DRN-5572127

The complaint

Mr B complains that Gentoo Group Limited mis-sold him a regulated second charge mortgage (secured loan), and that it hasn't acted fairly in the years since, leading up to repossession action in 2023.

What happened

In 2011, Mr B bought a leasehold property. Gentoo was the developer of the estate the property was part of and became the freeholder following completion. This wasn't a new build estate; Gentoo refurbished and modernised historic property and converted it into a mix of houses and flats – Mr B bought one of the flats. It also offered a deposit loan scheme – whereby it would lend a percentage of the purchase price, reducing the deposit Mr B would need in addition to his main mortgage. The loan was a regulated credit agreement and secured over the property by way of a second charge.

The loan term was ten years. It was interest free for the first five years, but required Mr B to pay monthly interest payments for the second five years. And at or before the end of the term, Mr B was required to repay the capital borrowed.

Unfortunately Mr B says he has experienced problems with the property over the years. He has made a series of complaints to Gentoo as the freeholder about the condition of, and defects in, the property. Towards the end of the loan term, he began to withhold payments in protest and didn't pay the loan back at the end of the term.

As a result, Gentoo took possession proceedings to recover the arrears of interest and the outstanding capital balance. The possession proceedings were dismissed by consent in September 2023 when Mr B agreed to repay the outstanding sums.

Mr B complained. He said that the loan had been mis-sold, because he was told he had to use a solicitor and financial adviser recommended by Gentoo – which meant he didn't receive proper independent advice as he should have done, including about the drawbacks of being a leaseholder. He said that from a year after the purchase he had experienced problems with the property which he had struggled to get resolved. He had also tried to claim on the new build warranty insurance, again without success. He was not advised about limitations on the policy when he bought the property. There have been many issues with the property, including a lack of maintenance and repair, which Gentoo have failed to address – and it has failed to address his complaints about them too. When Mr B withheld payments in desperation, Gentoo still didn't take his concerns seriously and instead took him to court. He believes that was related to complaints he has made, on his own behalf and that of other residents.

Mr B said that but for the problems with the property he would have repaid the loan sooner, and therefore he doesn't think that interest from year six onwards was fairly charged. He said that the time he had spent dealing with Gentoo over the years had been substantial, and dealing with all the issues had had a significant impact on him – especially as he had other health concerns. Mr B said that Gentoo's actions had led him to purchase a poor quality property – so Gentoo should refund not only the interest but also the capital, as well

as be required to carry out necessary repairs.

Gentoo didn't agree that the loan had been mis-sold. It said that Mr B had been free to appoint his own financial adviser and solicitor and had not been pressured to use ones recommended by Gentoo. Any concerns about the advice they gave Mr B would need to be raised with them.

Our investigator didn't recommend upholding the complaint, so Mr B asked for it to be considered by an ombudsman.

Although I reached the same outcome as the investigator, some of my reasoning was different to hers, so I issued a provisional decision setting out my initial thoughts and inviting the parties to make any further arguments they wanted me to consider before making a final decision.

My provisional decision

I said:

> "Although I haven't set it out in detail in this decision, I've very carefully considered everything Mr B has told us about the issues he's experienced with his property over the years. I'm sorry to hear about the difficulties he's had. But I'm afraid they're not matters we can assist with. Although Gentoo is both the freeholder of his property and the lender of this loan, the Financial Ombudsman Service only has the power to consider those activities of Gentoo which fall within our jurisdiction. That means we can consider its actions as lender – but not its actions as developer, or freeholder of the property except (as I explain below) to the extent that those impact on the fairness of the lending relationship.
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> In terms of Gentoo's actions as lender, this complaint concerns both the circumstances in which the loan was originally taken out and its actions since, culminating in the legal action in 2023, at which point the loan was repaid.
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> Dealing first with the original lending of the loan, I think it's important to take into account that purchasing a property involves two separate transactions. There is the purchase of the property itself – a transaction between vendor and buyer. And there is the financing of the purchase – a transaction between lender and borrower. In this case, the vendor and the lender are the same company. But they are nonetheless separate transactions.
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> Mr B decided to purchase this property. That decision, and any representations Gentoo may or may not have made about the property and its condition, are not matters that fall within my jurisdiction. Whether a borrower buys a newbuild property from a developer, a pre-existing property from a previous owner, or – as here – a refurbished property from a developer, the decision on whether or not to proceed with the purchase is one for the buyer – Mr B – to make. That decision may or may not be assisted by others, for example a survey or valuation by a surveyor, but it is ultimately a decision for the buyer to make. Buying property is a high value transaction and always involves risk. It's for the buyer to satisfy themselves of the wisdom of the purchase. There may or may not be legal recourse against the seller if, for example, there is misrepresentation – but that's not a matter for me. Property sale transactions fall outside the jurisdiction of the Financial Ombudsman Service. But I'll say more below about the extent to which this may be relevant to the fairness of the lending relationship.

