## complaint

Mr A and Ms S complain that they were mis-sold a mortgage by an appointed representative ("AR") of TenetLime Ltd ("TenetLime"), and advised to invest some of the proceeds into an unregulated investment.

## background

I issued a provisional decision on this complaint in July 2019 (copy attached). I set out the reasons why I intended to uphold Mr A and Ms S' complaint against TenetLime.

In summary, I said that although I wasn't persuaded the AR ("1994") had given unsuitable mortgage advice, I felt that advice had been given to invest as part of the same process. Given Mr A and Ms S' circumstances, that investment advice was unsuitable and TenetLime should compensate them for that.

Mr A and Ms S' representative accepted the provisional decision.

TenetLime disagreed and, in summary, responded saying:

- The ombudsman ought to consider causation. The reason given by the consumers for borrowing funds was to buy a motorhome, but it appears they had always intended to use the money to invest in Harlequin.
- If the investment was provided to the lender as the intended use for proceeds, it's likely the mortgage wouldn't have been approved.
- This is not a case where the investment was made from existing funds; but it believes Mr A and Ms S misrepresented the position to obtain funds and become indebted.
- Had true information been provided to the lender, the investment would never have been able to happen.

I've considered this response in the circumstances of what happened in order to review my conclusions.

## my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I remain of the opinion that the complaint should be upheld.

Having considered the comments received in response to my provisional decision, I'm not persuaded to change my mind in relation to the conclusions reached in that decision. As those reasons are set out in the attached decision I have not repeated them here, but I will address the additional points raised by TenetLime.

I know that on the mortgage application Mr A and Ms S stated the additional borrowing was going to be used to make home improvements and to buy a motorhome. As I explained in my provisional decision, it was for them to decide how they ultimately used the proceeds, but I acknowledge TenetLime's point that it's possible the mortgage would not have been approved if the lender knew the proceeds were to be used to invest.

TenetLime has asked that I request the mortgage lender to confirm if its decision to lend to Mr A and Ms S would have been different if the Harlequin investment had been stated as the

intended use of proceeds. But I don't feel this is necessary for me to decide what is fair and reasonable in the circumstances – and I'll explain why.

The mortgage application was made in July 2009 and Mr A and Ms S entered the investment contract soon after. Given the proximity of the transactions, the involvement of the 1994 advisers, and the amount borrowed being exactly what was required for the Harlequin investment; I think it's probable the proceeds were always going to be used to invest. Whilst I appreciate why TenetLime says this was a misrepresentation by Mr A and Ms S which makes them responsible, I don't entirely agree.

If the mortgage proceeds were always intended to be used to invest in Harlequin, the 1994 advisers would have been aware. I have concluded 1994 introduced Mr A and Ms S to Harlequin, and advised them to invest, and so it would have known they could have only made the investment by raising funds against their home. Yet it was a 1994 adviser who had completed the application and issued a recommendations letter referring to home improvements and a motorhome.

So when deciding what is fair and reasonable I am persuaded by the fact that 1994 was the regulated party that was advising Mr A and Ms S. The adviser was likely to be leading the process in order to enable the borrowing to be secured and the investment to be made. 1994 had an obligation to ensure its customers were treated fairly. But if a misrepresentation was made, the advisers would have known that, yet proceeded in any event. 1994 failed to protect Mr A and Ms S, and given the wider circumstances it's likely the adviser would have in fact been the one to suggest how the mortgage application was to be completed.

So whilst I can't be certain about the accuracy of the information given to the lender, on balance I think it would have been 1994 that led the process and told Mr A and Ms S what was required. So overall, I'm satisfied that the complaint should be upheld, and TenetLime should be held responsible for its AR, 1994.

**my final decision**

For the reasons I have explained, my final decision is that I uphold the complaint against TenetLime Ltd. To put things right it should pay to Mr A and Ms S:

A) The £1,000 deposit paid to secure the Harlequin investment.
B) The £62,000 additional mortgage borrowing taken to invest in Harlequin.
C) Any interest payments Mr A and Ms S have paid to service the £62,000 mortgage, but less any contributions they have received from Harlequin towards those costs.
D) 8% simple interest per annum on the amounts calculated at C), from the date each payment was made, to the date of settlement.
E) £500 for the trouble and upset of having an interest-only mortgage without the repayment vehicle that they hoped and expected to use, and so meaning there was a realistic prospect of having to sell their home.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A and Ms S to accept or reject my decision before 31 August 2019.

Ross Hammond
**Ombudsman**

COPY SECOND PROVISIONAL DECISION

**complaint**

Mr A and Ms S complain that they were mis-sold a mortgage by an appointed representative of TenetLime Ltd ("TenetLime"), and advised to invest some of the proceeds into an unregulated investment.

**background**

I issued a previous provisional decision on the complaint (a copy of which is attached).

Mortgage advice was given to Mr A and Mrs S by 1994 Ltd ("1994"), an appointed representative of TenetLime. A large part of the mortgage proceeds were invested into an unregulated off-plan property development based overseas ("Harlequin"). I set out a detailed background of the circumstances around the complaint in that decision and so have not repeated it here.

