

The complaint

Ms M is unhappy with the advice she says she received in 2012 to re-mortgage her home to invest in Harlequin properties in the Dominican Republic. She says the advice was given to her by Mr O who worked for The Mortgage Company ("TMC") which was an appointed representative of Personal Touch Financial Services Ltd ("Personal Touch").

What happened

Mr O and Mr H

Mr O worked as a mortgage adviser at TMC. TMC was an appointed representative of Personal Touch from October 2004 until April 2015.

In 2010, Mr O set up another unregulated company called Atlantic Overseas Investments/Atlantic Partnership LLP (together "Atlantic"). Mr O was a director of this company together with someone called Mr H.

Mr H was also a director of a separate regulated financial advice firm called LP Financial until 2013. Ms M has made complaints against LP Financial in respect of her Harlequin investments.

Ms M and her investment in 2012

Ms M had already invested in Harlequin in 2011 via a mortgage after she says it was recommended to her by Mr H and Mr O. We've issued a decision saying Ms M's complaint about the 2011 mortgage and investment was made too late and so I haven't considered this again as part of this decision.

Ms M says she received further financial advice in around January 2012 from Mr O and Mr H to invest more money into Harlequin. Ms M says that Mr O recommended that she re-mortgage her residential home in order to make the investment. She says Mr O told her that the Harlequin investment would produce a guaranteed 10% return.

Mr O arranged the mortgage for £190,000 in addition to the £70,000 Ms M had outstanding on her existing mortgage. So in total, Ms M borrowed £260,000 over a 15 year term on an interest only basis. We have a fact find, suitability letter and other documentation evidencing the mortgage recommendation of Mr O of TMC in January 2012. We don't have any formal advice documentation recommending the investment.

Using the mortgage funds, Ms M invested £194,000 in five Harlequin properties in the Dominican Republic in around January 2012.

We know from other complaints that Harlequin offered investors the chance to pay, usually, a 30% deposit on an overseas off plan property. Where finance (such as a mortgage) was taken to fund the deposit, Harlequin agreed to service the loan. The final payment (70%) would become due on completion of the property when investors were told that an overseas mortgage could be taken to pay the remaining balance.

We don't have a copy of the finance agreement with Harlequin, but Ms M has told us that she expected the funds from the completed properties to repay her residential mortgage when it reached the end of the term and for Harlequin to satisfy the monthly payments in the interim.

At the beginning of 2013 Harlequin defaulted on the payments and these ceased all together a few months later. I understand that Ms M repaid the mortgage when she sold her home in 2015.

Complaint to Personal Touch

In January 2018, Ms M complained to Personal Touch and later referred the complaint to our service, explaining she was unhappy as both the mortgage and investment advice in 2012 had been unsuitable for her. Ms M's complaint is that Mr O worked together with Mr H in recommending that she re-mortgage her home in order to invest in Harlequin and that Personal Touch is therefore responsible for her losses from the mortgage and investment.

An ombudsman has already issued a decision that the complaint about this mortgage/investment in 2012, unlike the 2011 investment, was made within our time limits.

Personal Touch said the complaint shouldn't be upheld. It said that Mr O had not given any advice about Harlequin and that he'd only given mortgage advice – and the mortgage advice was suitable given Ms M's aims and circumstances.

Ms M told us that much of the information in the TMC fact find was false and had been made up by Mr O. She says she only discovered this after obtaining the mortgage papers during the complaint proceedings.

One of our investigators then considered the complaint. She was satisfied that Mr O had likely given Ms M investment advice in the course of advising on and arranging the mortgage in 2012. She thought that the two things – the mortgage and investment advice – were intrinsically linked and that Personal Touch was therefore responsible for the investment advice and should pay Ms M compensation.

Personal Touch didn't agree and asked for the case to be referred to an ombudsman. In summary, it says:

- Mr O was not authorised by Personal Touch to give investment advice – nor did Personal Touch earn any commission for the Harlequin investment.
- The broader background to the case was that Mr O was involved with Atlantic which obtained a significant commission from Harlequin investments.
- The investigator had misapplied case law – *Tenet Connect v Financial Ombudsman Service [2018] EWHC 459 (Admin)* - to arrive at her conclusion that the investment advice was intrinsically linked to the mortgage advice. Any investment advice in 2012 was given by Mr O and Mr H in their own capacity – not linked to Personal Touch.
- Mr O's acts were akin to those of the adviser in the case of *Frederick v Positive Solutions [2018] EWCA Civ 431*. In that case, the adviser was a registered individual and was able to use his role at Positive Solutions to apply for mortgages on behalf of victims of a dishonest property investment scheme (to which the adviser was a

party).