Once Mr B decided to buy the property, having taken whatever steps he took to satisfy himself of the wisdom of that purchase, he then had to finance the purchase. To that end he borrowed from a mortgage lender, and also borrowed from Gentoo to minimise the cash deposit he had to find.

One of the emails from the time Mr B has shared with us shows that he told the financial adviser he was dealing with that he could only afford a limited deposit, around 5% of the purchase price. So to proceed with the purchase, Mr B had to use Gentoo's loan scheme to supplement the amount he was able to borrow on a standard mortgage. There was no obligation on him to take a Gentoo loan of any particular size, or to take a Gentoo loan at all – but I think it's clear that, having decided to purchase the property, this was in practice the only way to finance the purchase.

Gentoo did not give Mr B advice on the loan or the mortgage. It made clear that he would need to take independent legal advice and independent financial advice before going ahead. It seems it did recommend a financial adviser, who in turn recommended a solicitor.

I've carefully considered what Mr B has said about this. His recollection is that he was told he had to use this particular adviser and solicitor – meaning Gentoo could ensure he wasn't properly advised.

But the evidence from the time doesn't support the accuracy of that recollection. There are emails asking Mr B who he has decided to instruct. But they don't specify any individual or firm. Mr B's responses don't suggest that he was pressured or not making a free choice. The initial documents were drawn up with the adviser and solicitor details omitted, to be added once Mr B had decided who to use. The only suggestion in the documents from the time that Mr B felt under pressure was because of pressure of time – being keen to complete the purchase before his existing tenancy expired.

Recommending a particular financial adviser is not unusual in cases involving the sale of multiple properties on a development, particularly where there are finance arrangements other than standard mortgages in place, because the adviser has experience of the arrangements in place. I've not seen any evidence that Gentoo went beyond a recommendation or that it placed improper pressure on Mr B, or made it a requirement, that he use any particular adviser or solicitor.

Even if it did recommend particular advisers and solicitors, it was Mr B's choice to accept those recommendations and use those firms. Gentoo is not responsible for any advice they gave – or failed to give – Mr B and any complaint about that would need to be made to those firms.

Mr B also says that Gentoo ought to have known that it hadn't done a proper job in refurbishing his and other properties. It ought to have foreseen that he and other leaseholders would have had issues. In selling him a loan secured over his property despite that, it created an unfair relationship between him and Gentoo. And Gentoo's failings as developer and freeholder polluted the lending relationship it also had with him.

The law on unfair relationships is found in s140A of the Consumer Credit Act 1974. It's relevant law for me to take into account in deciding what's fair and reasonable in all the circumstances. It says that a relationship may be unfair because of anything done or not done by the creditor (Gentoo). In circumstances where the creditor is

both the lender of the finance and the supplier of goods (in this case, property) which that finance is used to purchase, I think that could mean that failings in its capacity of supplier of the goods might make the lending relationship unfair from the outset. It could also be the case that any failings in its capacity of freeholder managing the property might mean that the lending relationship later becomes unfair.

That's because the law on unfair relationships is concerned with whether the relationship between the debtor (Mr B) and the creditor (Gentoo) is currently fair or not (or where the relationship has ended, as in this case, whether it was fair when it came to an end). Section 140A says that a relationship may become unfair

> …because of one or more of the following:
>
> (a) any of the terms of the agreement or of any related agreement;
>
> (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;
>
> (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).
>
> (2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).

