

The complaint

Mrs M's complaint is about her Self-Invested Personal Pension's ('SIPP's') commercial property investment (the 'property'). The SIPP is administered by JAMES HAY ADMINISTRATION COMPANY LIMITED trading as James Hay Partnership ('JHP'). She alleges failures by JHP in relation to the lease for the property.

What happened

Mrs M's complaint is associated with her husband's, on the same subject matter. Both share the same main facts and issues. Her husband has led in presenting and pursuing both complaints, but they have been separated, so this decision is only about her complaint. However, given that the submissions have mainly been made by her husband, I will reflect that in the contents of this decision.

In 2009 the couple set up their respective SIPPs with JHP, and in 2010 they used those SIPPs to jointly invest in two commercial units, which form the property. JHP's SIPP Trustees are the legal owners of the property, the couple are the beneficial owners. The SIPP Trustees are the landlord of the property, but rental income belongs to the SIPPs and all property/property maintenance costs/expenses that do not belong to the tenant(s) belong to the SIPPs.

Responsibility for the investment management of the SIPPs belongs to Mrs M and her husband. JHP's SIPP Trustees' responsibilities as landlord of the property was delegated to a third-party property manager, and it (JHP) says the associated duties included "... *taking receipt of rent, arranging building insurance, property inspections, recharging property expenses to the tenant (when applicable) and answering tenant enquiries. It should be noted that many landlord responsibilities can only be carried out when there is a valid lease agreement in place.*"

The couple initially sought to place their company as the tenant and, it appears, they did so for a period of time, but a lease was never executed for this purpose. Thereafter, a third-party tenant was placed in the two units. JHP says this happened without its knowledge and consent, and that the tenant took over one of the units in 2011 and then took over the second unit in 2016.

In September 2019 JHP instructed solicitors to resolve the outstanding lease issue. Its chronology of events mainly relates to what happened thereafter. It shows that the lease, covering the two units, was eventually executed, for the same third-party tenant, on 24 June 2022. The chronology also sets out the problems it says it encountered between 2019 and 2022 in trying to achieve this outcome. JHP also notes that prior to the lease agreement, in 2021 the tenant removed the original mezzanine floor in one of the units and installed a smaller version, that this had been agreed between the tenant and Mrs M's husband in 2016 and that it was approved by an independent surveyor.

A summary of the specific allegations made by Mrs M is as follows –

- JHP failed to ensure the SIPP's investment was generating rental income; it failed to resolve the lease for the third-party tenant in 2016 and delayed in doing so from then up to 2022; its responsibility for those failures means it is responsible for the loss of rental income throughout this period, for taking no action against the tenant throughout this period (with regards to its occupation and responsibility for business rates and other rental expenses associated with the units), and for the costs incurred by the SIPP in meeting the units' expenses in the absence of rental income. [issue 1]
- JHP agreed the June 2022 lease on an unreasonably low rental rate – a total of £22,000 per year, instead of between £26,000 and £28,000 per year. [issue 2]
- JHP allowed the tenant to remove the original mezzanine floor in one of the units and to replace it with a smaller version, which has resulted in reducing the rental floor space and associated rental value; it also did not ensure that there was a clause in the lease requiring the tenant to restore the unit to its original state (inclusive of the original mezzanine floor) after the tenancy; the reduction in floor space has meant a loss in rental value of around £9,000 per year. [issue 3]
- JHP has misrepresented its awareness of the history of the tenant's occupation of the units. [issue 4]

I issued a Jurisdiction Decision ('JD') for the complaint, in which I concluded that we have no jurisdiction to address issues 1 and 4, but we can address the merits of issues 2 and 3.

My findings in the JD included –

"Issue 1 is quite clearly a repeat and continuation of the 2019 complaint that was addressed by JHP's 2019 final response and that was referred to and addressed (in 2020) by the [Pensions Ombudsman]. Therefore, its referral to us in 2024 happened more than six months after the 2019 final response and is out of time."

