

The complaint

Mr and Mrs E complain that Curtis Banks Ltd (CBL) failed to properly manage the collection of rental payments due in respect of commercial property owned within their CBL SIPP.

What happened

Mr and Mrs E ran a business for many years, trading from land and premises beneficially owned by both of them (Mr E – 95%, Mrs E – 5%). For ease of reference, I'll refer to Mr E only in this decision. Their respective interests in these premises were held within separate SIPPs in their names. Their business occupied these under separate leases (one for premises at a rate of £60,000 per annum, and another for the adjacent land at a rate of £3,500 per annum) from the SIPP Trustee as landlord. In 2016, Mr E sold their company – with the company, under new unconnected management, continuing to trade from the land and premises under the terms of the existing leases.

After the business sale, the tenant company soon ceased making payments under the lease - quarterly rent on the main premises was only paid until December 2019, whereas rent for the smaller parcel of land was only paid up until December 2017.

CBL had continued sending quarterly invoices in respect of each lease to the tenant, but these were ignored. At the beginning of 2021, CBL began chasing the arrears, believing at that time the main property arrears were £30,000 only. Discussions with Mr E in February and March 2021 – who says he was unaware of the backlog until then - alerted CBL to the fact the arrears were greater than that. A Final Arrears Notice was sent in March 2021. No payments were received. In the meantime, the tenant company had been experiencing financial problems, culminating in it entering Liquidation in July 2021. The leases were formally disclaimed by the Liquidator eight days later.

Mr E complained to CBL in July 2021. He felt their negligence had caused a loss to his SIPP of over £100,000 in lost rental payments – had they carried out their invoice chasing/debt recovery actions properly, this loss was unlikely to have occurred.

CBL acknowledged mistakes had been made in the collection process. Rent collection and arrears recovery procedures weren't followed. They admitted not knowing the full extent of the arrears until Mr E alerted them. And that the service CBL provided to Mr E fell well below the level he should have expected to receive. But, CBL said the contractual responsibility to make the rental payments was the tenant's, and CBL weren't liable for them not having done that. CBL went further by explaining they couldn't control the trading ability of the tenant.

But in recognition of their service failings, they refunded £1,080 worth of charges, and £300 compensation in respect of the distress and inconvenience caused by their actions.

Unhappy with this, Mr E complained to this Service. He reiterated his claim for compensation was essentially as a result of their negligent lack of care and attention, and failure to fulfil their contractual obligations, which caused a loss to his SIPP of over £100,000 – he wasn't suggesting CBL automatically became liable for the unpaid rent. And he questioned whether the invoices had been sent on time – as copy invoices provided by CBL showed sequential invoice numbers, which he felt showed they were issued at the same time.

One of our investigators considered the complaint, and whilst agreeing that CBL's actions fell below the standards Mr E was entitled to expect, he concluded that CBL were not liable for the losses caused by the unpaid rent. The investigator highlighted the terms of the lease, which makes clear it's the tenant's legal obligation to pay the rent. And he felt that, even had further invoices been sent, there's nothing to suggest the outstanding rent would then have been paid. And having considered everything, he felt CBL's offer to reimburse fees and pay £300 distress compensation was fair.

Mr E disagreed with this outcome. He felt that, because it was accepted CBL hadn't followed their processes properly, he (his SIPP) should be put back in the position it would have been in had CBL followed their processes correctly. He felt the investigator had misunderstood the basis on which he was seeking unpaid rent recovery from CBL. And Mr E felt the investigator had placed too much weight on the terms of the lease, which he felt were irrelevant in the context of his complaint.

Mr E also referred to the terms of CBL's property guide, which includes reference to notifying [Mr E] in the event CBL experience problems recovering rental payments. He says this never happened. He repeated CBL have repeatedly admitted their failure to manage the collection process properly. Mr E said the only remaining question should be whether these admitted errors caused the £100K financial loss – which he believes is the case.

Unable to reach an acceptable outcome, Mr E asked for this complaint to be reviewed by an Ombudsman, and so it was passed to me to consider further. And having considered the evidence, I reached a slightly different outcome, and so issued a Provisional Decision setting out my thoughts and proposed redress – in which I said as follows:

What I've provisionally decided – and why

I'm grateful to Mr E for proving a significant amount of commentary regarding this complaint. I can assure him that I've read and considered everything he's sent. However, I won't be commenting on every point he's raised here, just the ones that I think are necessary to consider the fundamental elements of this complaint. No discourtesy is intended.

