

The complaint

Mr and Mrs P complain to Openwork Limited (“Openwork”) about mortgage advice they were given in 2007. They used the mortgage proceeds to make an off-plan overseas property investment which has not performed as they expected, leaving them unable to repay the mortgage.

The complaint is that the adviser failed to ensure the mortgage was suitable for Mr and Mrs P as there wasn’t a realistic repayment strategy in place.

What happened

Mr and Mrs P were longstanding clients of an adviser from Integrated Financial Solutions for You – an appointed representative of Openwork. For simplicity, I will refer to Openwork throughout this decision.

In late 2007 the adviser recommended an interest-only mortgage to Mr and Mrs P and introduced them to another company – Olive Tree Global Property Services (“Olive Tree”). Mr and Mrs P met with Olive Tree and it was suggested they invest in an off-plan property development in Cape Verde with The Resort Group.

At the time, Mr and Mrs P had a small outstanding mortgage balance secured against their home. The adviser recommended a flexible interest-only mortgage of £100,000 over a 14-year term, allowing them to make overpayments and drawdowns. It was recorded that the mortgage would be repaid using an existing endowment policy and the sale of the overseas investment property.

The mortgage proceeds were used to redeem the outstanding mortgage balance and make an investment with The Resort Group. Payments of £76,380 were made in instalments to invest in an off-plan hotel development in Cape Verde.

Once the property was completed, Mr and Mrs P received some return on their investment in the form of monthly rent payments, which they used toward the cost of servicing the mortgage. Those payments ceased in 2020 and, via a claims management company, Mr and Mrs P made their complaint to Openwork.

Openwork responded stating that:

- The complaint had been made outside of the time limits required for our Service to consider.
- Its appointed representative gave suitable mortgage advice, and Mr and Mrs P had a previous interest-only mortgage and so knew how they functioned.
- There is no record of any investment advice being given to Mr and Mrs P by any appointed representative of Openwork, and it doesn’t accept responsibility for the ‘advice’ they received in respect of the overseas property investment.

Unhappy with Openwork's response, Mr and Mrs P referred their complaint to our Service. One of our investigators reviewed everything and concluded the complaint was one that she could consider and set out why she felt the complaint should be upheld. In summary she said:

- Although the advice was given over six years ago, she considered the complaint was made within three years of when Mr and Mrs P had cause for complaint.
- She agreed that Openwork was not responsible for any investment advice Mr and Mrs P received about the overseas property.
- The Openwork adviser was required to ensure the mortgage was suitable for Mr and Mrs P – which includes considering the repayment strategy. These requirements are set out in the Mortgages and Home Finance: Conduct of Business Sourcebook ("MCOB") in the FCA Handbook.
- She hadn't seen evidence to demonstrate the repayment strategy was appropriately considered.
- Mr and Mrs P should be compensated by putting them in the position they would have been in had the mortgage not been taken out (and the investment property should be assigned to Openwork).

The CMC representing Mr and Mrs P accepted the investigator's assessment.

Openwork didn't accept the assessment and provided a detailed response. I've reviewed and considered everything, but in summary it said:

- It maintains the complaint has been made too late and outside of relevant time limits. Mr and Mrs P ought to have concerns by 2013 – as no 'rent' had yet been received – at least five years after they had committed money to the investment.
- It was not for the adviser to explain all the potential risks that could impact the price of the investment property – including the effect of the covid pandemic.
- The suitability report given to Mr and Mrs P made it clear that there were risks if the repayment vehicle failed to provide necessary funds to repay the mortgage.
- The adviser could not provide advice about the investment but did refer Mr and Mrs P for investment advice – in accordance with its requirements under the rules in place at the time.

It also asked a number of questions about specific information to do with the investment property and how it has operated.

The investigator considered Openwork's response but was not minded to change her conclusions – and so the complaint was passed for an ombudsman to review afresh and make a decision.

Prior to the complaint being allocated to an ombudsman, Openwork re-iterated a number of the questions it had previously asked, and also provided further evidence. This included a letter dated November 2011 from The Resort Group to Mr and Mrs P in response to concerns they had raised about delays in the completion of the overseas development. It

says this demonstrates Mr and Mrs P knew the investment carried substantial risk and may never have been built.

Openwork also commented on the redress recommended by the investigator. It stated that if Mr and Mrs P had not taken an interest-only mortgage, they would have instead taken a repayment mortgage which would have incurred additional costs which should be taken account of.

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.

Having considered everything, I've reached much the same outcome as the investigator and for broadly the same reasons. I'll set out why below – and whilst I have considered everything provided by both parties, I will refer only to the issues I consider central to my decision.

It's important I acknowledge that Openwork has requested answers to specific questions about the sequence of events and I have considered those requests. I'm satisfied that I have seen sufficient evidence to decide this complaint, and I have reached my conclusions on the balance of probabilities where information conflicts or is unavailable.

Jurisdiction

I understand Openwork considers Mr and Mrs P's complaint has been made too late to be considered by our Service, and that it's not responsible for any investment advice which may have been given to Mr and Mrs P.