Section 140C (4) says that

> References in sections 140A and 140B to an agreement related to a credit agreement ("the main agreement") are references to:
>
> (a) a credit agreement consolidated by the main agreement;
>
> (b) a linked transaction in relation to the main agreement or to a credit agreement within paragraph (a);
>
> (c) a security provided in relation to the main agreement, to a credit agreement within paragraph (a) or to a linked transaction within paragraph (b).

There are three contracts between Mr B and Gentoo here – the purchase of the property, the finance agreement financing the purchase of the property (this is the credit agreement), and the ongoing lease. In my view, the purchase agreement and the lease are related agreements. They come within s140C (4) (b) as linked transactions to the credit agreement. They are intertwined – without the credit agreement there would be no purchase agreement, and vice versa. And the lease is an inevitable consequence of the purchase agreement being for the purchase of the leasehold interest in the property.

Any obligations Gentoo may or may not have had, or continues to have, under the purchase agreement and the lease are not obligations of the credit agreement. There is no express provision about either construction quality or ongoing maintenance in the credit agreement – and given the existence of the related agreements, there would not need to be any implied term either.

In my view, section 140A would not permit a court to make findings about any breach of the purchase agreement or the lease as standalone matters in proceedings brought under s140A. But a court would be entitled to take into account any obligations on Gentoo under those contracts, or the way in which it has exercised any of its rights under those contracts, as relevant matters concerning the fairness of the lending relationship. In other words, a court dealing with proceedings under s140A could not, for example, award compensation for breach by Gentoo of the lease agreement. But it may be able to find that the way in which Gentoo exercised (or failed to exercise) its obligations under the lease made the relationship arising out of the credit agreement unfair – and make orders in relation to the credit agreement under s140B accordingly. This is relevant law for me to take into account.

I am not an expert in housing construction, housing repairs and defects, or leasehold management. No expert evidence in relation to the construction of the property, or its later repair and maintenance, has been provided specifically in relation to this complaint.

However, Mr B has previously made a complaint about the same matters to the Housing Ombudsman. I've seen a copy of its determination. The Housing Ombudsman is an expert in this area, and had the benefit of seeing all the related evidence. Rather than require the parties to provide further expert evidence in relation to this complaint, I think it's fair and reasonable in all the circumstances for me to rely on the conclusions of the Housing Ombudsman on the issue of any defects with the property itself or with its maintenance and repair, before going on to think about how those conclusions may be relevant to the fairness of the lending relationship.

The Housing Ombudsman found:

- Gentoo had not found evidence of structural issues with Mr B's property – in particular, the floors and roof – and it was reasonable that it relied on the opinion of a qualified professional in declining not to carry out further investigations. However, in light of its other directions, the Ombudsman recommended that a further structural inspection be carried out to reassure Mr B.

- The Ombudsman found that there was evidence of water ingress. Issues with the guttering and roof were identified. Gentoo, or the management company acting on its behalf, failed to resolve these issues appropriately. The Ombudsman directed Gentoo to commission an independent contractor to reassess what work was required and complete it within a reasonable timescale, as well as pay Mr B £1,500 compensation and apologise to him.

There were other findings relating to Gentoo's governance and oversight which are not directly relevant to the condition of Mr B's property.

Gentoo says that following the Ombudsman's investigation it complied with the directions. Necessary work was completed by May 2024 and the Ombudsman was informed that it had been done. It also commissioned a non-invasive survey which found no structural issues and that the condition of the roof suggested it was still within its serviceable lifespan.

Following the Ombudsman's decision, Gentoo carried out its own internal review. It accepted that there had been failings in maintenance and repair – but not structural issues – due to Gentoo at the time lacking the relevant specialist expertise to

manage a development of this specific type, and due to failures by, and in Gentoo's oversight of, its appointed management company.