CBL agree they failed to undertake the tasks relating to rental collection as they should have done. They issued invoices, and their systems or accounts personnel (for whatever reason) failed to identify when the tenant didn't pay these. There were no debt collection actions instigated until Mr E made them aware of the issue, by which time the tenant was in the final stages of its' trading life, and no recoveries were made.

A look at the CBL property guide identifies the extent to which they failed to undertake the tasks they were required to do. It sets out (at page 12) what tasks their property management team will undertake. This includes "Invoicing and collecting rent...". Further, under the heading 'Letting the Property' (page 23), it says:

"If we are experiencing prolonged difficulties on collecting rent our Property Credit Control Team will notify you. If we exhaust our internal rent chasing process without

recovering the debt, we may move to formally pursuing the debt and/or to bring the lease to an end”

And, the CBL Terms and Conditions document, at point 10.28 (page 15) says CBL will be responsible for the following activities:

“Invoicing and collecting rent and other sums due ...and where required pursuing any late payments in accordance with normal commercial arrears processes”

But at point 10.37, it also confirms:

“...we will not be liable for any losses associated with the failure of any tenant to meet the obligations contained within the tenancy agreement”.

So, whilst it's clear CBL aren't contractually liable for the unpaid rent - the legal obligation to pay rent was the tenant's, and the tenant's alone - I need to consider here the extent to which, if any, CBL are liable to make good the losses Mr E's SIPP suffered as a result of their agreed lack of appropriate actions.

When a business has made a mistake, or not done something we think they should have done, we ask what would have happened had that mistake/omission not occurred – and further what that business needs to do to put their customer back into the position they would have been in had their mistake/omission not occurred. It's that principle that underpins how we approach complaints and consider what we believe is fair redress.

But ascertaining what I think would have happened, had CBL's arrears collection process been actioned when it should have, is not a straightforward question to answer. CBL make a point, which in principle I agree with, that sending arrears/chaser invoices to the tenant wouldn't necessarily have guaranteed they would then have paid them. The tenant could have continued to ignore them or promised to pay the arrears and still then not paid them. Or, they could have paid them immediately.

This sums up the key issue here in terms of the 'what would have happened, but for...' question. The answer depends on the actions of a third party that are impossible to know. So, I need to think about what, based on the evidence I do have, I think is likely to have happened had the arrears been chased when they should have been.

And, having thought very carefully about this, and considered all the points made by both parties, I'm unable to reasonably conclude it's likely the tenant would have paid the invoices had chasers been sent in a timely manner. In reaching this outcome, I'm mindful of the evidence I've seen in relation to what did happen, both in terms of historic invoice payments, and the wider issues pertaining to the financial health of the tenant. I'll explain.

The tenant paid both the smaller and larger invoices until the end of 2017, following which they continued paying the much larger invoice only for a further two years. It's clear the tenant knew about the smaller lease, and the continuing obligations under it, but seemingly decided to stop paying it in 2017 – the reason isn't material here – whilst continuing to honour a separate lease costing twenty times as much for a further two years. That wasn't CBL's fault, that was the tenant's decision. The tenant likely received invoices for both leases between 2017 and 2019, and seemingly decided not to pay one. So, I'm not persuaded chaser invoices, or threats of collection activity, would have caused the tenant to start paying these 2017-2019 'small lease' payments or arrears either.

And I can't ignore the fact the tenant company (and it's wider group) began to experience significant financial problems at around this time – accounts filed at Companies House for

the tenant, for the period ending September 2018, show a trading loss of approximately £4m in the previous 18 months, and it being Liquidated in September 2021. The 'small lease' arrears began to accrue during this accounting period, and the larger lease arrears period (2020 onwards) was firmly within this accounting period too.

Given this, I'm unable to reasonably conclude that, had arrears letters been sent for both leases over the relevant periods, it's likely the tenant would have paid these. My conclusion here is supported somewhat by the fact that, once arrears letters were sent at the beginning of 2021, they weren't paid either, nor was there any attempt (as I understand) by the tenant to engage with CBL about the arrears.

So, put simply, whilst it's clear CBL failed to undertake any arrears chasing activities until 2021 – in clear breach of their obligations as set out in their property guide – I'm unable to reasonably conclude the tenant would have paid the arrears had chaser invoices been sent, and so I can't fairly or reasonably hold them responsible for the losses Mr E's SIPP experienced resulting from that non-payment.