I've not seen any evidence to suggest Openwork's appointed representative gave any investment advice. In fact, it is accepted between the parties that a referral was made to Olive Tree who suggested Mr and Mrs P invest with The Resort Group. However, this complaint principally stems from the mortgage advice given to them and Openwork is responsible for that.

The rules about time limits and whether our Service can look into the merits of a complaint are set out in DISP 2.8.2R. It says:

"The ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

...

(2) more than:

- (a) six years after the event complained of; or (if later)*
- (b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;*

Unless the complainant referred the complaint to the respondent or to the ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received."

In this case, the mortgage advice was given in late 2007. The complaint was referred to Openwork in July 2021 and so is clearly out of time for the six-year part of the rule.

The issue for me to decide is whether the complaint is also out of time for the purposes of DISP 2.8.2(2)(b) which sets out the three-year rule. There are two parts to that rule – when Mr and Mrs P actually became aware they had cause to complain, and when they ought reasonably to have become aware.

Openwork says that Mr and Mrs P knew there were problems with the investment property when the development was completed late – and refer to the letter of response from The Resort Group in 2011 explaining the delay in completion of the development and declining a request to refund the deposit funds paid. It says this ought to have alerted Mr and Mrs P to the risks associated with the investment and triggered a cause for complaint. It effectively says this was compounded by the fact they didn't receive any rental income for some time after this date and had to maintain the mortgage themselves.

I've carefully considered these points, and understand the position put forward by Openwork. However, whilst I acknowledge Mr and Mrs P clearly had some concerns about the investment property at that time, overall, I am not persuaded that would have necessarily given them cause for complaint about the mortgage advice.

Mr and Mrs P knew they were investing in an off-plan property investment being undertaken on a significant scale. It is not uncommon for such construction projects to be delayed and impacted by external factors, and whilst I have no doubt it would have been frustrating for them, I don't think that would have necessarily alerted them to the fact they would not be able to use the sale of the investment to repay the mortgage many years later by the end of its term.

Ultimately the development was completed and began providing Mr and Mrs P a rental income, but that stopped in 2020 following the impact of the covid pandemic. This was compounded soon after when Mr P was made redundant. I appreciate these changes in circumstances are not things that Openwork are responsible for or could have necessarily known when the mortgage advice was given.

However, I don't think Mr and Mrs P would have had cause for complaint until around that time, because the rental income from the investment was never going to cover the cost of repaying the mortgage. But that is when it became apparent to them that the investment was illiquid and wouldn't provide the means to repay the mortgage at the end of its term – which was soon approaching.

As Mr and Mrs P raised their complaint in July 2021, I have to decide whether there was a trigger which ought reasonably to have given them cause for complaint before July 2018. Overall, I'm not persuaded that there was – and so I'm satisfied the complaint was made in time under the three-year part of the rule and is one I can look into.

Suitability of mortgage advice

When deciding the merits of a complaint I am required to determine what is fair and reasonable in all the circumstances. That includes taking account of the law, rules, regulations, good practice and the individual circumstances of a complaint.

I'm aware that Openwork's adviser did not give investment advice about the overseas property development. But he was required to consider whether the mortgage was suitable for Mr and Mrs P's circumstances – and that included considering how the mortgage was going to be repaid.

I've considered all the obligations the adviser had to meet under MCOB, but I've only set out below some of the key provisions I consider most relevant to Mr and Mrs P's complaint.

MCOB 4.7.2R states:

"A firm must take reasonable steps to ensure that it does not make a personal recommendation to a customer to enter into a regulated mortgage contract... unless the regulated mortgage is... suitable for that customer".

MCOB 4.7.4R states:

"For the purposes of MCOB 4.7.2R:

(1) a regulated mortgage contract will be suitable if, having regard to the facts disclosed by the customer and other relevant facts about the customer of which the firm is or reasonably should be aware, the firm has reasonable grounds to conclude that:

(a) the customer can afford to enter into the regulated mortgage contract;

(b) the regulated mortgage contract is appropriate for the needs and circumstances of the customer; and

(c) the regulated mortgage contract is the most suitable of those the firm has available to it..."

I've considered the advice Mr and Mrs P received and the mortgage they were recommended – giving particular thought to whether it was affordable and suitable for their needs and circumstances.

I'm satisfied that it was affordable for Mr and Mrs P to maintain the cost of servicing the mortgage. The interest-only recommendation kept the monthly cost down, and this conclusion is supported by the fact they sustained payments to service the interest for a number of years before any rental income was received from the investment property.

However, in this case, the key issue is whether Mr and Mrs P would be able to repay the capital sum at the end of the 14-year mortgage term.

The adviser's recommendation from the time recorded:

"We discussed the fact that part or all of your mortgage will initially be on an interest only basis but that you plan to repay the mortgage by a combination of your endowment and the sale of the new property you are buying."

Whilst I am aware that Mr and Mrs P had an endowment in place at the time of advice, it seems that was intended to repay the existing modest mortgage borrowing they already had at the time.

MCOB 4.7.8G states:

"A firm may generally rely on any information provided by the customer for the purposes of MCOB 4.7.4R(1)(a) unless, taking a common-sense view of this information, it has reason to doubt it."