"Issue 1 is part of the complaint referred to us by Mrs M following her 2023 complaint and JHP's 2024 response ... I must consider whether (or not) JHP's 2024 response had the effect of reopening it or nullifying/withdrawing its 2019 final response to it. I find that the 2024 response had no such effect. This was expressly confirmed in the response, at its outset, by the following –

"We responded to your previous complaint in 2019 which was subsequently referred to the Pensions Ombudsman. My letter will refer to the same events in places where relevant, but our position as explained within our prior complaint response has not changed. For clarity, we're in agreement with the Pensions Ombudsman's findings and do not have anything further to add. I enclose a copy of our complaint response dated 25 July 2019 and the Pensions Ombudsman's opinion dated 13 March 2020 ..." [my emphasis]

For the reasons give above, I find that issue 1 is out of time, and, on this ground, JHP has confirmed that we do not have its consent to address it."

"Issue 1 is out of time and is outside our jurisdiction, so we cannot address it. As the investigator said, issue 4 is essentially a part of issue 1 – the history of the third-party tenant's occupation of the units and JHP's position on that is within the matters in issue 1 – so the same outcome applies to issue 4.

Issue 2 is about the rent agreed in the leases put in place in 2022. Mrs M's 2023 complaint was made within six years of that event and it was thereafter referred to us just inside six

months of JHP's 2024 response. Issue 2 is in time, and we can address its merits.

The same outcome applies to issue 3, which is about the mezzanine alteration by the tenant and Mrs M's allegation that the relevant 2022 lease fails to properly address it. As the investigator said, JHP's chronology of events refers to notice of the intended alteration in 2019. The relevant lease was put in place in 2022. The 2023 complaint happened within six years of both events, so issue 3 is in time.

There have been a number of complaint submissions from Mrs M's husband over time, but the majority of them relate to issues 1 and 4. They have all been read and considered, at the point the JD was being worked on and in the present review of the complaint. However, there is no jurisdiction to address issues 1 and 4.

There is jurisdiction to address only issues 2 and 3, and they are both about events surrounding the 2022 lease agreement.

In response to issue 2, JHP mainly says –

- The £28,000 per year rate cited by Mrs M husband is based on a valuation obtained in February 2023, after the June 2022 lease agreement.
- *"A qualified chartered surveyor ... provided their opinion on the market rent for each unit in 2019 when they were engaged to provide professional advice on the situation. The surveyor's opinion was that rent should be £11,000 per annum per unit so this is what was entered in to the first draft of the proposed lease. [the couple] were provided with a copy of the proposed heads of terms for both leases, and had opportunity to obtain an alternative valuation from another qualified surveyor, but did not."*
- The lease negotiations were lengthy, they were particularly drawn out by the tenant who seemed to lack incentive to finalise the lease, given that it was already in occupation of the property and had been so for some time. It caused delays in a number of respects, despite JHP's efforts to avoid them. By June 2022 JHP gave an ultimatum to the tenant to either complete the lease or face eviction from the property. The lease was completed in the same month. With regards to the rent applied at the time, it "... relied on professional advice given in 2019 and 2021 and there was no need to re-examine this as [the tenant] is not what HMRC would deem a "connected tenant", meaning it wasn't essential to obtain another valuation at the time of execution. I can't agree that we should have negotiated a higher starting rent in the circumstances."

There is a part of the complaint in which Mrs M's husband draws a connection between issues 1 and 2, whereby he alleges that JHP failed, in its lease negotiations and completion, to put in place an arrangement for the agreed rent to be backdated to cover past unpaid rent arrears.

In this respect, JHP mainly says – the original start dates for the lease were in 2018 (for one unit) and 2019 (for the other); the lease negotiations were not resolved until 2022; "... given that no formal lease had been in place since 2010 and the property expenses had been accruing to more than £30,000, our priority was finalising the lease to protect [the] SIPPs from any further expense"; its experiences in negotiating the lease and the circumstances presented by the tenant about the unfavourable state of its business made it unlikely that an insistence on backdated rent would be successful; instead, it was more likely to prolong the negotiations even further; it agreed, with the tenant, a payment of around £8,000 (paid in late 2022), around £3,000 was for rent owed from June 2022 onwards, and £5,000 was for the

tenant's previous 'undocumented occupation' of the property, but this part was not defined by a specified period; other than that, it focused on concluding the lease in the SIPP's best interests, and legal advice it took at the time supported this.