I now want to address the point Mr E made about the lack of communication from CBL regarding the arrears. CBL weren't obligated to advise Mr E every time a rental invoice was or wasn't paid. There was an online SIPP portal that contained the various transactions that took place on Mr E's SIPP each year (I'll expand on this point below). But as I've outlined above, CBL's property guide says their credit control team should have contacted Mr E after it became clear there were debt recovery issues. Clearly, that couldn't happen here because the relevant team weren't even aware that arrears were accruing. But had chaser letters been sent as they should, the knowledge of 'arrears' would in theory have existed, prompting the likely process leading to Mr E being contacted. That opportunity was lost.

I also note CBL's point there was nothing to stop Mr E from checking his SIPP online portal, which would show details of his SIPP's performance – including income and expenses where appropriate. CBL have advised portal access was created in August 2016, and fully operative by 2017. Whilst there is clearly no obligation on Mr E to have done this, and records from CBL suggest Mr E only first logged on to this in 2019, we would usually think it reasonable to expect a consumer to check in with the performance of their pension/SIPP performance at least once a year. I think this is especially so given the value of the assets sat within Mr E's SIPP, and the level of rental income the SIPP was expecting.

I acknowledge too what Mr E has said could have happened had he known earlier – he could have tried to intervene and make enquiries with the tenant (and sub-tenants, who he believes may have been paying their sub-tenant rent to the tenant). But for the reasons I've already set out, I can't reasonably conclude that would have likely resulted in arrears being paid, or future rent being paid on time. And it's possible that earlier knowledge of the arrears could have allowed Mr E to explore eviction and replacement of the tenant. However, given the date when the (larger) property lease started to fall into arrears – and taking account of the potential timescale an eviction process may have taken once instigated – I similarly can't reasonably conclude, in the absence of evidence to the contrary, earlier arrears knowledge would have allowed Mr E to have been able to mitigate his (SIPPs) loss in this way.

Notwithstanding what I've said above, I do think Mr E is entitled to a greater fee refund from CBL than he's been offered/given.

I then set out my proposed redress. CBL responded and accepted my PD outcome, but Mr E didn't. He provided some documents for me to read, and a very detailed response. I can assure Mr E that I've read and considered everything he's provided, although I won't be commenting on every point here. That's deliberate; ours is an informal service for resolving disputes between financial businesses and their customers. So, as with my PD, I'll focus on, and respond to, what I believe are the key complaint issues Mr E's raised.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

CBL raising and sending invoices to the tenant, and their credit control process

Mr E thinks my PD findings, that CBL had inadequate credit control procedures, misses the point – whilst true, he believes their failure to invoice was the catalyst for the subsequent problems. No invoicing meant credit control would never have rectified the situation.

Mr E remains convinced CBL didn't send any invoices to the tenant in relation to the small parcel of land until he contacted them at the beginning of 2021. He still thinks CBL didn't send some invoices in respect of the main site from the beginning of 2020 onwards. And, some main site invoices were backdated, as were all 'small parcel' invoices.

Mr E raised further questions about the validity of documents supplied to us (and him) which CBL said were copies of invoices raised at the time in Bristol. He mentions the non-sequential numbering of the invoices again - how do invoices for March and June 2020 have later numbers than those for September and December 2020. He also points to invoices which advise no payment is necessary because payment will be collected via Direct Debit (DD) – asking if that's correct, why were March and June 2020 not then collected by DD? He also repeats his unhappiness with the explanations we'd been provided with about what happened when the invoicing process moved from the Bristol office to the Ipswich one.

Mr E isn't providing me with any new information for me to consider here, instead asking that I essentially reconsider the information I've already reviewed. I appreciate his extreme frustration at how CBL managed the rent collection, and particularly their significant failure to carry out their defined arrears collection processes. And I have looked again at the evidence provided by both parties. I've also made further enquiries with CBL to understand more about the DD discrepancy, and to ask if CBL could provide any additional *evidence* to confirm the dates invoices were sent, and to which address.

CBL haven't been able to provide much in the way of compelling extra information. They advised that DD was the payment method for the main site rent whilst administered by the Bristol office (following which rent needed to be paid into a different 'Ipswich office' bank account). And whilst advising what the *general* process was if a DD request wasn't paid, they haven't provided any case-specific detail to confirm what happened after their DD requests for the March, June and September 2020 payments weren't paid.

But CBL has provided an internal payment system screenshot, appearing to set out the dates invoices were raised, and payments received. In relation to the main site, this shows that DD payments were regularly received, the last one being on 17 December 2019 for the December 2019 quarter. The screenshot for the 'smaller site' is less helpful. It doesn't record the payment method for the periods to August 2017 when payments stopped and appears to suggest some 2017 invoices were paid in 2015, which raises some questions about its accuracy.