The Court of Appeal ruled that Positive Solutions was not liable for the actions of the adviser, despite the fact that Positive Solutions received a commission on mortgages applied for through its systems. The Court of Appeal commented that the adviser had engaged in a “recognisably independent business” and that his role at Positive Solutions merely gave him the means by which to put his scheme into action.

Applied here, if Mr O acted as alleged, he used his role at TMC as the means of “unlocking” monies to invest in property. This was clearly as part of a separate business venture, in which remuneration accrued not to TMC but to Mr O, Mr H and Atlantic.

- Ms M had enough savings to make the investments – the re-mortgage wasn’t required.
- It was more likely that Mr H had given the investment advice as he was an investment adviser for LP Financial. The ombudsman service had issued a number of decisions which showed that Mr H and LP Financial were involved in pension investments in Harlequin.

I then issued a provisional decision on 31 October 2024. I explained that my view was that if Mr O had given any investment advice to Ms M about Harlequin, he likely had done so in his Atlantic capacity and not as TMC. Personal Touch was only responsible for things undertaken by TMC and not Atlantic. So I said we didn’t have jurisdiction to consider a complaint against Personal Touch about the investment advice.

I said that we did have jurisdiction to consider a complaint against Personal Touch about the mortgage advice that TMC had given, but that my view was that the mortgage advice was suitable as it complied with the regulatory rules at time.

Following my provisional decision, Personal Touch had nothing further to add. Ms M didn’t agree with my findings. In summary she said:

- TMC and Atlantic were located in the same building and were – in effect – the same thing. Mr O and Mr H had deliberately or negligently created this impression.
- Ms M knew other people who had similarly been given the impression that Atlantic was the same as TMC and LP Financial.
- Mr O and Mr H manipulated consumers and abused Ms M’s trust. She was persuaded to invest because she believed Mr O and Mr H to be connected to regulated networks who were intrinsically linked to the advice their agents were giving.
- Mr O had prepared fictitious fact finds and was motivated by greed. Mr O likely obtained a commission from Harlequin and made a huge personal gain. The ombudsman service had never asked Mr O how much he’d received from Harlequin. But it was Mr O’s greed that led him to manipulate Ms M into taking a mortgage in 2012 for the Harlequin investment that she did not need. Mr O judgement was corrupted by the money he stood to earn from Harlequin.
- Personal Touch failed to monitor Mr O’s activities and should have realised that he was advising on mortgages for investment in Harlequin.

- Ms M couldn't afford the mortgage payments that she had to make when Harlequin failed. She had to work away from home for months at a time to keep up payments and eventually she had to sell her home.
- Ms M was a cautious investor (she provided an assessment from another investment firm to prove this) and she would never have taken out a huge mortgage had Mr O not suggested it.

What elements of the complaint do we have jurisdiction to consider?

I've considered all the available evidence and arguments provided in relation to this complaint.

I've taken account of what Ms M has said in response to my provisional decision – but my view about whether we can consider the complaint about the Harlequin investment advice against Personal Touch hasn't changed for the same reasons as my provisional decision.

The Financial Ombudsman Service can't look at all complaints. Before we can consider a complaint, we need to check, by reference to the Financial Conduct Authority's ("FCA") Dispute Resolution Rules ("DISP") and the legislation from which those rules are derived, whether it's one we have the power to look at.

As mentioned, another ombudsman has already issued a decision that the complaint about the advice in 2012 has been made in time. This doesn't appear to be in dispute any longer. But for the avoidance of doubt, I agree with the previous ombudsman's findings on the time bar issue.

However, there are other jurisdiction rules that need to be considered.

DISP 2.3.1R says we can:

*"consider a complaint under the Compulsory Jurisdiction if it relates to an act or omission by a **firm** in carrying on...regulated activities...or any ancillary activities, including advice, carried on by the firm in connection with them."*

DISP 2.3.3G says that:

"complaints about acts or omissions include those in respect of activities for which the firm...is responsible (including business of any appointed representative or agent for which the firm...has accepted responsibility)."

