DRN-4990675

The complaint

Mr B and Mrs B complain that Gallery Finance Limited gave them unsuitable advice to take out an interest only mortgage to fund an investment.

What happened

In August 2017, Mr B and Mrs B went on holiday to Tenerife – the cost of the holiday was reduced on the condition that they attended a presentation with a company I shall refer to as Company S.

Following the presentation, Mr B and Mrs B agreed to take out the product being marketed for £52,024. They appear to have been introduced to Gallery Finance at this stage as one of its representatives was working in Tenerife. Following initial discussions and information gathering in Tenerife, the remainder of Gallery Finance's interactions with Mr B and Mrs B took place in and from an establishment in the UK – including the advice to take out an interest only mortgage.

Gallery Finance recommended Mr B and Mrs B take out an interest only mortgage across a seven-year term, borrowing £59,995.

The suitability summary completed by Gallery Finance and signed by Mr B and Mrs B says the following:

"You wish to re-mortgage your residential property to:

- *Raise capital to purchase your holiday home;*
- *Raise funds for your personal use."*

In October 2021, Mr B and Mrs B complained to Gallery Finance via a representative who is no longer joined to this complaint.

They dispute the reason for the mortgage was a holiday home rather than for an investment. And they say they did not discuss and did not intend to downsize, instead they intended to repay the mortgage with the proceeds from the investment. They also allege that Gallery Finance knew they were planning on putting money into a risky investment as it was involved from the outset, inducing them into the contract. As such, they think Gallery Finance's recommendation that they take out an interest only mortgage to fund the purchase to be unsuitable.

Gallery Finance investigated the complaint but did not uphold it. It disputes that it had any knowledge that Mr B and Mrs B were using the funds for an investment or that they were intending said investment to operate as their repayment strategy. Instead, it said they were seeking the cheapest interest only mortgage across a term of seven years to fund their purchase of a holiday home. It maintains the mortgage it recommended to meet this need was both suitable and appropriate.

Dissatisfied with Gallery Finance's response, Mr B and Mrs B referred their complaint to our service.

I issued a provisional decision earlier this month not upholding the complaint. I set out that the alleged activities of Gallery Finance which took place in Tenerife fall outside the scope of our jurisdiction. But the mortgage advice that was provided in the UK at a later date did fall within this Service's jurisdiction and as such, was something I had the power to consider.

I explained that while I had previously upheld this complaint, it was now clear that at the time Gallery Finance provided its advice, it did so on the basis that there would be sufficient equity in the property to repay the capital balance. It was not responsible for the subsequent down valuation of the property which happened after it provided its advice. Nor was it responsible for the lender's decision to deem the mortgage to be affordable and the repayment strategy as appropriate despite the down valuation. In light of this, I set out that I did not intend to uphold the complaint.

I invited both parties to tell me what they thought in response to my provisional conclusions.

Gallery Finance did not respond to my decision.

Mr B and Mrs B responded and said:

- Gallery Finance has not acted with due diligence and in their best interests. It failed to assess whether the investment was suitable for them given their financial position at the time. It also failed to enquire about their attitude to risk. The investment was high risk and had this been pointed out at the time they would not have gone ahead.

- Gallery Finance misused their position as financial advisers to go out of their way to ensure a mortgage was available.

- Prior to taking out this mortgage they were mortgage free and had worked hard to achieve that position.

- The statement that they intended to buy a holiday home is incorrect. The investment was a limited company which could fail at any time, and they were not allowed to use the connected properties.

- The idea of downsizing was never discussed and if this had ever been suggested, they would not have gone ahead.

- Gallery Finance had a representative who participated in the marketing of the investment, indicating that it was very familiar with the nature of this investment. So, if Gallery Finance is now saying it believed they were investing in a holiday home rather than a limited company, it has failed to understand the nature of the transaction and failed to execute due diligence.

- They concede that Gallery Finance should not be responsible for the return of their capital, but still consider the selling of the mortgage was not in their best interests and as such Gallery should compensate them with the amount previously recommended by this Service.