However, I think the information it contains regarding the main site is useful here. It appears to show CBL's (Bristol) rent payment processes went beyond simply issuing an invoice – an automatic request for payment was made via DD as well. This process appears to have worked without issue up until December 2019. And, I've seen nothing that persuades me invoicing or continued attempts to collect the 'Bristol' main site rent via DD wouldn't have continued after that, until the administration moved across to the Ipswich office.

As I've said, the information regarding the smaller parcel of land seems less certain. And I appreciate it's impossible to ask Mr E to prove invoices for this *weren't* sent – difficult to prove a negative in this situation. We'd previously asked CBL to respond to Mr E's suspicions about the invoicing, and their numbering, and their response/explanation was provided to Mr E. I know Mr E still questions the substance or accuracy of that response. However, I've seen no evidence that persuades me CBL's response is likely to be inaccurate or misleading. And I think the extra information CBL have provided, as mentioned above, supports that conclusion. I think it's more likely than not their systems did ensure invoices were sent on time, as they've indicated – and that the tenant stopped making payments in respect of the main site in the middle of 2019, and the smaller site in 2017.

So, having concluded it is likely invoices were raised and sent, I want to consider again the arrears collection procedure. CBL admit this was very badly managed. I think their response to my DD enquiries reinforces that conclusion. And having looked again at the evidence available I still think CBL's fundamental failing here appears to be their complete failure to follow their arrears collection processes. And there is little I can add to what I've already said in my PD on that point.

Mr E's access concerns regarding the CBL SIPP portal

Mr E accepts he didn't spot the rent for the small parcel of land hadn't been collected since 2017 when he first visited the portal in 2019 – essentially because it was a small amount only, and he had difficulties accessing the site and interpreting information contained on it. I've been provided with a 'log-in' report by CBL, which shows Mr E first accessed the portal in August 2019, and then again not until February 2021.

Mr E commented that, between 2016-2019, the rent for the larger site was paid on time. And so, when he first logged on in 2019, there'd have been no arrears on the 'main site', and so nothing to alert him of problems at that time. He also thinks my "*implied criticism*" of him on the portal access point is inappropriate. The portal was not fully functioning, and was difficult to use, and difficult to get assistance with. I can assure Mr E that my comments relating to him accessing the SIPP portal were not meant as criticisms. However, my job is to remain impartial and consider all the information when reaching an outcome, and not just that which evidences CBL not following their processes properly.

I acknowledge what Mr E says about main site arrears not existing when he first logged on in 2019. However, I believe the portal would have shown that 'main site' payments weren't being received from that point on (and the small parcel arrears would have been evident too). Regardless of any difficulties in understanding the data or how it was presented, which I acknowledge, this would still have been freely available to Mr E to access.

And as I said in my PD, I think it's reasonable to assume that a consumer with SIPP investments as valuable as here, with significant income being generated from those investments, would reasonably want to keep apprised of their performance. I repeat that's not a criticism of Mr E, but simply an acknowledgement that information about the tenant non-payment of rent could have been readily available to see.

The financial wellbeing of the tenant, and the wider group in which it sat

Mr E suggests it's wrong for me to look at the financial difficulties of the tenant in isolation, as the tenant is part of a much wider group. He explains the Liquidation was, in effect, an accelerated mergers and acquisition process, involving 'pre-packs' of selected parts of the larger group to a new holding structure, which took time. Had Mr E known of the rent arrears, he'd have been able to engage with the tenant/its board, with whom he had good relations following the sale of his company, to ensure payments were made. He appears to imply that, because the tenant wasn't a standalone company, but part of a much larger group, funding the rental would not have been a problem if they had been invoiced correctly. And there was enough time, if Mr E had been made aware, for him to have recovered unpaid amounts.

I appreciate the information Mr E has provided, but it doesn't alter my conclusions. The obligation to pay the rent was the tenant company's only. That company may well have been part of a pre-pack restructure process, but its filed accounts show it to have made a trading loss of about £4m in the 18-month period between April 2017 and September 2018. This *suggests* the company was struggling to pay its bills at the time the main lease arrears started to build up, and *may* explain why it stopped making rent payments when it did (or why DD's were returned unpaid from 2020 onwards).

I acknowledge Mr E believes had he been able to contact the tenant (or wider group) earlier in the arrears period, he'd have been able to get them to pay the arrears, but I've seen nothing that persuades me this would likely have happened.