As set out above, Ms M has alleged that both Mr O and Mr H were involved in advising her. Mr H had no connection to Personal Touch.

It's not in dispute that Mr O of TMC gave the mortgage advice and that Personal Touch accepts responsibility for the mortgage advice. I will deal with the mortgage advice further below, but for now I'll set out my findings about the investment advice.

I don't doubt Ms M's testimony that she received advice to invest in Harlequin as I don't think she'd have made the investment in 2012 without it being recommended to her. And there's no dispute that such advice is a regulated activity.

Was it Mr O or Mr H who advised Ms M to invest in Harlequin?

There is no documentary evidence – such as a fact find or suitability letter - directly relating to the 2012 investment advice at all. This means I've had to make my decision about what happened in 2012 based on limited circumstantial evidence.

It's impossible to know with any degree of certainty who specifically gave her the investment advice. Ms M has made complaints against both Personal Touch and LP Financial. In her complaint correspondence with LP Financial, Ms M focuses on Mr H's involvement in giving her investment advice. And in her complaint correspondence with Personal Touch, Ms M focuses on Mr O's role in advising her about the investment. I don't criticise Ms M for doing this at all – it is natural for her to have weighted her complaints in this way depending on who she was writing to.

It does appear from the general tenor nature of Ms M's submissions that Mr H was her primary contact in respect of the Harlequin investment.

However, Ms M has consistently said that Mr H and Mr O acted together. And I think it's probable that they *both* advised her at times about Harlequin. However, for the reasons I explain below, as I don't think any investment advice by Mr O was given in his TMC capacity in any event, my decision doesn't hinge on this finding.

Is Personal Touch responsible for any investment advice from Mr O?

Mr O was not himself authorised by the regulator as a *firm* in 2012 – he was linked to TMC. Personal Touch is and was a firm at the relevant time and TMC was its appointed representative. So we can only consider a complaint against Personal Touch about the Harlequin investment advice if Mr O gave the advice to Ms M *in his capacity as a TMC adviser*.

As a reminder, our investigator concluded that Mr O had given Ms M *both* mortgage and investment advice in 2012 *as a TMC adviser*. And the investigator said that even though Mr O wasn't authorised by Personal Touch to give investment advice, Personal Touch was responsible for the investment advice as it was intrinsically linked to his authorised mortgage advice.

Personal Touch doesn't dispute the possibility that Mr O did give Ms M investment advice. But it says that, if he did so, it was in his Atlantic capacity – not in his TMC capacity.

Companies House records show that a business called Atlantic Overseas Investments Limited was incorporated in 2010 and Atlantic Partnership LLP was incorporated in 2011 with both Mr O and Mr H as directors.

So, the key question is whether Mr O was working in his capacity as a TMC adviser or in his separate Atlantic capacity when giving Ms M any investment advice in 2012.

I think the following is evidence that Mr O was working in his Atlantic capacity - and not as a TMC adviser – when advising Ms M about Harlequin:

- The mortgage suitability letter dated 30 January 2012 sent to Ms M makes no mention whatsoever of the Harlequin investment.
- We have been provided with a document titled - "*Letter of Introduction and Engagement – Atlantic Overseas Investments*". This document says:
 - "*This letter sets out the advice and liability position regarding your terms of engagement with Atlantic overseas investments limited with specific regard to*

any financial transaction you may enter in to, resulting from an introduction via AOI.

- *AOI is not regulated by the Financial Services Authority for the provision of investment advice or any other type of advice and does not provide or intend to imply any type of investment or tax advice.*
- *AOI can refer you to a third party will be able to offer advice in these areas at your request."*

The letter is signed by Ms M and dated 20 January 2011. This document pre-dates the 2012 investment in Harlequin.

- I also note that Ms M was provided with an Atlantic business card by both Mr O and Mr H - although we don't know when these were provided to her and in what context.
- Ms M has provided statements she says were sent to her by Mr O and Mr H in May and September 2012. These are on Atlantic headed paper and show the alleged values of Ms M's Harlequin investments at that point - including those that are the subject of this complaint.
- TMC was only authorised to provide mortgage advice – not investment advice. I'm satisfied that any commission from the Harlequin sales would have been paid to Atlantic – not TMC.
- Ms M has consistently said throughout this complaint and other complaints linked to her investments in Harlequin that she was aware that Mr O and Mr H were in business together and worked together to convince her to make the investments. The only business that Mr O and Mr H operated together was Atlantic – not TMC.
- TMC and Atlantic shared the same office and clearly Mr O worked for both companies. But TMC was still a separate legal entity and it doesn't follow that anything Mr O did as Atlantic from the same office can be attributed to TMC.