- The advice given was unsuitable and the mortgage should not have been sold. Downsizing was not an option and Gallery Finance must bear some responsibility for the poor advice it gave in the first instance.

As the parties have both had a chance to respond to my provisional conclusions, it is now appropriate for me to issue my final decision on this complaint.

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 the complaint in full again, including Mr B and Mrs B's most recent submissions, I do not uphold it. I realise this will come as a disappointment to Mr B and Mrs B, but I hope my explanation helps them to understand why I have reached this conclusion.

Our jurisdiction

Mr B and Mrs B have reiterated that Gallery Finance was involved from the outset in Tenerife and that it was equally responsible for the bad advice they received to enter the investment and that it ought to have done more to sense check both the investment and Mr B and Mrs B's attitude to risk as well as their understanding of what they were committing to. They say that had they been told the investment was high risk, they would not have gone ahead.

I do appreciate why Mr B and Mrs B feel this way and their strength of feeling on this point. But as I set out in my provisional decision, the application of the rules that set out our power to consider complaints is not something over which I have any discretion.

Applying the Financial Conduct Authority's DISP rules to the circumstances of this complaint, I must conclude that the alleged acts and omissions of Gallery Finance that took place in Tenerife fall outside the scope of this Service. I can only look at Gallery Finance's actions that were carried out from an establishment in the UK.

This means that Mr B and Mrs B's continued complaint that Gallery Finance is responsible for their reliance on the investment advice they received in Tenerife, including the suggestion it should have done more to either sense check the investment or Mr B and Mrs B's awareness of what they were taking out, falls outside of our jurisdiction and is not something I am able to investigate within this case.

The mortgage advice

It is accepted by all parties that Gallery Finance provided an advised service to Mr B and Mrs B. It is also accepted that this advice took place from a UK establishment once Mr B and Mrs B had returned home, and it is in relation to their residential home. So, I am satisfied I have the power to consider this element of the complaint.

I am aware the purpose of this loan continues to be in dispute. Mr B and Mrs B say it was to invest in a limited company which was building holiday lodges. In contrast, Gallery Finance documented the purpose as being a holiday home. I also know that Mr B and Mrs B argue that, if Gallery Finance truly believed they were investing in a holiday home (which they doubt given its earlier involvement), this shows it did not carry out due diligence before recommending they take out this mortgage. But I am not persuaded I need to make a finding on this to decide the case.

Instead, what I need to decide is whether Gallery Finance made a suitable recommendation that Mr B and Mrs B take out an interest only mortgage. The decision of whether to invest in Company S' product or not (be it a holiday home or an investment) had already been made *before* Gallery Finance gave its mortgage advice. And as I've set out above, any involvement Gallery Finance may or may not have had at the time Mr B and Mrs B made this decision falls outside of the jurisdiction of this Service.

Gallery Finance recommended Mr B and Mrs B take out an interest only mortgage. In doing so, it needed to ensure that type of mortgage was appropriate for their needs and circumstances at the time.

I can see from the handwritten notes at the time that Mr B and Mr B were seeking the cheapest mortgage over a seven-year term to cover the cost of their purchase with Company S and some home improvements. Taking out an interest only mortgage would enable them to keep their monthly payments as low as possible and enable them to meet this goal. Mr B and Mrs B's latest submission suggests this objective was led by Gallery Finance and not something they initiated. But it is hard to reconcile that Mr B and Mrs B would not want this funding to be as low cost as possible, particularly given they were reliant on their pensions as an income source.

As the monthly payments would purely go towards paying the interest, it was also important that Mr B and Mrs B had a repayment strategy in place to clear the mortgage at the end of the seven-year term. The strategy listed on the paperwork at the time is the sale of their family home to downsize, using the additional equity to repay the mortgage.

Mr B and Mrs B strongly dispute this was ever discussed. They say they had worked hard to be mortgage free so would not have wanted to do something that would put their home at risk or lead to them paying a mortgage. They maintain that the repayment strategy discussed with Gallery Finance at the time was the return on their investment.

I have taken on board what Mr B and Mrs B have said, including in their most recent submissions, but I remain of the opinion that the contemporaneous evidence from the time of the advice does not support this position and as such, I am not going to uphold the complaint on this basis.

