

The complaint

Mrs and Mr P have complained about the advice they were given by an appointed representative of Openwork Limited when they wanted to consolidate some unsecured debts.

Openwork said a further advance with their existing lender wasn't possible and referred them to a different broker firm for advice about second charge loans.

Any reference to Openwork in this decision should be taken to mean its appointed representative where appropriate.

What happened

I issued a provisional decision in November 2022, the findings of which said:

"Although I've read and considered the whole file, I'll keep my comments to what I think is relevant. If I don't comment on any specific point it's not because I've not considered it but because I don't think I need to comment on it in order to reach the right outcome.

Where the available evidence is incomplete, contradictory or missing, our rules require me to reach my conclusions on the basis of what I consider is most likely to have happened on the balance of probabilities. That's broadly the same test that the courts use in civil cases. I set out my findings in this provisional decision, in order that both parties have the opportunity to comment before I finalise my decision.

The outcome of this case turns on two core questions; these are:

- *whether Openwork could have obtained a competitive first charge mortgage for Mrs and Mr P to repay their unsecured debts (either a further advance with B, or a full remortgage to a different lender); and*
- *whether Openwork is responsible for the advice given by firm E to take out the second charge loan.*

I've considered this case very carefully but I'm not persuaded I can safely answer 'yes' to either question. I'll explain why.

I acknowledge that putting Mrs and Mr P's basic information (that is, their incomes and the details of their borrowing requirements) into B's affordability calculator indicates the potential further advance could have been affordable for them. But that isn't the only consideration a lender has when being asked to lend more money.

Many lenders are understandably cautious when they're asked to consolidate unsecured debts onto a mortgage especially where, as it seems was the case here, the unsecured debts don't have a specific reason for being owed, have been building up over time, and are almost equal to the main income earner's annual gross income (and in excess of their combined net annual income).

Different lenders have different risk profiles, with mainstream first-charge lenders often being the most risk adverse and unwilling to lend in scenarios that non-mainstream lenders (particularly in the second charge market) would be willing to consider.

I'm required to reach my decision on the basis of what I consider is most likely to have happened, on the balance of probabilities. Ultimately, what that test means for Mrs and Mr P is that, as the party bringing the complaint, it falls to them to present a case that is more likely than Openwork's case; not just as likely. Having considered what both sides have said I don't find Mrs and Mr P's arguments to be any more than just as likely.

There are many reasons why a mortgage application might fail and no guarantees can ever be given that an application will be successful. We can't say for sure whether B would or wouldn't have granted Mrs and Mr P a further advance in 2018 as a formal application wasn't made but, based on everything I've seen and my experience in seeing the types of applications that are accepted and declined, I'm not persuaded it is more likely than not that B would have accepted the application had it been made.

I understand Mrs and Mr P have now remortgaged to a mainstream lender but they wouldn't have been able to remortgage to that lender in 2018 with the level of unsecured debt they had as – based on my experience and understanding of that lender's criteria - it would have been outside its criteria and therefore the application would have been declined.

Consolidating secured debt isn't viewed the same way as consolidating unsecured debt, and so because those debts were now secured on the property, the new lender was willing to grant them a remortgage in 2021, but if those debts had been unsecured it is likely that the remortgage would have been declined. In my experience Mrs and Mr P would have had similar difficulties with other mainstream lenders in 2018.

In 2018 the position Mrs and Mr P were in wouldn't have been attractive to the mainstream mortgage market as a remortgage proposition for the reasons I've given, and the non-mainstream first charge mortgage rates would have been higher and therefore unlikely to be cost effective when considering the low rates that were available with B for the existing mortgage.

By 2021 Mrs and Mr P were in a much more positive position for mainstream lenders due to the second charge loan consolidating their unsecured debts, and therefore they were able to get a very attractive rate, but their 2021 position is simply not comparable with their 2018 position and so can't be used as an indication of what might have been possible in 2018.

Having considered everything I'm not currently persuaded that it is more likely than not (as the test I must use) that Openwork could have placed Mrs and Mr P's application requirements within the mainstream first charge mortgage market at a rate that would have made it financially suitable, and so I can't safely answer 'yes' to the first of the two core questions.

