James Hay in their capacity as landlord and tenant respectively. In particular, there is no provision in the Indenture for James Hay to negotiate or challenge the level of service charge imposed by MW (NI) Ltd (now Shaftesbury Court). In the event of a disagreement, James Hay could only refer the matter to an external independent surveyor whose determination would be binding on both parties.

- 11. James Hay appointed CBRE Ltd on 1 August 2009 as their managing agent to assist with their duties and obligations as landlord of the commercial property. Previously Countrywide had held this role. The finite services provided by CBRE to James Hay are set out in their “Core Management Services” document. According to this, there is no requirement for CBRE to review the service charges being imposed upon Mr N by the superior landlord or to consider whether they were “value for money”. CBRE may, however, consider charging additional fees for undertaking work which fell outside its core duties.
- 12. Mr and Mrs N each completed and signed an application form and also a Member Agreement in order to set up the Plan. By doing so, they agreed to be bound by the rules of the Plan and to pay the associated Plan administration fees and charges for

the services offered by James Hay as detailed in section 14 of the Member Agreement. The notes in section 14 stated that:

- annual fees would increase in line with the rise in national average earnings; and
- charges for any additional services offered in the future may not be reflected in the Member Agreement and Mr and Mrs N should refer to the latest Schedule of Charges for current details

13. Mr and Mrs N also completed a Property Questionnaire. By signing the declaration on it, they confirmed to James Hay that they had read and understood the Property Purchase Guide and agreed to be bound by its provisions.
14. A dispute arose between Mr N as tenant and James Hay as landlord about the level of service charges being demanded for occupation of the commercial premises and whether James Hay had done enough to check and challenge these charges. James Hay maintain that Mr N currently owes the Plan a considerable amount of service charges which they have paid to the head landlord over several years. This was the scope of dispute outstanding when Mr N brought his complaint to the Ombudsman.
15. In the course of investigation into the service charges which had been levied, James Hay discovered that they had not been collecting the correct rent. The mistake was due to a failure in 2006 to increase rent recovery to £49,200 plus VAT, in line with the Deed of Variation. James Hay have admitted liability for the mistake, but pointed out that as a consequence, Mr N has also underpaid a significant amount of rent on the property.
16. James Hay considers that Mr N should have known that the rent was being underpaid because it is clear from how the Deed of Variation has been drafted that the annual rent payable would be increased from £41,000 to £49,200 plus VAT from 29 March 2006. Furthermore, Mr N received a copy of their letter dated 25 July 2005 to his solicitors which said that:

“With regard to the Lease...we note that the rent is only £41,000. Firstly, this amount does not fit in with the 130% coverage James Hay requires for a fixed rate loan in respect of the loan repayments. Secondly, whilst we understand that we are not required to amend existing leases based on the rental figure given to us in the report, this would be let at an undervalue to a connected tenant and therefore the only way of ensuring it fits with the Inland Revenue rules and the loan repayments is to increase the rent to £49,200. We note that the member is expecting this, therefore perhaps you could liaise with the member and arrange a variation of the lease on completion please.”

17. James Hay has calculated that as at November 2016, Mr N owed the Plan around £105K including VAT in service charge and rent arrears and say that this amount will continue to rise if he continues to underpay rent and fails to contribute to the service charges. They say they are prepared to pay the loss of interest to the Plan as soon as Mr N has fully repaid all the rent arrears.