In response to issue 3, JHP mainly says – given that the mezzanine alteration was in the terms Mrs M's husband approved and presented to JHP in 2016, years before the lease agreement, it follows that he agreed with the alteration; the tenant subsequently pressed ahead with the alteration without consent from JHP and before the required license had been signed, but it cannot reasonably be held responsible for the tenant's actions.

It also says –

"[Mrs M's husband] appears to believe that the new mezzanine floor that has been erected is smaller than the original ... We were not aware that there was a substantial difference in size between the old and new mezzanine floors, but the opinion of the surveyor we engaged, was that the alterations were positive and when completed meant the unit was useable by the tenant."

Our investigator looked into the merits of issues 2 and 3. He concluded that neither should be upheld.

On issue 2, the investigator found that the overall circumstances in which the rental rate was determined shows, on balance, that JHP conducted its role reasonably, and that there were some limitations upon it caused those circumstances.

He also noted that the lease agreement included an *upward only* rent review clause, which resulted in increases to the annual rents (to £15,000 for one unit and £13,000 for the other) following the December 2023 based rent reviews. He said these rent levels matched those Mrs M sought for the 2022 agreement, albeit a year and a half after the lease agreement.

With regards to issue 3, the investigator noted that removal of the original mezzanine floor had been agreed in the Heads of Terms that Mrs M's husband approved in 2016, so it was not unreasonable for JHP to agree to that too. In terms of the absence of a clause requiring its reinstatement by the tenant, he found that negotiating this might have delayed the lease agreement further, that the surveyors did not attach much value to it, and that based on the information JHP had about the rental value of the mezzanine (including the surveyor's opinion) it was not unreasonable for it not to have given attention to its reinstatement.

Mrs M disagreed with this outcome. Her husband mainly referred to matters related to issues 1 and 4 and maintained that they should be addressed.

He also said – JHP did not seek and obtain his acceptance of the rental rate that it proceeded to agree, despite his beneficial ownership of the SIPP (and the property); he might be minded to agree with the rental rate reached by JHP, but he does not accept its failure to ensure the agreed rent was backdated to cover the rent arrears since 2016 (given that JHP knew the tenant had occupied the property throughout that period); it was inactive at first, then it over indulged the tenant's strategy to frustrate the lease negotiation; both aspects led to delays lasting many years, at costs to the SIPP of well over £100,000; that should have been avoided, in the alternative it should have been repaired by the backdating of rent to cover the arrears; the pressure on JHP noted by the investigator was caused by JHP's own mishandling of the matter; he does not accept that the mezzanine did not have a value, and there is evidence that says it would have increased the property's rental value.

The investigator made some additional enquiries, but he did not change his view. He explained why to the couple. 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.

Both parties are familiar with the JD I issued for the complaint, so it is not necessary to go through its contents beyond what I quoted above.

I have jurisdiction to address only issues 2 and 3 of the complaint, so my findings below do not go beyond this scope.

I understand the reasons Mrs M's husband continues to refer to matters concerning issues 1 and 4. For the couple, I imagine that the entire facts and history of all the complaint issues are live and relevant considerations, and that they are matters they seek to have addressed in order to achieve resolution and closure. However, for our service, we must operate within the rules that govern us. That includes the rules on our jurisdiction, so we do not have the power to determine matters without jurisdiction to do so. I understand the history behind the complaint. If and where any part(s) of that history is relevant to my findings for issues 2 and 3, I will take that on board, but my focus remains on determining issues 2 and 3 only.

Roles and Responsibilities

Issues 2 and 3 relate to JHP's conclusion of the lease agreement in June 2022. Mrs M essentially says it committed the following wrongdoings – it allowed a lower rental rate in the agreement than it should have, it failed to backdate application of the agreement to cover the rental arrears, and it failed to address, in the lease and in practice, the mezzanine alteration performed by the property's tenant.

This leads to consideration of both parties' roles and responsibilities. Including attention to what JHP was entitled to do in both issues, the reasonableness and legitimacy (or otherwise) of what it did in the relevant circumstances, and Mrs M's entitlement(s) in the matters.

We have a copy of the JHP *Commercial Property Purchase Guide* ('CPPG') document that was in force around the time the SIPPs purchased the commercial property, which also formed a part of the overall terms of the SIPPs' investment in the property. Notable contents in the CPPG include –

"We will expect all properties to be tenanted on or before completion."