However, even if I did answer 'yes' to the first core question, it doesn't automatically follow that this complaint should be upheld. I'd have to also be satisfied that Openwork was directly responsible for Mrs and Mr P instead taking this second charge loan. Which leads me to the second core question; that is, whether Openwork is responsible for the advice given by firm E to take out the second charge loan.

It isn't in dispute that Openwork referred Mrs and Mr P to E in the knowledge that E could arrange a second charge loan. But that doesn't mean that Openwork is responsible for the advice E gave, and therefore any complaint that follows.

E held its own separate authorisation with the regulator, the Financial Conduct Authority (FCA), and it is liable for the advice it gives under that authorisation. If E felt a second charge loan wasn't suitable for Mrs and Mr P (which I'm not saying either way) then it was its responsibility to say so.

Openwork simply isn't liable for what happened after it passed Mrs and Mr P onto a separate FCA-regulated firm of advisers. Any complaint about the suitability of the second charge loan would need to be made to E, I simply can't consider that against Openwork. Having considered everything, I'm not minded to uphold this complaint as I can't hold Openwork liable for the advice Mrs and Mr P received to take a second charge loan."

Openwork had nothing further to add. Mrs and Mr P responded but their comments broadly reiterated the complaint points I'd already considered when I reached my provisional decision.

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.

Mrs and Mr P have questioned how I can decide against them on the balance of probabilities when they've *"provided comprehensive factual evidence and Openwork has not"* and have said that my comments about lenders being cautious when asked to consolidate unsecured debts are *"pure speculation"*. To explain; the balance of probabilities comment is about the fact there is no evidence to prove beyond doubt that lender B would have lent the money to Mrs and Mr P in 2018. Mrs and Mr P have given their thoughts and details of lending policy and the affordability calculator, but as I explained in my provisional decision there is much more to a lending decision than those basic facts.

Mrs and Mr P have said in relation to the balance of probabilities *"In a court of law this would not be the case - either prove your innocence with hard facts and evidence to back this up or the balance of probabilities is that you are guilty!"* but that's not right. In a court of law it is up to the accuser to prove guilt, it isn't for the accused to prove innocence. Or as I explained in my provisional decision, under our remit, *"Ultimately, what that test means for Mrs and Mr P is that, as the party bringing the complaint, it falls to them to present a case that is more likely than Openwork's case; not just as likely. Having considered what both sides have said I don't find Mrs and Mr P's arguments to be any more than just as likely."*

In my experience, and based on everything I've seen, I'm not persuaded it is more likely than not that lender B would have accepted a further advance application from Mrs and Mr P in 2018 to repay the unsecured debts they had at that time.

Mrs and Mr P have asked why no attempt was made to approach another lender, rather than referring them to the second charge broker. That isn't something I'm able to answer as I don't know what enquiries Openwork made of other lenders at the time. But I would remind Mrs and Mr P what I said in my provisional decision about their likely options within the mainstream mortgage market in 2018:

"I understand Mrs and Mr P have now remortgaged to a mainstream lender but they wouldn't have been able to remortgage to that lender in 2018 with the level of unsecured debt they had as – based on my experience and understanding of that lender's criteria - it

would have been outside its criteria and therefore the application would have been declined.

Consolidating secured debt isn't viewed the same way as consolidating unsecured debt, and so because those debts were now secured on the property, the new lender was willing to grant them a remortgage in 2021, but if those debts had been unsecured it is likely that the remortgage would have been declined. In my experience Mrs and Mr P would have had similar difficulties with other mainstream lenders in 2018.

In 2018 the position Mrs and Mr P were in wouldn't have been attractive to the mainstream mortgage market as a remortgage proposition for the reasons I've given, and the non-mainstream first charge mortgage rates would have been higher and therefore unlikely to be cost effective when considering the low rates that were available with B for the existing mortgage."

Irrespective of everything else, as I explained in my provisional decision, I can't hold Openwork liable for Mrs and Mr P taking out the second charge loan as the suitability of that product is the responsibility of broker E.

My final decision

I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs and Mr P to accept or reject my decision before 2 January 2023.

Julia Meadows

Ombudsman