

The complaint

Mr J and Mr W ('the complainants') are represented. XPS SIPP Services Limited ('XPS') is the provider and administrator of their jointly held Self-Invested Personal Pension ('SIPP'). Their SIPP has a commercial property investment and their complaint relates to outstanding rent arrears owed by its previous tenants. They say XPS did the following –

- Failed to inform them, until December 2022, about the rent arrears problem that had been ongoing since March 2022.
- Denied them the level of service they were entitled to.

For these reasons, they seek compensation from XPS and an undertaking from it to cover the legal costs of recovering the rent arrears debt.

XPS disputes the complaint.

It says it has apologised for the delay in informing the complainants; but that was somewhat inconsequential because it nevertheless discharged its administrative duties to pursue the rent arrears during the relevant period; those duties did not extend to the property management service the complainants appear to have expected; and responsibility for legal fees in the matter rest with the SIPP (not XPS). It has also disputed our service's jurisdiction to address the complaint. It says the Pensions Ombudsman ('PO') has the [correct] jurisdiction to do so.

What happened

One of our investigators looked into the complaint. A telephone conversation record says he explained to XPS the basis for our jurisdiction to address the complaint. Nevertheless, in its most recent correspondence XPS says it maintains the position expressed in its previous submissions (part of which relates to its dispute of our jurisdiction).

The investigator proceeded to issue a view on the merits of the complaint and concluded that it should not be upheld. XPS accepted this view, but the complainants and their representative disagreed with it. They have asked for an Ombudsman's decision.

The investigator mainly said:

- XPS has apologised for not communicating the rent arrears problem to the complainants earlier than it did, but evidence shows it was in contact with the tenants during the relevant period.
- XPS' conduct in the matter was consistent with the terms for the SIPP and the SIPP's Property Guide document. The former confirmed that it administered the SIPP, but it did not provide advice. The latter confirmed it ensured transactions in the SIPP met HMRC and other regulatory requirements, but it did not provide a property management service. With regards to addressing the rent arrears, XPS behaved as the Property Guide prescribed.

The complainants' representative conveyed their disagreement and mainly said – XPS was aware of the problems (which extended from the rent arrears to an outstanding insurance reimbursement) as they were happening; its failure to inform the complainants lasted over eight months, as the problems developed; even when they were disclosed, the rent arrears amount remained unclear, until clarified in further correspondence; by being kept uninformed the complainants were deprived the opportunity to take action to either avoid entirely or reduce the impact of the tenants' actions; the lack of information therefore compounded the problems, the impact and their loss; XPS' conduct breached the level of service it was obliged to provide to them.

These submissions were shared with XPS and it responded to say – it is unclear what the complainants would have done, and/or done differently, had they been informed about the problems earlier; it is unlikely they would have done any more, or anything differently, to what XPS was already doing to address the matter; they would more likely (than not) have attempted to negotiate with the tenants, and when that failed (as it did in XPS' negotiations with the tenants) they would have instructed solicitors to remove the tenants; the outcome would have been the same as it was; the lack of information to the complainants made no difference to the cause, effect and outcome of the problems; XPS was not a property manager and the complainants could have appointed one, but did not.

The matter was referred to an Ombudsman.

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.

Jurisdiction

XPS says the complaint is about administration of the SIPP, which is a subject matter that falls under the jurisdiction of the PO, so, as set out in the Memorandum of Understanding ('MoU') between our service and the PO, we should defer to that jurisdiction.

The MoU includes the following provisions –

“Both ombudsmen have a broad jurisdiction to consider complaints about pension related matters.”

“The Pensions Ombudsman deals with matters which concern the administration ... of occupational and personal pension schemes”

“The Financial Ombudsman Service can also consider complaints about the administration of personal pensions and group personal pensions (but not complaints about the administration of occupational schemes). This means there is a jurisdictional overlap between the two ombudsmen.”

“If a complainant refers a complaint to an ombudsman and it is apparent, or becomes apparent that the complaint is more suitable to be dealt with by the other ombudsman, the first ombudsman will transfer the complaint to the other ombudsman, if the complainant consents.”

The complaint is indeed about administration of a SIPP (which is a personal pension). It is clear from the provisions quoted above that the MoU recognises our jurisdiction to address such complaints, and that ours overlaps with the PO's jurisdiction to do the same. Therefore,

there is no automatic expectation for us to defer to the PO's jurisdiction. Instead, and because of the overlap, the questions to address are about whether (or not) the complaint is more suited for the PO and, if so, whether (or not) the complainants consent to it being transferred to the PO – both questions also arise from our Dispute Resolution ('DISP') rules, within the regulator's *Handbook*, at DISP 3.4.1R.

The complaint was submitted to us by the complainants and their representative. It features a regulated firm and it has been investigated by our service. The investigator issued a view on its merits, and it has been referred to an Ombudsman for a *decision* on merits. There are no time limit or compensation limit issues in the case that might not exist with the PO. Furthermore, the case is not linked to a complaint about an occupational pension that is being referred to the PO – whereby, it could be more suitable for the PO to consider both complaints.