Mr E became aware of the arrears in the early part of 2021 – before the liquidation and subsequent lease disclaimer by up to four months – but appears to have been unable to generate any payment from the tenant (or wider group) in that time. I don't know what steps Mr E was able to take to try and secure the arrears payments, but I don't need to either. And what I've said is certainly not a criticism of Mr E or any efforts he made. But I think this does support my conclusion about what would most likely have happened if CBL carried out its arrears' recovery processes correctly. Had they done this as they should, and when they should, I'm not persuaded it would have resulted in the tenant paying the arrears upon receipt of further letters. I haven't seen any evidence that suggests collection activity would have prompted arrears to be paid by (or on behalf of) the tenant.

Conclusion

So, for the reasons I've outlined, I'm satisfied CBL did more likely than not send rent invoices to the tenant on a timely basis – or at the very least I've not seen anything that persuades me CBL *didn't* send the initial rental invoices on time (whether from their Bristol or Ipswich office). CBL have already acknowledged their arrears-chasing processes were not followed, which I agree with. But I still can't fairly conclude that CBL's failures in this regard caused the losses Mr E's SIPP experienced when rent wasn't paid, and so I won't be asking CBL to pay anything in addition to what I'd set out in my PD, which I repeat below.

Putting things right

Mr E thinks CBL should be held responsible for the £100,000-odd of unpaid rent and told to repay this. For the reasons I've explained above, I disagree and won't be asking CBL to compensate Mr E (his SIPP) for the unpaid rent. CBL thinks their refund of £1,080 of fees, made up of £300+VAT partial refund of 2018, 2019 and 2020 annual property fees, plus £300 compensation for distress is sufficient redress. I disagree with this also.

I agree with CBL when they explain the operation of a commercial property SIPP involves more than just managing rental income. I appreciate there are other activities that variously need undertaking, including lender reporting, tax reporting, lease alterations etc. And it's only fair that, notwithstanding their failure to undertake the majority of their rental collection activities professionally, they should still be entitled to be paid for that work. I agree with that in principle.

However, one of the fundamental elements of holding a commercial property in a SIPP is to generate income. There were tasks that should have been done to assist with that, which CBL admit were repeatedly overlooked. And I think that oversight needs to be properly considered in the context of deciding what fees I think were fair for CBL to charge – or more precisely what fees I think it's fair and reasonable for them to now refund.

CBL have provided an overview of fees charged to Mr and Mrs E's SIPPs, providing figures for various categories – some are yearly personal SIPP fees (for managing the SIPPs in each of Mr and Mrs E's names). Others are yearly property-related fees. It's these I think need to be considered.

The yearly property fees overview supplied hasn't broken down the various elements for each year's charges, so it's not possible to identify which amounts are for tasks that are unconnected with the rental collection. They also don't break down the amounts relating to each separate lease, which is important because CBL continued doing what it should have done in respect of the larger lease for two years after it began overlooking the smaller one.

So, in respect of the 'both lease' inactivity period from 2020 onwards, I can see CBL issued property related invoices totalling £1,170 (I presume net of VAT), payable on 1 December 2019. I think, in the circumstances here, it's fair that most of this fee is refunded, and I think an 80% reduction is a fair amount - £856.

In respect of the following 'both lease' period (2021), fees of £1,050 were charged. CBL did start issuing unpaid invoice reminders in this period, until the company entered Liquidation in July 2021. Accordingly, I think a fair fee refund amount for this would be 40% - £420.

In respect of the earlier fees charged – when just the smaller rent amounts weren't being chased – CBL had issued invoices across the relevant years both totalling £1,781.50. In respect of these periods, I think a smaller refund is due, and I think a fair amount here would be 25% - £445.38.

So, in total, I think a fair and reasonable outcome here would be for CBL to refund *total* fees and charges to Mr and Mrs E's SIPP accounts (in the relevant proportions) of £1,721.38 – less the £900 (+VAT) previously refunded.

Distress and Inconvenience

It's clear this episode has caused Mr and Mrs E considerable distress and inconvenience – Mr E in particular has clearly had to spend considerable time engaging with CBL on the matter and in trying to understand what happened, and why. Whilst placing a value on distress isn't an exact science, I don't think the £300 already offered provides a fair reflection of the distress caused. I think £800 provides a better reflection, and that's what I propose to award in total here.

My final decision

I uphold Mr and Mrs E's complaint against Curtis Banks Ltd, and require them to refund their fees to their respective SIPPs as outlined above, and pay a total of £800 compensation for distress (less £300 already offered if that has been paid).

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr E and Mrs E to accept or reject my decision before 21 April 2023.

Mark Evans
Ombudsman