On the evidence available to me, I'm not persuaded that there were construction or structural issues present from the outset, when Mr B purchased the property following its redevelopment. I think it's also relevant to note that it's common practice in property transactions for a buyer to instruct their own surveyor to advise them on the condition of the property before purchasing, as I said above. I don't know if Mr B did that in this case. But whether he did or not, the fact is that there is a general understanding in the property market that it is for the purchaser to satisfy themselves of the wisdom of buying a particular property. While a vendor should not mislead or conceal matters within their knowledge, ultimately it is for the purchaser to decide whether to go ahead.

There are specific requirements for new-build property. This was not, though, a new-build – it was a refurbishment. Even so, Gentoo arranged a building warranty. Mr B complains that wasn't effective. But the terms of the warranty, and any claims made under it, are not something I can consider here. That would have to be the subject of a separate complaint to the warranty provider.

As I say, I don't have any evidence of structural or build quality issues from the time of the sale. But the evidence – not least of the Housing Ombudsman's findings – shows that there have been ongoing problems with repair and maintenance, including problems of water ingress.

However, the existence of those problems is not, of itself, sufficient for me to uphold this complaint. What I need to consider is whether, as a result of those problems, the relationship between Mr B and Gentoo arising out of the credit agreement became unfair – and, if so, what Gentoo needs to do to put matters right.

On balance, I'm not persuaded that the maintenance and repair problems made the lending relationship unfair in this case. The maintenance and repair obligations arise out of the lease, not the original purchase agreement. Although the lease is also a linked agreement, as I've said above, the purpose of the credit agreement was to finance the purchase of the property.

To that extent, structural problems or problems with initial build quality are more likely to have a direct impact on the fairness of the credit agreement – since they potentially undermine the value of the property whose purchase was the purpose of the credit agreement. If there were structural or construction issues, this might mean that Mr B paid more for the property than it was worth, and therefore borrowed more than he needed to – which might in turn make the lending relationship unfair. Whereas problems with ongoing repair and maintenance might impact Mr B's ability to enjoy the property, but don't impact the value of what he purchased at the time he purchased it.

Serious unresolved repair and maintenance problems might impact the current value – and future resale value if left unresolved. But any impact on current or future value would only be crystallised if those issues remain unresolved at a time when Mr B may decide to sell the property. He is not currently intending to do so, as far as I am aware. The ongoing maintenance issues have been resolved following the involvement of the Housing Ombudsman. So I'm not persuaded they are likely to have impacted any future re-sale value of the property. To that extent, they have not caused Mr B any direct financial loss in the value of the asset whose purchase was financed by the credit agreement.

As I say, repair and maintenance issues might have impacted Mr B's ability to enjoy the property without causing financial loss. But I don't think that's enough for me to uphold the complaint. Gentoo's failings in its capacity as freeholder did not impact the value of his asset. They did impact Mr B's ability to enjoy the asset while they were ongoing. But the Housing Ombudsman awarded Mr B compensation for that. Even if I were persuaded that diminished ability to enjoy the property without financial loss was enough to make the lending relationship unfair, it wouldn't be appropriate for me to make a further award for that, as doing so would amount to double compensation.

I'm not therefore persuaded that anything Gentoo did, or failed to do, in its capacity as freeholder caused the lending relationship to become unfair such that it would be fair and reasonable for me to make an award of compensation.

I've also thought about whether Gentoo acted fairly in taking steps to enforce the credit agreement – in taking Mr B to court when he withheld interest payments, and when he didn't repay the capital at the end of the loan term.

The possession proceedings were ended by agreement between Mr B and Gentoo. Mr B agreed to pay the outstanding sums, Gentoo agreed to drop the possession action if he did so, and both parties agreed to bear their own costs. The effect of that agreement is that Mr B accepted that the interest and capital was due and ought to have been repaid. I don't agree that the agreement that each party bears its own costs should be taken as a tacit admission of fault by Gentoo. Such a costs agreement is not unusual where proceedings are settled by consent.

The terms of the credit agreement required Mr B to repay the interest and capital. There is no provision for payment to be withheld while there is a dispute between the parties – including where the dispute arises out of the lease rather than the credit agreement.