"We will be the legal owner of the property and the landlord for letting purposes. We use an external property management company to undertake day to day management of the properties."

"All lettings must be on commercial terms approved by a qualified valuer."

"What we require from the surveyor's report ...

The market value ...

A recommended current market rent ..."

"A formal lease must normally be entered into at the time of completion of the purchase

unless there is an existing occupational lease.”

“The lease must be on normal fully repairing and insuring terms commercial terms, which are acceptable to us, and must be at the market rent with upward only rent reviews.”

“Valuations ...

... routine valuations of the property, normally every five years.”

“Any proposed alterations ... on commercial property should be notified to [the property management company] for approval.”

Issues 2 and 3 relate to events in the complaint around 12 years after the commercial property was bought by the SIPP.

In the absence of an existing lease, the CPPG required that a formal lease, on terms acceptable to JHP, must exist for the tenant of the property at the point of purchase. It follows that the new lease agreed in June 2022 also had to be on terms acceptable to JHP. In other words, other than the duty owed to her in JHP’s overarching responsibility to uphold her best interests/beneficial interest in the SIPP, Mrs M had no active role in the agreement of the lease’s terms.

Those terms, in the fiduciary context noted above, were to be determined by JHP only.

The same context applies to the matter of alterations to the property, but the CPPG requirements show that the normal and expected course of events was for alterations to be proposed to JHP’s property managers for approval. The facts of issue 3 do not lend themselves to this, so my consideration will mainly relate to the reasonableness (or otherwise) of JHP’s approach, in the lease agreement, towards the alterations that the already occupant tenant made to the property *before* the agreement was concluded.

Issue 2

The tenant had occupied the property (both units) since around 2016.

I am aware of the dispute between the parties over how this happened and over matters associated with the tenant’s occupation of the property between 2016 and 2022. These matters mainly belong to issue 1, which I am not addressing. However, I consider it relevant to isolate the following facts from this history –

- By 2022, the tenant had occupied the property without a formal lease for many years, contrary to the CPPG’s requirements. This needed to be rectified.
- The tenant did not pay rent or rates for the property for most or all of the above period. This also needed to be rectified.
- During the same period, mounting SIPP costs and property expenses (like buildings insurance) had accrued in the SIPP while no income from the property was received in the SIPP, causing adverse effects on the financial state of the SIPP.

These are made as statements of fact, and no more, I make no findings about fault or liability associated with them.

The statements sum up the background that led, during the above period, to JHP, the property managers, Mrs M and her husband, the tenant, solicitors (on the SIPP’s side and

on the tenant's side), and the surveyor, all being involved, in one way or another, in the process of resolving a formal lease for the property.

As stated above, in 2019 JHP appointed solicitors (for the SIPP's) for the purpose of resolving the lease.

There is a Heads of Terms document dated 2 September 2019, produced by the Chartered Surveyors appointed for the SIPP's property and for the formal lease process. The terms addressed both units of the commercial property. It confirmed the surveyor's rent valuation for each unit as being £11,000 plus VAT per year, payable quarterly in advance. Evidence from JHP is that the surveyors had visited the property in July 2019 and had advised this rental rate, the property manager agreed, and the solicitors were thereafter instructed to draw up a lease based on the Heads of Terms.

In the same month (September 2019) the solicitors introduced themselves to Mrs M and her husband. Her husband responded (copying JHP) and voiced concerns – mainly relevant to issue 1. In another email to JHP, date 12 October, he raised further concerns, again mainly relevant to issue 1. JHP responded on 23 October, attaching a copy of the Heads of Terms to keep him informed in that respect (including in relation to the rent that was to be applied to the agreement).

As I quoted earlier, routine valuations of the property were normally to happen every five years. In this context, the 2019 rent valuation by the surveyors covered the events, three years afterwards in 2022, in which the lease agreement was concluded. Based on the surveyors' correspondence with the SIPP's solicitors in 2021 they appear to have stood by the 2019 rent valuation in this year too. In other words, the £22,000 (total) rental rate agreed in the lease was based on an independent surveyors' rental valuation in 2019 that the surveyors maintained in 2021, that was applicable in 2022 and that did not need to be reviewed until five years after the 2019 valuation (in 2024). On balance, I am satisfied that this made it reasonable for JHP to use the rental rate in the lease agreement.