Having considered all of the above, my view is that I can't conclude that any investment advice given by Mr O was given in his capacity as TMC adviser. Ms M clearly knew that Mr O had a separate business that he operated with Mr H – Atlantic - for selling investments. She signed the Atlantic agreement for that purpose and Mr O and Mr H had given her business cards about Atlantic. Mr O and Mr H do not appear to have concealed their role with Atlantic.

I don't doubt that Ms M took comfort from knowing that Mr O was also a regulated mortgage adviser with TMC and this added credibility to what Mr O may have said about investing in Harlequin. And of course the lines were blurred as Ms M was dealing with Mr O in his role as a TMC adviser in respect of the mortgage to raise funds for the Harlequin investment at the same time. But I don't think this means that Mr O was giving investment advice in a TMC capacity rather than as Atlantic or that Ms M reasonably believed that anything he said about Harlequin was being said as a TMC adviser.

I think the TMC mortgage suitability letter is a clear indication that the mortgage recommendation was separate to anything Mr O was saying or recommending about Harlequin. If that was not Ms M's understanding, I would have expected her to query it at the time and ask why Mr O had not committed anything he had said about Harlequin to TMC headed paper.

I also don't see why Mr O would have sent the Harlequin statements to Ms M in May and September 2012 on Atlantic headed paper if he had advised her (and Ms M understood he had advised her) in his TMC capacity.

So, I think it's likely that any investment advice given by Mr O to Ms H was given in his separate Atlantic capacity. That is an independent business to TMC and had no connection with Personal Touch. We could only hold Personal Touch responsible for the investment advice if it was *given by TMC* and that investment advice was intrinsically linked to mortgage advice *also* given by TMC. Here, my finding is that the only advice that was given by Mr O as a TMC adviser was the mortgage advice.

Because of this finding, there is no other legal basis by which I could hold Personal Touch responsible for any investment advice given by Mr O.

As a result, we don't have jurisdiction to consider any investment advice in this complaint against Personal Touch.

Ms M says in her response to my provisional decision that Personal Touch should be liable for failing to supervise Mr O adequately. But in this instance, I'm not satisfied that Mr O was acting as a TMC adviser when giving any investment advice – he was conducting independent business of his own. So Personal Touch wouldn't be responsible for failing to supervise the non-TMC activities of Mr O. And in any event, supervision (including a failure to a relating to supervision) isn't a regulated activity and so we wouldn't have jurisdiction to consider a complaint about that.

We do have jurisdiction to consider a complaint against Personal Touch about the mortgage advice given by Mr O and I now consider this below.

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.

I've fully considered Ms M's points since my provisional decision about the suitability of the mortgage advice. But they don't fundamentally raise any new issues – and my findings remain largely the same.

It's important to remember that I'm not considering the investment advice here, only the mortgage advice. I'm satisfied that Ms M had decided to make the investment in Harlequin based on advice provided to her by Mr H and Mr O in their Atlantic capacity.

So, did Mr O provide suitable mortgage advice?

The obligations placed upon Mr O when advising Ms M are set out in the Mortgage Conduct of Business Sourcebook ("MCOB") that applied at the time. As the mortgage was taken out on Ms M's residential property it was a regulated mortgage contract.

Under MCOB 4.7.2R a regulated mortgage contract was suitable if having regard to the facts disclosed by the customer and other relevant facts about the customer of which the firm is or should be reasonably aware, it had "reasonable grounds to conclude" that:

- "the customer can afford to enter into the regulated mortgage contract";
- it "is appropriate for the needs and circumstances of the customer"; and

- it “is the most suitable of those that the firm has available to it”.

So, in his role as a TMC mortgage adviser, Mr O needed to make a suitable recommendation and in doing so he needed to consider how she would service and repay the mortgage.

Ms M’s income was recorded as being £56,000 in the fact find for the mortgage application with a net monthly income of £3,260. Ms M says that this figure was, without her knowledge, inflated and that she discovered this when making her complaint to Personal Touch.