The adviser obviously knew that Mr and Mrs P had an endowment policy to have referred to it, but I've seen no evidence to demonstrate he enquired as to its value or likely maturity. But

given the significant additional borrowing Mr and Mrs P were taking, I think it reasonable to conclude the adviser would have known the investment in The Resort Group would have been required to provide the means for repayment for the majority of the new mortgage.

Although advice on an interest-only mortgage includes considering the repayment strategy, I don't think that extends to making in-depth checks on the investment. MCOB 4.7.12G states it *"does not require a firm to provide advice on investments"* when considering its obligations under MCOB 4.7.11E. So, I don't think the adviser needed to assess the overall viability of any investment with The Resort Group. But it does go on to state that *"whether such advice should be given will depend upon the individual needs and circumstances of the customer"* and that MCOB 4 *"does not restrict the ability of an adviser to refer the customer to another source of investment advice"*.

The Openwork adviser did refer Mr and Mrs P to Olive Tree in relation to the investment they made, but he had his own obligations in respect of the mortgage. I haven't seen anything to show me that the adviser looked at the investment advice or projections in deciding whether it would be a realistic repayment vehicle for the mortgage. But having said that, I consider it likely, on balance, that he would have known the key features of the investment, and how it might differ from the purchase of a more commonplace investment property.

The Resort Group investment was a hotel development in Cape Verde, that was high risk and esoteric. There were risks of currency fluctuations, development problems, potential legal and title issues – all of which would have been apparent without assessing the specific viability or suitability of the investment.

Although I understand the recommendation letter given to Mr and Mrs P highlighted the broad risks around using the investment as a repayment vehicle, I don't think this was enough. Under MCOB a firm is required to *"take reasonable steps to ensure that it does not make a personal recommendation to a customer to enter into a regulated mortgage contract... unless the regulated mortgage is... suitable for that customer"*. This means the adviser had to ensure the mortgage was *"appropriate for the needs and circumstances"* of Mr and Mrs P – not just point out broad risks.

Had the adviser given full and suitable advice which considered an appropriate means of repayment, I don't think Mr and Mrs P would have gone ahead with taking out the extra borrowing. I have considered whether, in the alternative, a capital repayment mortgage would have been recommended instead of interest-only. However, the monthly cost of servicing a repayment mortgage would have been considerably higher and so less affordable to maintain in order to warrant generating funds to invest. So, on balance, I'm persuaded it likely that Mr and Mrs P would not have proceeded with the additional borrowing at all.

I note that Openwork has specifically said that Mr and Mrs P would have taken a repayment mortgage in the alternative to their interest-only mortgage – but I do not agree for the reason set out above.

Overall, I am persuaded that the mortgage advice provided to Mr and Mr P by Openwork's appointed representative in 2007 was not suitable as it did not ensure an appropriate method of repayment was in place. Having reached that conclusion, I have decided it is fair and reasonable to uphold the complaint and ask Openwork to put Mr and Mrs P into the position I consider they would be in but for that advice.

Putting things right

Putting things right is not an exact science and can be complex. Amongst other things, Mr and Mrs P had an existing mortgage which was redeemed using the proceeds from the new mortgage in 2007, there was the opportunity for overpayments and drawdowns, the investment made has paid some returns and may or may not have a realisable capital value.

I've set out what I consider to be fair and reasonable overall – broadly rewinding the transaction and putting Mr and Mrs P back into the position they would have been had they not taken the mortgage out at all.

Openwork should calculate and pay the following to Mr and Mrs P:

- The mortgage funds borrowed in 2007, less the balance of their previous mortgage which was redeemed using those proceeds.
- The payments made to service the mortgage interest, less any rental income or returns received from the overseas property investment (Mr and Mrs P must provide Openwork with reasonable evidence of these).
- £300 for the trouble and upset Mr and Mrs P have experienced as a result of being faced with a mortgage they were unable to repay.

When deciding what's fair and reasonable, I've considered whether interest should be applied to the payments Mr and Mrs P made to service the mortgage interest, but I also recognise they may have received a benefit and interest on payments received from the investment. So, I don't consider any adjustment or allowance necessary in this case.

Although payments from The Resort Group investment ceased in 2020 and any capital value could not be realised whilst it was illiquid, that may no longer be the case now or in the future. I've considered what is required to ensure Mr and Mrs P don't double recover their losses, and to give Openwork the opportunity to recoup any payments made where appropriate. Openwork may request that Mr and Mrs P undertake to transfer any future rights or assign ownership of The Resort Group investment to it. Openwork must pay the costs associated with any such assignment or undertaking.

My final decision

My final decision is that I uphold Mr and Mrs P's complaint against Openwork Limited.

To put things right I direct Openwork to calculate redress as set out above and make payment to Mr and Mrs P.

The compensation must be paid within 28 days of the date Openwork receives notification of Mr and Mrs P's acceptance of this decision (and them providing details of the investment returns received as set out above). Interest must be added to the compensation amount at the rate of 8% per year simple from the date of this decision to the date of settlement if the compensation is not paid within 28 days.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P and Mrs P to accept or reject my decision before 11 March 2024.

Ross Hammond
Ombudsman