I have considered the 2023 valuation report Mrs M has cited in support of her argument that a higher rent should have been applied in the 2022 lease agreement. The report provided a rental valuation of £28,000 (in total) for the property. However, this valuation is dated 1 February 2023, around seven months after the 2022 lease agreement, so it was not a factor available for JHP to consider at the time of the lease agreement. As I have found above, it was not unreasonable for JHP use the 2019 valuation in the agreement, which is what it did. It is possible that it could have obtained a fresh valuation in 2022, but, for the aforementioned reasons, it did not need to.

I understand that the underlying argument in referencing the 2023 valuation is that a valuation the year before could have reflected a similar rental rate. There is not enough evidence to establish this. Even if this was the case, for the purpose of determining the present complaint, I have found grounds on which it was reasonable for JHP to use the 2019 valuation and on which it was not expected to review the valuation until around 2024. Therefore, at best, this argument would mean it *could* have considered a higher rental rate in the 2022 agreement, but it was not unreasonable for it not to have done so.

My reading of Mrs M's husband's comments on the investigator's findings is that he might be prepared to concede the conclusion that the rental rate in the lease agreement was fair, but he strongly maintains that JHP wrongly failed to backdate the rent/agreement.

It could be argued that there is primarily a need to be satisfied that JHP holds responsibility in issue 1 (including responsibility for any unpaid rent between 2016 and 2022), in order to have grounds to consider a duty on its part to address the rent arrears in the 2022 lease.

Parts of Mrs M's husband's submissions seem to address this, with his conclusion being that the rent arrears were wholly or mainly JHP's fault. However, I do not have jurisdiction to deal with issue 1 or to determine, as part of issue 1, who is at fault for the unpaid rent between 2016 and 2022.

He could apply the alternative argument that, irrespective of who is at fault for the previously unpaid rent, the fact is that rent arrears were owed and due at the point the 2022 lease was agreed and that, as part of its overarching duty to uphold Mrs M's best interests/beneficial interest in the SIPP, JHP should have ensured that the lease included a means by which to recover those arrears.

This is a point worth considering, so I have looked into the history between 2019 (when the journey towards the lease agreement appears to have begun in earnest) and 2022 (when the lease was concluded) to find what JHP did or did not do in this respect. To be clear, I am not drifting into determining a matter under issue 1. Instead, I acknowledge that the 2022 lease did not provide for recovery of the rent arrears owed at the point of the agreement, so I am looking into whether (or not) there was any previous effort by JHP in the lease negotiations leading to the 2022 agreement to have such a provision in place.

There was such effort.

In summary – in February 2020 the SIPP's solicitors wrote to the tenant's solicitors, as part of correspondence on the proposed lease, to query payment of the rent arrears; in October 2020 the latter asked if a payment plan for the rent arrears could be considered; in December 2020 JHP and the SIPP's solicitors agreed to proceed with the suggestion of a payment plan; by August 2021 there appears to have been an agreement in which the tenant would pay, at completion of the lease agreement, £5,000 towards the rent arrears and then would follow a £1,000 per month payment plan for the rest of the arrears until they were cleared; coupled with this, JHP had initially applied start dates in the lease in 2018 (for one unit) and 2019 (for the other), which created the basis for the collection of rent from those start dates onwards.

However, it appears that the protracted nature of the lease negotiations and the urgent need to have a lease in place to generate rental income for the SIPP's led to notable concessions in this pursuit. The 2018 and 2019 start dates did not survive, instead the lease started when it was agreed (in June 2022). The payment plan appears to have been abandoned. There is no mention of it in the agreement. The £5,000 sum was paid, but as I noted in the background section above it appears to have been no more than a payment by the tenant towards what was termed as its previous *undocumented occupation* of the property – or, the rent arrears.