In the above circumstances, our approach would usually be to retain a complaint (one with overlapping jurisdiction) about a personal pension's administration. I have not seen cause in the present complaint to depart from this approach, so I confirm that we have jurisdiction to address it and I do not find that it would be better suited for the PO.

Merits

The factual events in the complaint are mainly documented and undisputed.

There is evidence of XPS' ongoing pursuit of the rent arrears (and insurance reimbursement) and its communications with the SIPP property's tenants in this respect. In 2022 XPS chased the tenants for the outstanding payments in March (two emails and a telephone call), May (an email), June (two emails), July (an email), August (an email), September (three emails), November (two emails) and December (five emails and a formal demand letter). This makes it reasonably evident that it was fully engaged in its responsibility to collect the SIPP's owed/outstanding rental income.

It accepts that it did not inform the complainants until December 2022, and it has apologised for that. After December 2022, the tenants filed for bankruptcy, the debt they owed/owe (rent arrears and property insurance payments) was not settled, a new tenant was found for the property and the SIPP appointed solicitors to assist in having the previous lease surrendered and a new lease established for the new tenants. It appears that no legal action has yet been taken to recover the previous tenants' debt to the SIPP, and I have not seen evidence that the complainants have instructed this.

I have read XPS' correspondence with the tenants and I am satisfied it made reasonable efforts throughout to achieve collection of the owed payments. It does not appear that the complainants dispute this, but if they do, I do not find grounds to say XPS should have done more, or something different, in its interactions with the tenants. It was the SIPP's administrator. Whilst its administrative duties included receiving property income, the terms for the SIPP confirm that they did not include property management. The Property Guide document also confirms it did not perform the role of a property manager, and that the complainants could have appointed someone to perform that role if they wished.

The Property Guide document also confirms that XPS' role was limited to monitoring and receiving rent payments, that in cases of rent arrears they are to be treated as a debt, and that in its associated role as Trustee of the SIPP it would take steps to recover such debt on a *commercial basis*.

XPS acted in line with this. Its efforts between March and December illustrate its work in trying to recover the debt owed by the tenants, and on 19 December it issued a formal

demand to them in which it warned that non-payment by 23 December would be followed by legal action. As I stated above, legal assistance was subsequently obtained to terminate the lease and establish a new one.

On balance, I am not persuaded it should have done anything differently. The correspondence shows that the tenants made a number of promises to resolve the issue that seemed reliable at the times they were given (until they were subsequently breached). For this reason, I can understand why XPS applied patience, alongside persistence, up to December, when it became clear (or clearer) that the formal demand was necessary. I do not consider that its actions were unduly delayed.

XPS certainly should have informed the complainants earlier than it did. Even if its reliance on the tenants' promises led it to believe the problem was soon to be resolved, it was a rent arrears problem nevertheless, and the complainants should not have been unaware of it until shortly before the formal demand was required. As beneficial owners of the SIPP, they had an interest in knowing such a problem was ongoing. Having said this, I acknowledge that it has already apologised for this shortcoming and, importantly, I am persuaded by its argument about what, if any, difference earlier notice to the complainants would have made to addressing or resolving the problem.

On balance, I consider it more likely (than not) that if they had received earlier notice, they would have supported XPS in taking the same steps that it took.

With the benefit of hindsight, they might disagree. However, without such hindsight it is probable that they would have adopted the same *commercial basis* approach taken by XPS, whereby effort is initially made and maintained to resolve the problem without incurring avoidable costs (as XPS did and eventually exhausted), resolution proposals from the tenants are given time and opportunity to work (which is what happened), pressure on the tenants is maintained following failures of such proposals (as XPS did) and then the decision is eventually made to incur costs in order to terminate the lease, mitigate escalation of the debt and establish a new lease with new [rent paying] tenants (which is what happened).

The same approach could also have been adopted by a property manager, if one existed. It is not uncommon for commercial property rent arrears problems to continue and develop over some time and either eventually be resolved or eventually result in actions similar to those in this complaint. The disincentives to taking immediate or earlier cost bearing action could be factors like the prospect of negotiations resolving the problem, and/or a wish to avoid costs, until necessary, associated with evicting tenants and finding new ones, and/or a wish to avoid having an unoccupied property (earning no income) for periods between an eviction and a re-leasing.

The complainants did seek clarification, in December, of the correct rent arrears amount, but that was given within a few days of their request. I do not consider that they were misinformed in the matter because they were given copies of the formal demand, which stated the same rent arrears amount that was stated in response to their enquiry.

For all the above reasons, I am not persuaded to uphold the complaint and I do not find grounds for the compensation and undertaking for legal costs that the complainants have asked for.

My final decision

For the reasons given above, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J and Mr W to accept or reject my decision before 6 June 2024.

Roy Kuku
Ombudsman