

Ombudsman's Determination

Applicant	Mr N
Scheme	James Hay SIPP (the SIPP)
Respondent	James Hay Partnership (James Hay)

Outcome

1. Mr N's complaint against James Hay is partly upheld, but there is a part of the complaint I do not agree with. To put matters right, for the part that is upheld, James Hay shall pay £1,064.25 into Mr N's self-invested personal pension (**SIPP**) bank account.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr N complains that James Hay has failed to collect the rent due in relation to a property held in his SIPP.
4. Mr N says that, as a result of this failure, he has lost the opportunity to recover the outstanding arrears which amount to £5,273 excluding interest.

Background information, including submissions from the parties

5. Mr N has an individual SIPP with James Hay. The SIPP holds a 45% investment in a commercial property comprising of seven units on an industrial estate. The remaining 55% is owned by another individual SIPP member who is not party to this complaint.
6. The units are let on an individual basis, this complaint concerns unit two within the property investment portfolio (**the Property**).
7. For the purpose of receiving rent James Hay acts as Landlord, however James Hay employs CBRE to act as the professional property managing agent. CBRE was appointed in August 2009 and is responsible for, amongst other things, the collection of, and accounting for, rent.
8. The former tenant of the Property was Craftwork Cards Limited (**Craftwork**). Craftwork signed a lease to rent the Property for six years from 1 April 2004.

9. In December 2009, the rent payment from Craftwork, which under the tenancy agreement was payable quarterly in advance, fell short of the amount due. Further rent payments were either missed or not paid in full resulting in arrears.
10. Craftwork vacated the Property on 31 March 2010, when the lease expired.
11. CBRE began to take action to collect the rent arrears in January 2011. However, Mr N was not notified of the arrears at this point. Mr N only became aware of the arrears following a review by his financial adviser in March 2013.
12. In April 2013, a repayment plan was negotiated with Craftwork, but no repayments were made. As a result, in late 2013, Coffin Mew solicitors was appointed to recover the arrears. Coffin Mew's professional fees amount to £1,203 including VAT and disbursements.
13. To date, the arrears, which currently stand at £5,273.42 including VAT, have not been recovered. In addition to the arrears, Mr N is also seeking recompense for Coffin Mew's professional fees.
14. Mr N's contention is that, had the arrears been identified sooner, there may have been the ability to recover the outstanding amount before Craftwork's finances worsened.
15. James Hay has accepted that CBRE ought to have done more to try and recover the arrears. However it pointed out that there was no guarantee that the arrears could have been recovered, even if CBRE had acted sooner. James Hay also said that the rules of the SIPP mean it is not liable for, and offers no indemnity for, rent arrears.

Adjudicator's Opinion

16. Mr N's complaint was considered by one of our Adjudicators who concluded that further action was required by James Hay. The Adjudicator's findings are summarised briefly below:-
 - Investing in property using a SIPP is not without risk. By choosing to hold a property investment within his SIPP, Mr N accepted the risk, which is inherent with such an investment, that the tenant may default on the rent repayments.
 - Craftwork fell into arrears in December 2009. However, it was not until 2011 that CBRE started to take action to recover the arrears. CBRE has failed to carry out its responsibilities adequately and to a reasonable standard that could be expected, this amounts to maladministration.

- It is accepted that Craftwork's financial position deteriorated after the lease had expired and the arrears had been incurred, but the accounts Craftwork filed with Companies House between 2010 and 2013 indicate there was a severe decline in Craftwork's finances. Consequently, it is not possible to say with any certainty that the arrears could have been recovered, especially when taking into consideration that the value of the arrears represents the majority of Craftwork's 2010 profits.
- There is evidence that Craftwork was unwilling to engage with CBRE to make good the arrears. Craftwork ignored the email CBRE sent seeking recovery of the outstanding amount and, when a repayment plan was put in place in April 2013, Craftwork did not make any payments in line with the agreement.
- Despite Coffin Mew being appointed to seek recovery of the debt, the arrears remain outstanding. So it is more likely than not that attempts to recover the arrears would have failed, even if Mr N had been aware of the issue earlier.
- It is likely that the need to appoint a solicitor to deal with the arrears was inevitable, consequently it would not be appropriate for the solicitor's fees to be refunded.
- By signing the agreement to establish the SIPP, Mr N agreed to be bound by the terms and conditions governing the SIPP. The SIPP terms and conditions specifically exonerate James Hay for any liability in relation to the rent, so James Hay cannot be directed to compensate Mr N for this.
- When responding to Mr N's complaint, James Hay paid him £1,000 compensation. This is reasonable and generously reflects the distress experienced as a result of learning about the historic arrears and the concern caused by finding that CBRE had not dealt with this adequately.
- However, James Hay has been charging a property management fee to the SIPP, but the level of service it has provided falls short of the required standard. James Hay, nor CBRE as its agent, should be remunerated for work that it has failed to carry out, or failed to carry out to a satisfactory level.
- The property management fee is not just limited to collecting the rent. However, the collection of, and accounting for, rent represents a substantial majority of the work James Hay should undertake in relation to the Property.
- The Adjudicator recommended that James Hay refund 90% of the annual property management fees taken between January 2010 and January 2013. This covers the period between Craftwork falling into arrears and Mr N becoming aware of the issue, and is broadly reflective of the work that can be apportioned to the collection of and accounting for rent.