My decision set out why I didn't intend to uphold Mr A and Ms S' complaint, but invited responses from both parties. In summary I concluded:

- The mortgage adviser had considered and discussed the means of repaying the mortgage at the time of advice.
- Mr A and Ms S had sufficient means to repay the mortgage through other assets, and weren't reliant upon the Harlequin off-plan investment.
- TenetLime's appointed representative had introduced Mr A and Ms S to the Harlequin investment, but advice was given by a third party agent.

TenetLime agreed with my provisional decision and provided no new evidence. But it re-iterated:

- The mortgage recommendation was suitable with appropriate repayment options in place.
- The investment recommendation wasn't made by an agent of TenetLime, and wasn't a regulated product in any event.

Represented by a claims management company ("CMC"), Mr A and Ms S disagreed. The CMC made a number of further representations in response to the provisional decision and provided a number of documents from the time of advice.

I've reviewed all the representations made and evidence provided, but in summary the CMC said:

- The information provided by TenetLime and what was recorded on the mortgage documentation differs. There is reference to an ISA that didn't exist and the paperwork refers to the sale of their main residence. But Mr A and Ms S have always maintained that returns from the Harlequin investment were always intended to repay the mortgage.
- The other means of repaying the mortgage (such as their property in Cyprus) were only mentioned to help secure the mortgage and get a better rate – not because they were ever intended to be used as a repayment strategy.
- There are questions about the credibility of the statement provided by the third party Harlequin agent who said the advisers from 1994 were not involved in the sale of the investment.
- It provided documents to show that 1994 had provided investment analysis and its advisers were involved in the investment transaction.

I've reviewed everything again in view of the further representations and reconsidered my previous conclusions.

**my provisional findings**

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so, I am now minded to uphold the complaint.

I remain of the view that the mortgage recommendation itself was not entirely unsuitable, but I now consider the 1994 advisers were more involved than just introducing Mr A and Mrs S to the Harlequin investment. As I believe the investment advice was sufficiently closely linked to the mortgage advice, TenetLime is responsible – and I'll explain why.

***mortgage advice***

I understand that the CMC has strongly argued that the mortgage was not suitable for Mr A and Ms S. In particular, it has set out the reasons why it considers there were inconsistencies in what was recorded at the time, and the reasons given for the recommendation now.

When 1994 was first approached, Mr A and Ms S had wanted to borrow £35,000 to be used to help their daughter purchase a property. They borrowed an additional £62,000 and it was recorded they had wanted to make home improvements and purchase a motorhome. In fact they used the £62,000 to make the investment into Harlequin and not for the reasons stated. It was for Mr A and Ms S to use the mortgage proceeds as they wished, and they knew what the money was to be used for at the time.

This does not mean that the adviser had no responsibilities in respect of the mortgage. As has been previously explained, the adviser was required to meet the standards set out in MCOB.

Under MCOB 4.7.2R in order for a mortgage to be suitable, the adviser must have *"reasonable grounds to conclude"* that "*the customer can afford to enter into the regulated mortgage contract"* and it *"is appropriate for the needs and circumstances of the customer"*.

The borrowing was taken out on an interest-only basis and I've previously concluded it was affordable for Mr A and Ms S to maintain. The issue which is disputed between the parties is what the intended repayment vehicle was.

The CMC has explained Mr A and Ms S were advised the Harlequin investment would provide the means to repay the borrowing. This may have been the case and their understanding as a result of investment advice, but as far as the mortgage advice is concerned, they had means to repay the borrowing without relying on the investment.

Mr A and Ms S have themselves confirmed that:

*"If a repayment plan was needed for mortgage purposes then we did tell them that we would sell our house or the property we had in Cyprus which is valued at around £200,000."*

They also confirmed that they had savings which could be used for repaying part of the mortgage, although not in the form of an ISA.

So I'm satisfied that there was some discussion about mortgage repayment strategies at the time, and Mr A and Ms S have explained they were willing to provide details of other plausible means of repayment if required. The CMC representing them has stated Mr A and Ms S had only provided those details in order to help secure the mortgage and get a better interest rate for the borrowing. This demonstrates that they were willing to ensure details of a repayment vehicle to secure the mortgage, and could afford to do so if required.

So even if the details recorded by the adviser had not been a suitable method of repaying the mortgage, I'm persuaded Mr A and Ms S would have still proceeded with the mortgage if asked to confirm the use of other assets as a repayment strategy. Given this, I cannot say the mortgage advice was responsible for the losses they incurred, and so it would not be fair and reasonable for me to compensate them on that basis.

***investment advice - jurisdiction***

In my previous provisional decision I commented upon a statement provided by the Harlequin agent who said that 1994 was not involved in the sale of Harlequin. He stated that the only involvement of 1994 was by way of an introduction.

The CMC questioned the credibility of the Harlequin agent's statement, and set out why it believed 1994 was involved in the investment recommendation. Having reviewed the evidence provided, I'm certain the involvement of the 1994 advisers was more than just an introduction, and am persuaded they did provide advice to Mr A and Ms S.