The purpose of the credit agreement was to finance Mr B's purchase of the property. The ongoing repair and maintenance issues didn't impact his ownership of the property. And, as I've said above, they didn't in fact in this case – in my view – impact the value of the property either.

I must also bear in mind that withholding payment was not the only route open to Mr B to require Gentoo to meet its obligations under the lease. He had the option of complaining to the Housing Ombudsman, or bringing proceedings for breach of the maintenance obligations in the lease. He was in fact making a complaint to the Housing Ombudsman at the same time as the proceedings for repossession for non-payment were ongoing.

Even if Mr B considered Gentoo to be in breach of its obligations under the lease, therefore, I'm not persuaded that justified Mr B breaching his own obligations under the credit agreement – or that, in those circumstances, Gentoo acted unfairly in taking possession proceedings based on the non-payment.

In conclusion, then, I don't intend to uphold this complaint. I'm not persuaded that Gentoo required Mr B to use a particular adviser or solicitor at the time of the purchase or that the loan was mis-sold. I'm not persuaded that Gentoo acted unfairly in taking possession proceedings when Mr B withheld payment. And I'm not persuaded that there was an unfair lending relationship between Gentoo and Mr B that would justify me in making an award of compensation beyond that already awarded by the Housing Ombudsman.

The responses to my provisional decision

Gentoo accepted my provisional decision and said it had nothing more to add. Mr B did not accept it. He said, in summary:

- Gentoo's activities towards him include being lender, developer, freeholder and managing agent. I should take all those activities into consideration. It acts and omissions across all those capacities had created an unfair relationship between them.

- Gentoo has failed to honour the terms of the guarantee it gave when Mr B bought the property, and failed to comply with its obligations as freeholder to him as leaseholder. Serious failures of maintenance caused lasting damage to his property, but Gentoo denied responsibility.

- Gentoo has evaded complying with the Housing Ombudsman's directions, in particular by not adequately repairing the roof of the building to prevent further water ingress. This is an ongoing issue.

- The loan was mis-sold because of the relationship between Gentoo, the adviser and the solicitor. Mr B was verbally told by Gentoo that he had to use the adviser and solicitor it recommended. The adviser and solicitor worked for the same company. The adviser did not discuss any alternatives with Mr B or advise him on the terms of the loan or its implications for him.

- In not upholding the complaint, I relied heavily on the findings of the Housing Ombudsman, on the basis that the Ombudsman considered matters appropriately and Gentoo acted in good faith to follow its directions. Mr B does not agree that is the case. Works that were agreed in 2015 and again in 2021 have not been carried out. Mr B was not given a copy of the survey carried out in 2023. All the works recommended have not been carried out. Gentoo did not appoint the management company in consultation with the leaseholders, as it should have done – which is the subject of a new, as yet unresolved, complaint to the Housing Ombudsman. Senior staff at Gentoo have refused to meet with Mr B. Gentoo is now using a surveyor who does not hold proper accreditation. Gentoo has sought to delay and shift responsibility for problems with the development. It has charged repairs to residents despite saying it would pay for them itself. It has sought to manipulate the evidence in its favour.

- Due to Gentoo's failings, the property Mr B bought was not in the condition he was led to believe it was. But many of the issues with it have come to light since and would not have been apparent to the surveyor he instructed before the purchase. Gentoo has also failed in its repair and maintenance obligations.

- As a result, the contractual relationship between Mr B and Gentoo has been unfair from the start.

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 also carefully reviewed the further arguments Mr B made in response to my provisional decision. But I haven't changed my mind about my findings.

I appreciate the strength of Mr B's recollection that he was required to use the adviser and solicitor that Gentoo recommended. But it was a long time ago and much has happened since, and – as I explained in my provisional decision – the available documentary evidence from the time doesn't suggest that was the case. In any case, even if there was an obligation to use them (which I'm not persuaded of), Gentoo is not responsible for any advice Mr B may (or may not) have received from the adviser and solicitor.

It's important to note that I can't consider whether the relationship between Mr B and Gentoo was unfair or not in general terms, or its relationships with him as vendor or freeholder. Any matters other than Gentoo acting in its capacity as Mr B's lender fall outside my jurisdiction.