Personal Touch has provided a “Client Confirmation” page from January 2012 – that has a footer saying that it is part of a “fact find” and is signed by Ms M. Personal Touch says this shows Ms M saw the fact find. Ms M can’t recall signing this document.

It’s not clear whether the signed Client Confirmation page was sent to Ms M with the rest of the fact find on which the 2012 mortgage was based and that Ms M would have seen the fact find at the time of the mortgage application. I say this because the signed page has “Page 4” in the footer, but the actual fact find has a completely different page 4. So the Client Confirmation signed by Ms M was not part of the fact find – but an additional document.

In the circumstances, I think it’s reasonable to proceed by looking at what would have happened based on what we now know about her income at the time.

Ms M has provided tax information to confirm that her income in 2012 was just over £40,000 from her employment, business and property rental. In the previous year it was over £30,000. So in 2012 Ms M’s net monthly income would have been around £2,940. So, although I know Ms M’s income went down in 2013 and 2014, I don’t think the information in the fact find about her net monthly income being over £3,200 in 2012 was significantly inaccurate.

Ms M has said that Mr O would have known from her discussions with Mr H that her income would go down after 2012. But I can’t be sure that Mr O did know or was told this. And, in any event, after 2012 Ms M also had additional property rental income that she could use to meet the mortgage costs.

So, I’m satisfied the new mortgage –£672 per month - was serviceable with Ms M’s existing income.

The fact find also said that Ms M planned to repay the interest only mortgage by selling investments or moving to a smaller property. The suitability letter says the mortgage would be repaid with the “sale of property”.

Ms M says that she was told that Harlequin would be used to repay the mortgage and that’s the basis upon which she proceeded.

I don’t doubt that Ms M was told by Mr O and Mr H as Atlantic that Harlequin was a good investment and would pay her mortgage. But – as explained - I need to put aside any investment advice she received from Atlantic and focus on whether he recommended a suitable and affordable mortgage.

It’s not clear whether the reference to selling “investments” in the fact find is to Harlequin or other investments. But Ms M accepts that, aside from the 2011 Harlequin investment, she had a very significant sum in other inherited investments - a bond worth around £240,000 and stocks and shares of around £160,000. I know she later disinvested the shares to make

a further investment in Harlequin in 2014. But she had the shares in 2012. Ms M also had significant equity in her home – it was worth around £900,000 and the mortgage she was applying for was for £260,000. She had a large home with one adult child and one child aged 16/17.

So I think selling other investments/downsizing were both viable and realistic repayment options for Ms M if things didn't work out as planned with Harlequin. In other words, she wasn't reliant on Harlequin to repay the mortgage. And ultimately, when Harlequin failed, Ms M did repay the mortgage in 2015 by selling her home whilst still retaining a large sum from the proceeds of the sale.

Ms M has said that the mortgage fact find also wrongly recorded her as having an "adventurous" risk profile and that she was in fact a "balanced" investor. I understand why Ms M thinks it important to point this out. But I think this would be relevant if I were considering any investment advice that Mr O gave. As I've explained I can't hold Personal Touch responsible for the investment advice. And I don't think Ms M being incorrectly classified on the fact find means the mortgage advice was suitable.

So overall, the mortgage Mr O recommended was a suitable recommendation for Ms M's needs at the time. Ms M wanted to invest in Harlequin – most likely on the basis of advice from Mr O and Mr H in their Atlantic capacity.

I've considered the fact that Mr O will have received a commission from the Harlequin investment that Ms M made using the mortgage funds. It was possibly a large commission. And to that extent, I agree with Ms M that Mr O was likely motivated principally by his own interests rather than her interests. But that doesn't mean TMC recommended an unsuitable mortgage. The mortgage that Mr O recommended to Ms M in his TMC/Personal Touch capacity was affordable and suitable for Ms M's purposes. And it's important to remember that what has gone wrong for Ms M is the Harlequin investment, not the mortgage.

I'm sorry to disappoint Ms M. She's lost a lot of money in Harlequin and I have no doubt that this has had a profound impact on her. But for the reasons I've noted above, I can't hold Personal Touch responsible for the investment advice. Nor can I say that the mortgage advice given to her was unsuitable.

My final decision

I don't uphold Ms M's complaint against Personal Touch Financial Services Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms M to accept or reject my decision before 7 January 2025.

Abdul Hafez
Ombudsman