Summary of Mr and Mrs N's position

18. James Hay, in their capacity as trustees of the Plan owed a duty to them as the Plan's members to act in their best interests.
19. They accept that any dispute over the amount of service charge payable is a landlord and tenant issue. But since March 2006, when the Lease was amended by the Deed of Variation James Hay has been Mr N's landlord and he no longer had any contractual relationship with the superior landlord. In their view the head landlord has adopted a systematic practice of overcharging, and James Hay as intermediate landlord should be held liable for "carelessly passing on unscrutinised service charges" to them for payment from the Plan.
20. Mr N considers that James Hay should have been aware in 2006 from the Indenture that, as landlord of the property, they would become a shareholder in Shaftesbury Court automatically, and should therefore have attended and exercised shareholders rights at Shaftesbury Court's Annual General Meetings where the service charge amounts were agreed and/or inspected Shaftesbury Court's management accounts. If it was James Hay's policy to delegate their right to participate in shareholder's meetings to Mr N, they should have done this back in 2006.
21. James Hay should now exercise their right as a shareholder of Shaftesbury Court to seek the removal of Charterhouse if it is unable to "demonstrate full transparency" of the service charges and the appointment of a new managing agent for the property.
22. Since 2012, they have asked James Hay several times to explain how the service charges have been calculated but have not had satisfactory answers. They have required the withholding of service charges and consider that the charges should therefore not have been paid out of the Plan funds.
23. James Hay's administration fees for the Plan are unfair and unjustifiable for the amount of work they actually undertake.
24. Initially they questioned whether the rent was being underpaid. In their view, the Deed of Variation was designed to effect only a change of landlord and the term of the Lease. No one explained to them that it was also intended to raise the rent. Clearly this was James Hay's understanding at the time otherwise they would not have continued to invoice the same rent of £41,000 pa plus VAT for 10 years.
25. Furthermore market rent throughout this period has never exceeded £41,000 pa plus VAT. There is no reason why Mr N should have to pay more than the market rent.

26. If that is wrong and HM Revenue & Customs (**HMRC**) requires underpaid rent for the last six years to be paid into the Plan, then in their view, an amicable solution to the underpayment issue would be for Mr N to pay four years of the additional £8,200 plus VAT into the Plan and James Hay to pay for the other two years plus the interest due on the whole underpaid amount. In their view, the "Judgement Rate" which has been 8% pa since 2009 should be used to calculate the amount due. They also suggest that Mr N's annual rent revert back to £41,000 plus VAT from April 2016 because this amount has been the maximum market rent at all relevant times.
27. James Hay's failure to collect the increased rent since 2006 has impacted on Mr N's tax liability.
28. James Hay have previously provided them with incorrect figures for the amount of Mr N's rent arrears. They consequently no longer have any confidence in James Hay's ability either to keep proper books of accounts or to supply accurate figures for underpaid rent and service charges.
29. It was only after they had complained to James Hay that they properly responded to their legitimate enquiries about the amount of service charges payable.
30. They have earmarked funds to pay the service charges and rent owed to the Plan but need to be satisfied that James Hay's figures are correct before doing so.
31. They say that:

"The level of compensation proposed and interest at bank base rate on the underpaid rent amount to a disproportionately low penalty given the level and many years of maladministration on the part of James Hay that we have had to tolerate. Moreover, we regret to note that James Hay's administration capability is still woeful as our annual statements dated 3rd January 2017 are full of omissions and errors and have been referred back to James Hay for correction. It seems that carelessness is endemic in James Hay and we can't be the only members who are suffering. We would like the Pensions Ombudsman assurance that he/she will refer James Hay to the Financial Conduct Authority for inspection of its administration processes."

Summary of James Hay's position

32. The Plan administration fees which are not dependent upon the amount or level of administration work carried out have been correctly calculated and levied in accordance with the Schedule of Charges, as amended.
33. They only granted a concession on the administration fees payable by Mrs N from April 2011 and are willing to reconsider the terms if this would help resolve this complaint. No such concession was agreed with Mr N.
34. Any dispute over the fairness of the service charges is a matter between the superior landlord and Mr N.