The overall impression I get from the evidence is that JHP agreed these concessions reluctantly, and because it did not find the circumstances conducive to resist doing so. I share the investigator's views about considering JHP's actions in the circumstances as they were at the time. The SIPP's urgently needed rental income that they had been deprived of for around six years, during which they continued to incur costs and expenses. It was not in Mrs M's, or her SIPP's, best interest to prolong the negotiations further without good cause and my reading of the correspondence between the parties does not suggest that the tenant was likely to yield to a position where all the rent arrears owed were to be paid. Therefore, prolonging the negotiations in pursuit of the rent arrears was arguably not a good cause.

The notion of starting afresh with a new tenant does not appear to have been a viable alternative. Eviction action against the existing tenant, marketing of the property for a new tenant, finding a new tenant and then negotiating a lease with the new tenant, would have added more time in which the SIPP's continued to be without much needed rental income. In

any case this alone would not have resolved the rent arrears. It would have led to a new lease for a new tenant, in which there would have been no basis to pursue rent arrears owed by the previous tenant, and no basis to backdate the start date.

Overall, on balance and for the above reasons, I do not find it unreasonable that JHP agreed the June 2022 lease without provisions to recover the full rent arrears owed by the tenant.

On all the above grounds, I do not uphold issue 2.

Issue 3

Heads of Terms for the tenancy were agreed between Mrs M's husband and the tenant in 2016.

With regards to alterations the 2016 terms said – "*Structural alterations are prohibited. Non structural alterations to be approved by the landlord in advance. Mezzanine in Unit 6 to be removed by Tenant.*" [my emphasis]

There is nothing in the alterations section of the terms that provided for the reinstatement of the original mezzanine floor by the tenant after the tenancy. Under the 'Reinstatement' section of the terms, it says – "*The tenant shall at the end of the term reinstate the property to full repair.*" – but this appears to relate to addressing disrepair in the property, not alterations of the property.

Given that the 2016 terms agreed by him did not stipulate a requirement, upon the tenant, to reinstate the original mezzanine floor, it would appear that this was something the couple neither sought nor expected from the tenant. The tenant carried out the alteration – replacement of the original mezzanine floor with a smaller version – before the 2022 lease agreement.

The Heads of Terms used for the 2022 lease agreement provided as follows (with regards to Unit 6) – "*Tenant to remove existing mezzanine and offices and install a new mezzanine ... which will become the landlord's property.*"

These terms also did not provide for reinstatement of the original mezzanine floor by the tenant after the tenancy. Instead, it affirmed that the new floor would belong to the landlord of the property, indicating that the new floor was to be retained as part of the property. I consider that the same implication arises from the terms agreed by Mrs M's husband in 2016. In other words, he appears to have accepted, in 2016, that the mezzanine alteration would remain, and the terms used for the 2022 lease agreement confirmed the same.

In their 2021 correspondence with the SIPP's solicitors, the surveyors said the following in relation to the alteration –

"They have removed the existing mezzanine and offices and installed a new mezzanine over just under 25% of the floor area ... From my point of view I am happy with what has been done – the premises are now useable !"

"Mezzanines are generally not worth very much, if anything, and often hinder letting buildings so as I said earlier, " I am happy with what has been done – the premises are now usable !" ..."

In the context of upholding the SIPP's best interests, and therefore the best interests of the commercial property investment, it would have been reasonable for JHP to be influenced by the surveyors' feedback about being *happy* with the mezzanine replacement work that had

been done – which meant disrepair was not an issue – and about the value of the mezzanine to the property. It is also possible that the surveyors' comment about mezzanines lacking value might have discouraged any consideration JHP had to look into reinstatement of the larger original mezzanine floor.

Overall, on balance, and for the above reasons, I am not persuaded that JHP did anything wrong in issue 3. At the point of the lease agreement, the property had not lost a mezzanine floor, instead the original mezzanine had been replaced by the tenant with a smaller version, alteration to the mezzanine was something Mrs M's husband had initially agreed with the tenant in 2016, there is no evidence that he subsequently withdrew that agreement and no evidence that he told JHP he wanted to have the original mezzanine reinstated after the tenancy. Feedback from the surveyors gave JHP no disrepair concerns at the time, and no concerns about the alteration adversely affecting the property. The terms JHP agreed in the matter broadly mirrored those Mrs M's husband had previously agreed.

My final decision

I do not uphold Mrs M's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 13 January 2026.

Roy Kuku
Ombudsman