

## **The complaint**

Mr Z complains about his investment in a commercial property using a SIPP provided by James Hay Administration Company Ltd ("James Hay"). He says that James Hay failed to act in accordance with its legal obligations in connection with the lease and sale of the property which led to him and his company suffering a total financial loss of around £300,000.

## **What happened**

### Background

Mr Z and another individual, Mr X, were separate James Hay SIPP members. They were both shareholders and directors of a limited company, Firm Y.

In 2003, Mr Z and Mr X pooled existing assets and obtained borrowing from the Bank of Scotland to collectively buy a commercial property using their SIPPs. Their shared interest in the property was equally split between Mr Z with 50% and Mr X and his immediate family whose shares made up the other 50%. James Hay held the property in trust and was the sole legal owner and landlord until such time as it was sold. In the meantime, Firm Y leased the property. A leasehold agreement set out the terms between James Hay and Firm Y. In simple terms, the agreement gave Firm Y the right to use the property for a specified term in exchange for rent which was paid into Mr Z and Mr X's SIPPs.

In October 2018, the property was listed for sale at £925,000. But in December 2018, at Mr X's instruction, the property was withdrawn from the market. It was listed for sale again in 2019 but a sale didn't go ahead. Mr Z says that there was a breakdown in his relationship with Mr X between December 2018 and December 2020.

In 2021, James Hay decided to proceed with a forfeiture of the lease and sale of the property without the consent of Mr Z and Mr X. This was because the SIPPs weren't receiving rental income after the tenant, Firm Y, had exited the property before the end of the lease and stopped paying rent. There was a lack of cash in the SIPPs to meet ongoing costs. In addition, James Hay failed to receive unanimous and workable instructions from Mr Z and Mr X regarding the future of the property and settlement of outstanding debts with the Bank of Scotland and James Hay:

- The Bank of Scotland debt was the outstanding mortgage that James Hay was being pursued for since it legally owned the property.
- The James Hay debt was in respect of its own funds used to cover expenses in the ongoing management of the arrangement due to lack of cash in the SIPPs.

In November 2021, the property sold for £760,000.

### This complaint

Mr Z was unhappy that James Hay had instigated the forced sale of the property for

£760,000. He believed the true value was £925,000 and that he had suffered a loss because of the lower sale price achieved. He noted that in December 2019 a similar property in the same block sold for around £1m which he believed supported his position. He also considered that an incorrect rental calculation between 2003 and 2012 led to Firm Y overpaying rent and associated costs. He said that James Hay failed to act in accordance with its legal obligations and had provided preferential treatment to Mr X by accepting his instructions in favour of his own. Overall, he believed James Hay had treated him unfairly. To put things right, he requested James Hay pay compensation to make good the total financial loss of around £300,000.

### The Financial Ombudsman Service

Our investigator didn't uphold this complaint. In summary, she concluded the following:

- This service couldn't consider the element of the complaint about the alleged overpayment of rent and associated costs paid by Firm Y between 2003 and 2012 because it had been brought too late under our rules given Mr Z was aware of the issue since at least 2016;
- She couldn't see any evidence the sale price of £925,000 was achievable. Property valuations aren't guaranteed and change over time. Furthermore, it's common for sales to fall through before the exchange of contracts. She couldn't find any evidence that James Hay were responsible for any agreed sales on the property falling through;
- Under normal circumstances the property could only be sold with the unanimous agreement of all SIPP members. Therefore, James Hay couldn't proceed with the sale after Mr X instructed it to withdraw the property from the market in December 2018;
- It wasn't James Hay's role or responsibility to get involved in negotiations about whether the property should be listed for sale and at what price since this was an investment decision to be made between Mr Z and Mr X and not a trustee decision.
- Once James Hay knew there was an irretrievable breakdown in the relationship between Mr Z and Mr X and that it had failed to receive unanimous and workable instructions from them regarding the future of the property it had acted reasonably in proceeding with a forfeiture of the lease and sale of the property without their consent. This was necessary to satisfy outstanding debts owed to the Bank of Scotland and James Hay.
- Overall, she thought that James Hay hadn't made an error or treated Mr Z unfairly. Therefore, she didn't think it was responsible for compensating any of the financial losses claimed by Mr Z.

Mr Z disagreed and provided additional comments. Our investigator considered those comments but wasn't persuaded to change her opinion. Since agreement couldn't be reached, this complaint has been allocated to me.