35. There is nothing contained in the Plan's literature or its terms and conditions stipulating that they or their agent CBRE should audit and challenge the service charge figures to protect Mr and Mrs N's interests.
36. Mr and Mrs N could instruct them to seek a review of the service charge calculations by an independent surveyor/arbitrator. Despite having this explained to them, Mr and Mrs N have not made such a request.
37. Whilst suggesting that legal action should take place against the superior landlord and Charterhouse, Mr and Mrs N have never formally instructed them to do so via their solicitors.
38. The Lease does not impose a legal obligation upon them or CBRE to attend shareholder meetings on Mr N's behalf. The rights and responsibilities placed upon them as a shareholder of Shaftesbury Court should have been notified to them by Mr and Mrs N's appointed solicitors at the time the property became an asset of the Plan. The solicitors reported no such responsibilities. If they had been alerted to this issue from the outset, any such duties would have immediately been delegated to Mr and Mrs N because it is not part of the administration service provided by them or CBRE.
39. In any case, Shaftesbury Court did not hold any shareholder meetings in 2006, 2007, 2011 and 2013. They only received formal written invitations to attend in 2009 and 2010 but these were not for Mr and Mrs N.
40. It is unclear and a moot point as to what extent the service charges payable on the property could have been reduced if Mr N had attended the limited shareholder meetings to which James Hay were invited.
41. They and CBRE have passed all queries raised by Mr and Mrs N about the service charge over to Charterhouse on a timely basis. There was little more that they or CBRE could have done because they have no influence over the terms which Mr N agreed with the superior landlord in the Lease. They are not responsible for advising/representing Mr N on matters relating to his tenancy of the property or the commercial arrangements which the superior landlord put in place for the ongoing upkeep of the property.
42. A detailed review of Shaftesbury Court's management accounts and the service charges being levied by Charterhouse on the commercial property is also not part of the service that either they or CBRE provides.
43. They cannot find any evidence to show that either they or CBRE regularly received annual Shaftesbury Court's management accounts from Charterhouse. The only such correspondence which they received from Charterhouse was in October 2010. Any subsequent accounts had to be specifically requested.

44. They and CBRE however accept that they could have provided Mr and Mrs N with copies of Shaftesbury Court's management accounts much earlier. It is unclear how this would have helped to resolve this complaint though.
45. As they are not responsible for calculating the service charge or producing the accounts, their failure to respond to Mr and Mrs N's questions about these matters does not mean that they have provided a poor service or that there has been a breach of trust.
46. An assignment of the reversionary legal interest between MW (NI) Limited and Shaftesbury Court took place on 25 April 2012. Their direct landlord is therefore now Shaftesbury Court.
47. The rental payment effective from 29 March 2006 of £49,200 pa was a market rental valuation of the property carried out using the "McQuoid" valuation basis. VAT is not included in the figure calculated using this method. Subsequent valuations revealing what may or may not represent market rent for the property are irrelevant in this case.
48. In 2014, Mr N requested CBRE to breach the terms of the Lease by withholding future service charge payments. Whilst no further payments were made to Charterhouse from the Plan during 2014, this could not be sustained. Neither they nor CBRE require the permission of Mr N to settle service charge payments from the Plan if they were correctly due under the terms of the Lease. They will now continue to pay these service charges from the Plan subject to funds being available.
49. They and CBRE have already apologised to Mr and Mrs N for providing them with incorrect information about both the service charges and rent arrears payable. They have also accepted responsibility for Countrywide's failure to invoice the increased rent after Mr N had signed the Deed of Variation but in their view, Mr N should have spotted this error at the time.
50. Mr N is bound under the terms of the Lease and Deed of Variation which he signed to pay in full the increased rent and service charges into the Plan. His debt cannot now be changed, waived or reduced without incurring an unauthorised payment under HMRC rules which they are obliged to report.
51. Mr N has not taken any of the opportunities which they have given him to put in place a plan to repay his debt. He has therefore benefitted from paying reduced rent and service charges over a considerable number of years.
52. They cannot seek the appointment of an independent surveyor to review the service charges without the written consent of Mr and Mrs N and their acknowledgement that there will be additional costs to the Plan by pursuing this course of action.