17. James Hay accepted the Adjudicator's Opinion and confirmed that the redress, calculated in line with the Adjudicator's recommendations, amounted to £2,365. James Hay said it could credit this to the joint SIPP property account. Alternatively 45% of the refund could be paid directly to Mr N's SIPP account, in line with his ownership split of the property.
18. Mr N did not accept the Adjudicator's Opinion. In support of his position Mr N has said:-
- It has always been Mr N's custom to make an early visit to tenants in arrears, this has repeatedly proven to be successful and has avoided the need to instruct solicitors. By not informing Mr N of Craftwork's arrears CBRE deprived him of the chance to recover the arrears. Mr N has said he, "would not have incurred Coffin Mew's legal fees if CBRE had not prevented [me] from personally intervening during late 2009."
 - Craftwork was in funds during late 2011 and was able to pay £2,127 to replace damaged guttering identified after Craftwork had vacated the Property. This, Mr N says, supports his belief that the rental arrears could have been recovered had he known of the situation.
 - Mr N does have a vested interest in his SIPP, however he considers that he has spent a disproportionate amount of time, which he ought to be compensated for, dealing with the issues for which CBRE and James Hay are ultimately responsible. On this point Mr R has said:-

"The failure of CBRE to take any action, of any kind, in relation to monitoring, chasing and collecting rental arrears, and keeping their clients informed, is the sole cause of this problem... They are guilty of both poor management, and avoiding their obligations to us by implementing 'terms and conditions'."
19. Because Mr N did not accept the Adjudicator's Opinion, the complaint was passed to me to consider. Mr N provided his further 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

20. In this case it is accepted by the parties that the level of service provided by CBRE, for which James Hay is responsible, has fallen short of the standard expected. As a result, the matter remaining for me to decide is whether Mr N has received appropriate redress for the injustice he has suffered.
21. The potential for a tenant to default on their rent is an intrinsic risk, borne by Mr N, as a consequence of holding a property investment. I acknowledge that Mr N says that had he known about the arrears sooner, it would have been possible for him to have

recovered the amount outstanding. However I cannot find, on the evidence available, that recovery of the arrears was more likely than it was not.

22. Although I accept that Craftwork reported a profit for 2010, 2011 and 2012, this was relatively modest and, in my view, indicates a serious deterioration in Craftwork's finances. This finding is supported by the fact that in 2013 Craftwork posted a significant loss, in excess of £100,000.
23. I find it likely that Craftworks financial position was such that this would have seriously impaired its ability to make good any arrears. In making this finding I do acknowledge that Craftwork was able, in 2011, to pay for repairs to the Property. However the cost of the repairs stood at less than half the value of the arrears which represented around 80% of the profit Craftwork reported for the year.
24. Moreover, it does not automatically follow that Craftwork would be any more willing to pay the arrears just because it had made a profit.
25. I am unable to say, on the balance of probabilities, that the arrears could have been recovered, even if Mr N had known about the problem earlier.
26. But in any case, the 'commercial property purchase guide', which forms part of Mr N's agreement with James Hay makes it clear that James Hay is not liable for rental arrears or interest. Therefore, I do not find that James Hay should make good the rental arrears and interest that Mr N is claiming.
27. As I have said, it is accepted that CBRE's failure to take adequate steps to recover the arrears and its failure to inform Mr K of the position, do not meet the standard which would reasonably be expected. I do not agree that CBRE, as an agent of James Hay, should be remunerated for work that it has failed to carry out satisfactorily.
28. A significant amount of the work involved in managing a property investment would concern the collection of, and accounting for, rent. In my view it is reasonable to apportion 90% of the annual property management fees towards dealing with issues concerning the rent, and I consider a refund of 90% of the annual fee to be commensurate with the failure to provide an adequate level of service.
29. Finally, I appreciate that Mr N has expended time and effort pursuing this matter, which he would not otherwise have spent, had it not been for CBRE's maladministration. However I consider that the compensation James Hay has already paid to be adequate redress for the non-financial injustice Mr N has suffered.
30. Therefore, I uphold Mr N's complaint in part.

Directions

31. James Hay shall, within 14 days of the date of this Determination, pay £1,064.25 into Mr N's SIPP bank account. This represents a refund, in proportion to his share of the Property, of 90% of the annual property management fees taken between January 2010 and January 2013.

Anthony Arter

Pensions Ombudsman
20 March 2017