### **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.

I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. Where the evidence is unclear, or there are conflicts, I've made my decision based on the balance of probabilities. In other words, I've looked at what evidence we do have, and the surrounding circumstances, to help me decide what I think is more likely to, or should, have happened.

I'd like to clarify that the purpose of this decision isn't to repeat or address every single point raised by the parties to this complaint. So if I haven't commented on any specific point, it's because I don't believe it's affected what I think is the right outcome.

### My findings

I've considered all the evidence afresh including the additional comments Mr Z made in response to our investigator's assessment of this complaint. Having done so, I've reached the same conclusion as our investigator for these reasons:

- In line with DISP 2.8.2R, it's my view that this service cannot consider the element of the complaint about the alleged overpayment of rent and associated costs paid by Firm Y between 2003 and 2012 because it was brought too late under our rules given Mr Z was aware of the issue since at least 2016. Mr Z hasn't provided any evidence that shows the delay in complaining about this was due to exceptional circumstances;
- Purchasing and holding a commercial property in a SIPP can be complex, particularly where multiple SIPP members pool assets and borrow money to collectively buy a single property, as happened in this case. While there are many benefits to buying property using a SIPP there are several potential disadvantages and challenges. Coordinating multiple SIPPs to invest in a single asset requires careful management and clear agreements setting out roles and responsibilities between the parties. It's also necessary for all parties with a beneficial interest to agree on management and investment decisions which can sometimes be challenging if there is a difference of opinion;
- Mr Z and Mr X both had a beneficial interest in the property at the centre of this complaint. Therefore, James Hay required their unanimous and workable agreement to take forward the sale of the property. If either party disagreed, then James Hay couldn't proceed with a sale. This is what happened after Mr X instructed it to withdraw the property from the market in December 2018. James Hay couldn't ignore Mr X's instruction and take forward the sale of the property simply because Mr Z wanted to sell;
- Mr Z says there was a breakdown in his relationship with Mr X between December 2018 and December 2020. It seems they temporarily reconciled after this period but no agreement was reached on the sale. This led to James Hay deciding to proceed with a forfeiture of the lease and sale of the property without the consent of Mr Z and Mr X. It's explained to this service that any decision it makes to instigate a forced sale without all SIPP members' instructions will only ever be made after its given careful consideration to the overall circumstances and concluded that such action is appropriate and fair. This is on a case by case basis, not least because the circumstances will be individual to each situation. This is why it was unable to provide to Mr Z a list of pre-defined measures that might detail what could lead to the decision to sell being taken;

- Based on the available evidence, I think James Hay's actions to instigate a forced sale were reasonable in the circumstances. In my view, it had given Mr Z and Mr X sufficient time between 2018 and 2021 to come to an agreement on the sale of the property. The SIPP's weren't receiving rental income after the tenant, Firm Y, had exited the property before the end of the lease and had stopped paying rent. The Bank of Scotland was pursuing James Hay for the mortgage debt. And James Hay was using its own funds to cover expenses in the ongoing management of the arrangement due to lack of cash in the SIPP's. The debts were increasing. So the situation couldn't persist for an interminable period of time until such time as the property sold at a price in line with Mr Z's expectations. I think on any reasonable assessment of the circumstances, James Hay had no other option but to proceed with a forfeiture of the lease and sale of the property without the consent of Mr Z and Mr X. So I don't think the decision it took was an error or unfair.
- The evidence indicates that at all times Mr Z was in agreement with the decision to sell the property. But he's unhappy about the sale price of £760,000 achieved. He believes it should have been sold for £925,000. But there wasn't any guarantee a higher price would be achieved. And as our investigator pointed out, it's common for sales to fall through before the exchange of contracts. James Hay didn't have any control over the price any buyer was willing to pay once it had decided to proceed with a forfeiture of the lease and sale of the property. So I cannot find James Hay liable to pay compensation based on the difference between £760,000 and £925,000; and
- Overall, I haven't seen any evidence that James Hay failed to act in accordance with its legal obligations and responsibilities towards Mr Z, as he's alleged.

### Conclusion

It's clear Mr Z feels very strongly that James Hay didn't act correctly in connection with the sale of the property at the centre of this complaint. But for the reasons explained above, I cannot find that James Hay made an error or treated Mr Z unfairly. So I find that it wouldn't be fair or reasonable in these circumstances for me to require James Hay to pay compensation to Mr Z or to take any further action in response to this complaint.

### **My final decision**

My decision is that I don't uphold Mr Z's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr Z to accept or reject my decision before 15 May 2025.

Clint Penfold

**Ombudsman**