As part of my consideration of its activities as lender, I can – as I said in my provisional decision – consider whether acts and omissions in its other capacities may have, as a result, made the lending relationship unfair. But I can't consider whether the relationship between Mr B and Gentoo as, for example, leaseholder and freeholder, was fair or not. That is a matter for the courts or the Housing Ombudsman.

That also means that I can't consider anything that Gentoo may or may not have done after the lending relationship came to an end when Mr B repaid the loan in 2023. After that point, there was no longer any relationship between Mr B as debtor and Gentoo as creditor – which means that Gentoo was no longer providing a financial service to Mr B, and that the law on unfair relationships in credit agreements was no longer of any relevance. Their relationship as leaseholder / freeholder continued – but, as I have explained, that is not a matter I can consider.

Mr B's criticisms of Gentoo's response to the Housing Ombudsman's decisions are not therefore something I can take into account. Any issues surrounding compliance with a decision of the Housing Ombudsman is a matter for the Housing Ombudsman, not a matter for me. Any failure to comply with the Housing Ombudsman's decision cannot have impacted on the fairness of a lending relationship when by then that relationship no longer existed.

The findings of the Housing Ombudsman about the condition of the property and any failings by Gentoo in its management of it during the period the debtor / creditor relationship still existed – that is, before the loan was repaid in 2023 – are potentially relevant to the fairness of the debtor / creditor relationship, for the reasons I explained in my provisional decision. With that in mind, I've thought carefully about the further points Mr B has made. He's clearly dissatisfied with the findings of the Ombudsman. But the Housing Ombudsman is the expert in this area, it had the benefit of seeing all the evidence, and both Mr B and Gentoo had the opportunity to make their cases. In all the circumstances, I think it's fair and reasonable for me to continue to rely on the findings of the Housing Ombudsman when deciding the underlying facts about the condition of the property and Gentoo's management of it insofar as they are relevant to the fairness of the lending relationship.

For the reasons I explained in my provisional decision, I'm not persuaded – in light of the facts as found by the Housing Ombudsman, and its decision in light of those facts – that it would be fair and reasonable for me to uphold this complaint. I don't think there's evidence on which I can safely find that the property wasn't fit for purpose at the time Mr B bought it from Gentoo. There have clearly been ongoing problems with repair and maintenance. But Mr B had the opportunity to complain about those to the Housing Ombudsman, which directed Gentoo to put matters right and compensate Mr B.

Even if the debtor / creditor relationship was also made unfair by the failings identified by the Housing Ombudsman – meaning Gentoo was acting unfairly as lender as well as acting unfairly as freeholder – I don't think it would be fair and reasonable for me to make a further

award of compensation for the same issues. As a matter of general principle, compensation shouldn't be awarded twice for the same underlying problem.

I appreciate he doesn't agree that the Housing Ombudsman's decision was adequate or properly complied with, but Mr B has been awarded compensation, and benefitted from a direction to make things right, in respect of Gentoo's failures in managing the property. Any failure to comply with that direction is not a matter for me, both because by then the lending relationship no longer existed, and because it is not for me to enforce decisions of the Housing Ombudsman. It's also not within my powers to change or set aside the decision of the Housing Ombudsman, and any concerns Mr B has about its decision are better addressed there.

That leaves Gentoo's actions specifically as lender. But I'm not persuaded it would be fair and reasonable to uphold this part of the complaint either. Although Mr B did have valid concerns about the management of his property, there were other ways (such as complaining to the Housing Ombudsman) apart from withholding payment of the loan for him to resolve those concerns. There's no doubt that Mr B did owe the sums Gentoo sought from him under the loan agreement – and indeed Mr B agreed to pay what he owed to avoid repossession. Mr B had other routes to resolving his dispute with Gentoo about the leaseholder / freeholder relationship besides putting himself in breach of the terms of the credit agreement. I'm not persuaded that it was unfair that Gentoo took legal action to recover the debt when it remained outstanding two years after the term ended.

My final decision

For the reasons I've given in this decision and in my provisional decision, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 24 June 2025.

Simon Pugh
Ombudsman