Conclusions

53. Mr and Mrs N's complaint was considered by one of our Adjudicators who concluded that no further action was required by James Hay. The Adjudicator's findings are summarised briefly below:

- The Lease which Mr N signed in November 2004 is clear on what he could do if there was a disagreement between him in his capacity as the tenant of the property and MW (NI) Ltd as the landlord, over service charges, i.e. he could refer the matter to an independent surveyor whose determination would be binding on both parties.
- The two new leases effectively introduced James Hay as an intermediary for Mr N and the superior landlord so that any disagreement over service charges had to be referred to James Hay first rather than directly to superior landlord. In accordance with the terms of the Indenture, James Hay via CBRE would then pass on their concerns to the superior landlord via its managing agents, Charterhouse so that it could deal with them.
- The Property Purchase Guide and the Plan's Terms and Conditions set out the extent of the service provided by and the responsibilities of James Hay in connection with the administration of the Plan holding the commercial property as an investment. There is nothing, however, within these documents that imposed any obligation upon James Hay to review the service charges being made other than that they are correctly being levied in accordance with the lease terms.
- Furthermore, as James Hay cannot investigate the reasonableness of the service charges imposed by the superior landlord under the provisions of the Indenture, if Mr and Mrs N were unhappy with the service charges being levied by Charterhouse, the onus was on them to ask via James Hay for the appointment of an independent surveyor to conduct a review of Shaftesbury House's management accounts and service charges levied. Alternatively Mr and Mrs N could ask James Hay to appoint a firm of solicitors to take legal action against the superior landlord and Charterhouse. The costs incurred in either option could be met by the Plan if Mr N can demonstrate that such costs ultimately benefit the Plan and not him as tenant of the property. The outcome of any action taken may not necessarily result in any change to the level of service charge being imposed though.
- James Hay became a shareholder in Shaftesbury Court automatically when the leasehold interest in the property was acquired by the Plan in March 2006. Neither James Hay nor CBRE would actively undertake any shareholder responsibilities because this fell outside of their core administration services. The right to participate in management companies are routinely delegated to members or their nominee on acquisition. It is unfortunate that such duties

were not delegated to Mr N much earlier but there is no legal or contractual obligation placed upon James Hay or CBRE to attend the annual general meetings of Shaftesbury Court or inspect their management accounts. Mr and Mrs N may prefer James Hay and CBRE to take more of an active role in such matters but this is simply not part of the service being provided by them.

- Mr and Mrs N contend that the £49,200 figure shown in the Deed of Variation for annual rent payable is simply a restatement of the initial rent of £41,000 pa with VAT at 20% included. In the view of the Adjudicator, the available evidence did not support their contention. He concurred with James Hay's view that the Deed of Variation would not have been drafted in the way that it had if the intention was merely to restate the initial rent to be inclusive of VAT. He also considered that James Hay's letter of 25 July 2005 to Mr N's solicitors, a copy of which Mr N received, should have made this perfectly clear to them.
- Mr N and Mrs N consider that James Hay's administration fees for the Plan are unfair and unjustifiable for the amount of work they actually undertake. But they both completed and signed an application form and also a Member Agreement in order to set up the Plan and by doing so, they agreed to be bound by the rules of the Plan and also pay the associated Plan administration fees and charges for the services offered by James Hay.

54. Mr and Mrs N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr and Mrs N provided their further comments. They say:

- They were forced to bring a complaint to the Ombudsman in order to get an account of the service charges levied.
- James Hay must have been aware of their shareholder responsibilities and should therefore have attended shareholder meetings. They appointed the solicitor who drew up the agreements and they received invitations relating to other businesses.
- They question whether the correct invoices have been applied to their account even now, or whether charges relevant to other properties have been applied to their account by mistake.
- James Hay should have noticed the errors in rent earlier and it was reasonable for the tenant to assume the rent billed was correct.
- James Hay has kept inadequate records, failed to supervise and monitor the performance of their agents, breached confidentiality, repeated errors in calculations and invoices, and were wrong to continue to pay service charges out of the Plan funds when Mr and Mrs N told them not to.