The paperwork Mr B and Mrs B signed at the time clearly sets out that the capital they were borrowing was going to be paid off by the sale of their house. This is mentioned in several places and noted to be correct by Mr B and Mrs B signing the documents. There isn't anything to show that Mr B and Mrs B queried why their paperwork listed this as their repayment strategy which I would have expected them to do if it was at odds with what they feel they had told the adviser verbally or what they thought Gallery Finance knew at the time.

In addition, Mr B and Mrs B have reiterated that they worked hard to become mortgage free and wouldn't want to be in that position again. But it is not in dispute that they knew they were taking out a mortgage to fund their purchase with Company S. And in doing so, they would once again have a mortgage debt to service, their house would be at risk if they did not maintain their payments and the borrowing would need to be repaid in full.

Taking everything into account, the evidence I have available to me suggests Mr B and Mrs B knew they were taking out an interest only mortgage to fund their purchase with Company S which would need to be repaid in full by the end of the seven-year term. And the paperwork they completed and signed at the time confirmed that the lending was being recommended on the basis that they would be using the equity in their family home to repay the capital borrowed.

In determining whether Gallery Finance gave suitable advice to take out this mortgage I have also considered whether it was appropriate for Mr B and Mrs B to rely on downsizing to free up equity as a suitable repayment strategy. Having done so, I am satisfied that it was.

At the time of this advice, Gallery Finance was not obligated to assess the suitability of the repayment strategy – that responsibility sat with the lender in determining whether the mortgage was affordable for Mr B and Mrs B. That said, it would not be suitable advice to recommend Mr B and Mrs B take out an interest only mortgage if it was clear from the outset that their chosen repayment strategy would not enable them to meet their goal of repaying the debt within the agreed term. With this in mind, I have looked at the information Gallery Finance had at the time it recommended Mr B and Mrs B take out this mortgage.

The documentation at the time showed an estimated value of £300,000 for Mr B and Mrs B's family home. It is noted that £240,000 would need to be reserved to enable them to downsize which would leave sufficient equity to cover the capital repayment of £59,995.

Taking this into account and the documented need to keep the repayments low over a short term, I am satisfied that Gallery Finance's recommendation that Mr B and Mrs B take out an interest only mortgage was suitable for their needs and circumstances at the time.

In reaching this conclusion I would like to highlight that this is not the same as me concluding that the decision to invest with Company S was suitable for Mr B and Mrs B's appetite to risk or that Gallery Finance was or was not involved in the interactions in Tenerife. Instead, I am looking solely at the mortgage advice Gallery Finance provided in the UK and not its alleged influence in Mr B and Mrs B's decision to invest in company S.

I am aware Mr B and Mrs B think Gallery Finance should have advised them on whether the investment itself was suitable when determining which mortgage would meet their needs, but I disagree. In its capacity as a mortgage broker acting in the UK and providing mortgage advice to Mr B and Mrs B, Gallery Finance had to assess what mortgage, if any, would meet their stated needs of raising just over £52,000 to pay Company S (something they had already committed to), over a short term while keeping their monthly payments low. Given it had been documented that they intended to repay this mortgage by selling their house (something with Mr B and Mrs B signed to confirm was accurate) I would not expect Gallery Finance in its capacity as a mortgage broker to provide investment advice to Mr B and Mrs B on an investment they had already committed to make with Company S.

I realise Mr B and Mrs B feel they have lost out on the money they hoped to receive in return for their investment and they argue strongly that Gallery Finance is at least partially responsible for this and that it failed to carry out appropriate due diligence. But their comments on this point relate to alleged acts and omissions that happened in Tenerife which fall outside the scope of my powers. This means I cannot uphold the complaint based on what Gallery Finance should or should not have done in Tenerife nor can I uphold the case against Gallery Finance simply because Mr B and Mrs B's investment did not perform as described.

My final decision

For the reasons detailed above, I do not uphold this complaint against Gallery Finance Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B and Mrs B to accept or reject my decision before 26 September 2024.

Lucy Wilson
Ombudsman