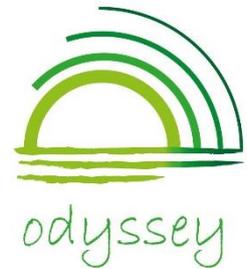


help &  
information



## rent arrears & tenancy difficulties

### background

One of the most popular features of a Self-Invested Personal Pension (SIPP) or Small Self-Administered Scheme (SSAS) is the ability of the Member, or Trustees, to acquire commercial property.

There are various reasons for doing so:

- The company may own existing commercial property and purchasing it in the pension scheme releases capital to the business for other purposes;
- The company could be looking to expand (or contract) and may be looking for alternative premises to assist it in doing so;
- Rental income is paid to the pension scheme (instead of, for example, a third party) which could be an attractive form of investment return.

Often, individuals will use their own pension schemes to let a commercial property to their own business, but it is also possible to have an independent tenant paying rent to a pension scheme.

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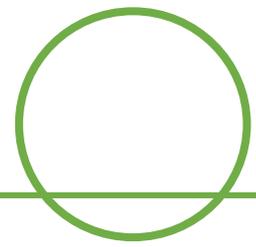
### typical tenancy situation

When a pension scheme owns a property, the relationship between it (as the landlord) and the tenant will normally be governed by a lease. This will likely take the form of what's called a 'FRI' lease – a fully repairing and insuring lease.

This is a lease where, generally speaking, all the costs of repairs and insurance are borne by the tenant. In addition, the lease sets out the position regarding rent, frequency of payment, rent reviews and, importantly, what happens when a tenant does not pay rent.

Most leases will have penalty provisions that will:

- Allow a landlord to charge interest on rent that is not paid on time;
- Ultimately allow the landlord to take back the property and, potentially, anything contained therein to offset lost rent.



## *connected and independent tenants*

Pension scheme rules make a distinction between what are called 'connected parties' and 'unconnected parties'.

Connected parties are, generally, people or companies connected to the pension scheme member. So, it could be the member's company, for example, or a company owned by a family member of a pension scheme member.

Unconnected parties are the opposite: they are independent parties who have no connection to the pension scheme member.

Pension rules require any interaction between pension schemes and connected parties to be conducted at 'arm's length'. In essence, this means that pension schemes usually have to be able to demonstrate that any arrangement they make with a connected party is commercial. This often means having an independent confirmation that a proposed course of action is acceptable. For example, a survey confirming the independent market rent of a property would be used as the basis on which to charge rent.

If HM Revenue & Customs judges that a pension scheme has given a 'benefit' to a connected party (such as foregoing rent) then they could look to impose heavy tax penalties on the pension scheme members. It is important, therefore, to deal with any problems properly.

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## *rent arrears and tenancy issues*

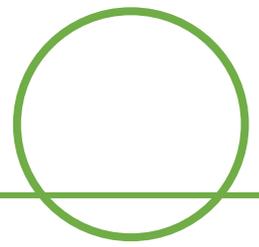
Tenancies don't always operate in the fashion expected or hoped for. Inevitably there are situations that arise where tenants find themselves unable to make payments as agreed.

The pension scheme, as landlord, has recourse to the terms of the lease to consider what it then might do:

- This could range from taking a very strict position, and applying the terms of the lease exactly as stated: charging interest, and ultimately taking legal action;
- Or a more measured approach can be taken where the landlord negotiates with the tenant to vary, temporarily, the terms of the lease on the basis that they might wish to retain the tenant longer term, irrespective of a short-term loss of rent.

In so doing, Trustees must act commercially. This means that, especially where connected parties are concerned, the Trustees should be able to demonstrate that they have acted in the best interests of the pension scheme.

In the longer term, it may not be in the best interests of the pension scheme to apply very strict measures to a tenant if that ultimately results in that business going bust, and the property being left vacant for some time.



## *coronavirus & the current environment*

The present environment is unprecedented given the impact that the Coronavirus is having on the economy generally. This impact is being felt by all manner of industries and commercial enterprises, large and small. Cashflow will inevitably be affected for many, meaning tenants are struggling to pay rents, which in turn impacts Landlords with property holdings.

Leases do not typically allow tenants to withhold or delay payment of rents, and nor do they oblige landlords to offer rent concessions during the term. Trustees and members of pension schemes are strongly advised to prepare themselves for requests from tenants to allow some short-term breathing space and consider what might be in their best interests. This is worth doing even where tenants have not made any formal requests. Pension scheme members need to think through what any shortfall in rent might mean for them.

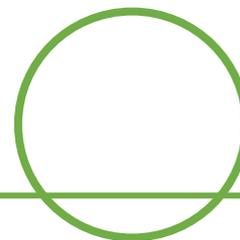
Where the tenant is a connected company, this does not prevent the same consideration or flexibility being applied, but it is important for Trustees to think through how they should approach the situation given that more stringent rules apply to these types of tenant.

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## *what can pension schemes do?*

As Landlord, the pension scheme can agree to vary the terms of the lease. The starting point is that flexibility can be afforded to a struggling tenant. There are, however, a number of important considerations:

- The tenant should try to detail the challenges that they are facing. This could be a few brief lines about the impact, but this is likely to be a very sensitive matter. Landlords should aim to be sympathetic to the situation and consider whether they need specific independent validation of any problems that a tenant presents. Equally, however, Landlords do have a right to know what the issues are and how long the rental payments might be affected.
- Any variation should be documented. This could be in the form of a side letter to the lease between the parties which details what the variations are. Documenting the situation in this fashion will help avoid disagreements in the future as to what the nature of the variation might be.
- Landlords should ask themselves whether they are allowing a deferment of rent (with the idea that it will be repaid at a future date), or a complete waiving of the requirement to pay rent (so, the rent is effectively 'lost').
- The period of deferral needs to be considered. A short period without payment combined with a regular review might be preferable to a long period of deferred or waived rent.
- The Landlord needs to be clear about the other provisions of the lease. For example, the tenant would be expected to continue to meet the cost of insurance, any service charges, utilities and rates, and still retains all its responsibilities subject to the lease.



- Additionally, the Landlord needs to balance providing flexibility to a tenant against the commercial impact on its own position. If a pension scheme is relying on rental income to pay retirement benefits or repay borrowing, then regular reviews of the position might be vital.
- There might be opportunity, for example, to allow a gradual return to full rent which could ease the cashflow of the pension scheme, and also allow the tenant continued breathing space to return to profitability.

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### *what should connected tenants not do?*

Tenants should not simply stop paying rent without communicating with the Landlord. This is equally as important, if not more so, for connected parties as it is for unconnected parties.

Where pension scheme members act in both capacities (both as the Landlord and the Tenant) there may be an assumption that a given course of action (i.e. stopping rent) is commercially in the interests of both parties.

The likelihood is that this may well be the case, but it is still important to document what is happening. In future years, pension scheme Trustees do not want to be challenged by HM Revenue & Customs to evidence why they conceded a relaxation of rent especially for a connected party.

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### *where can I obtain further information or help?*

Odyssey Pensions has a wealth of expertise relating to pension scheme property transactions and operations.

We can discuss particular situations with clients and help devise strategies, or comment on proposals, that will try to ensure that variations to tenancies remain within the relevant pension rules. We can assist in documenting the variations being considered, and also help with the ongoing reviews of any concessions.

We also have access to a number of professional, specialist law firms that can provide additional support and assistance.

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O-HI CV1.01 (03/20)