55. James Hay responded:

- The rent and service charges due totalled £105,178.33 on 4 November 2016 and will have increased. A breakdown has been supplied which has not been constructively challenged.

- Mr and Mrs N chose the solicitor who drew up the leasehold agreement by which the Plan acquired the property and they cannot blame that solicitor's failure on James Hay. It remains unclear whether James Hay are in fact shareholders in the management company with the rights asserted by Mr and Mrs N because they have never received any membership certificate. Invitations to meetings addressed to other clients cannot be relevant to this issue.
- Although some of the correspondence from Charterhouse used an incorrect name, only invoices attributable to the commercial unit at floor 2 Venture Gate have been settled from Mr and Mrs N's SIPP. James Hay accept responsibility for the mistake in rent charged by its agents since 2006, will accept any reasonable payment plan put forward to discharge the tenant debt to the SIPP and will meet the loss of interest once payment has been settled.
- They concede that some aspects of the service provided by their administration department and property managing agents could have been better.

56. This dispute raises some issues of jurisdiction which I will address first. I make no finding about the landlord and tenant aspects of the dispute which are in my opinion outside my jurisdiction. The acts complained about relate to the management of the property asset rather than the scheme to which the asset belongs. It would not in my view be proper for me to make findings about how service charges have been set and levied by parties who are not the subject of this complaint, or the role which James Hay should or should not play as landlord and/or shareholder of Shaftesbury Court in the context of the dispute about the reasonableness of service charges. My jurisdiction is limited to the conduct of James Hay under the terms of its agreement to provide the Plan.
57. James Hay have conceded that they have previously provided Mr N with incorrect information about the service charges and rent arrears payable to the Plan. I consider these mistakes and the failure to identify them earlier constitute maladministration on the part of James Hay.
58. James Hay have apologised for these errors and have now provided an itemised schedule of account.
59. Although I can understand why Mr N may now feel sceptical of James Hay's ability to provide him with the correct information about the rent and service charges which he owes the Plan, I am satisfied that James Hay have now checked and disclosed their workings. Mr N has not provided any alternative figures showing a different position. I therefore have no reason to question the accuracy of the figures currently supplied by James Hay for the rent arrears and service charges owed.
60. James Hay's failure to collect rent at the increased level of £49,200 pa since 2006 is also clearly maladministration on their part. In making this finding of maladministration, I rely on the admission of James Hay based on their own reasonable interpretation of the Deed of Variation.

61. James Hay have offered to compensate Mr N for their mistake by paying appropriate interest on the rent arrears once these have been paid into the Plan. In my view, their proposal is a fair and pragmatic approach, given Mr N's business has had benefit of the oversight since 2006 in the form of reduced rent. Mr and Mrs N have suggested the "Judgement Rate" be used to calculate the interest but in my view, bank base rates would be more appropriate given the circumstances.
62. Mr N maintains that he ought to be entitled to a refund of SIPP administration charges as a result of these oversights. However, I have no power to waive contractual fees properly incurred. I do agree, however, that Mr and Mrs N were justified in bringing their complaints about the degree of scrutiny and diligence which James Hay applied to the collection of rent and checking of charges due. Absent the complaints I do not think it likely that these errors would have come to light and arrangements now need to be made to correct the position. I therefore consider that the maladministration identified has caused significant distress and inconvenience.
63. I therefore partially uphold Mr and Mrs N's complaints against James Hay and make an appropriate direction below.

Directions

64. Within 28 days of the date of this Determination, James Hay shall pay £500 in compensation to each of Mr and Mrs N.

Karen Johnston

Deputy Pensions Ombudsman
3 March 2017