TenetLime said its appointed representative, 1994, was not involved in the recommendation to invest in Harlequin. It also commented that the investment isn't a regulated product and so our Service doesn't have jurisdiction to consider it.

It is not disputed that 1994 were authorised to, and did, provide Mr A and Ms S with regulated mortgage advice. This Service can't consider all complaints that are referred to us, and our jurisdiction is set out in the Dispute Resolution Rules ("DISP") in the FCA Handbook. In this case TenetLime says part of the advice (investment) is not subject to our jurisdiction, the following are relevant considerations:

Under DISP 2.3.1R, we can consider a complaint under our compulsory jurisdiction if it relates to an act or omission by a firm in the carrying on of one or more listed activities, (including regulated activities), or any ancillary activities carried on by the firm in connection with those activities.

Section 39 of the Financial Services Markets Act 2000 (FSMA) says:

> *"39. Exemption of appointed representatives.*
>
> *(1) If a person (other than an authorised person)-*
>
> *(a) is a party to a contract with an authorised person ("his principal") which-*
>
> *permits or requires him to carry on business of a prescribed description, and*
>
> *complies with such requirements as may be prescribed, and*
>
> *(b) is someone for whose activities in carrying on the whole or part of that business his principal has accepted responsibility in writing,*
>
> *he is exempt from the general prohibition in relation to any regulated activity comprised in the carrying on of that business for which his principal has accepted responsibility.*
>
> *…*
>
> *(3) The Principal of an appointed representative is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility".*

So under s.39, the principal is required to accept responsibly for the business being conducted by the AR. Case law has confirmed how this applies in certain circumstances. The words *"part of"* in s.39 allow a principal firm to accept responsibility for only *part of* the "*business*" conducted by an AR.

So, I think there are important points that I need to consider when deciding whether I'm able to look at the investment element of this complaint:

- what are the specific acts being complained about;
- are the acts being complained about regulated activities or ancillary to regulated activities;
- is TenetLime responsible for those activities by reason of agency or vicarious liability.

*what are the specific acts being complained about*

In summary, Mr A and Ms S complain about advice they say was given by 1994, an appointed representative of TenetLime. They say they were advised by 1994 to make an investment into an overseas property investment scheme, and in order to raise the funds they were advised to take out a mortgage.

*are the acts being complained about regulated activities or ancillary to regulated activities*

Regulated activities are specified in Part II of the FSMA 2000 (Regulated Activities) Order 2001 ("'the RAO") and include advising on the merits of buying or selling a particular investment which is a security or a relevant investment (article 53 RAO), and making arrangements for another person to buy or sell or subscribe for a security or relevant investment (article 25 RAO).

Advising on a regulated mortgage contract is a regulated act, as is advising on a collective investment scheme, which the Harlequin investment appears to have been.

Taking everything into account, I'm satisfied the acts complained about fall within our jurisdiction as set out in DISP 3.2.1R. They relate to acts or omissions in carrying out regulated activities.

*is TenetLime responsible for those activities by reason of agency or vicarious liability.*

For me to determine that TenetLime is responsible for the advice given to Mr A and Ms S, I must consider whether:

- Mr and Mrs A were given the advice by 1994;
- whilst 1994 was acting as its agent; and
- the advice was part of the business it authorised 1994 to carry out.

As set out above, there's no dispute that 1994 gave Mr A and Ms S regulated mortgage advice. This has been accepted by all parties.

TenetLime has claimed that 1994 didn't make any recommendations in relation to the Harlequin investment. And the Harlequin agent provided a signed statement advising he was solely responsible for the sale of the Harlequin property investment.

The CMC disagreed with the credibility of the statement and felt it was contradictory with evidence available from the time. I've reconsidered my earlier conclusions in view of this and am now satisfied the advisers from 1994 did make recommendations and were involved in investment beyond just making an introduction to Harlequin.

Mr A and Ms S have maintained that it was the advisers from 1994 that they dealt with about the investment as well as the mortgage. Having reviewed everything, I consider that on balance the evidence largely supports this to have been the case.

- It was recorded that the use of the additional mortgage proceeds was for home improvements and a motor home – but the money was not spent on those things. Instead, the amount of additional borrowing was £62,000 – the exact amount that was required to pay the deposit balance that Mr A and Ms S had contracted to invest in Harlequin a week before the mortgage application (having been 'introduced' by 1994).

- The *"Harlequin Preliminary Contract"* dated 11 August 2009 in relation to the sale of the investment off-plan property was witnessed by one of the advisers at 1994.

- 1994 provided receipts for payments made by Mr A and Ms S in relation to the investment. The receipts were issued on 1994 compliments slips which confirmed it was acting as an appointed representative.
  - An initial £1,000 reservation fee payment dated 11 August 2009 – a week before the mortgage application was completed.
  - A further £62,000 for the balance of investment deposit dated 16 October 2009.

- Mr A and Ms S were provided with an illustration document that shows the projected investment returns from the Harlequin property development. But it was not branded as Harlequin, but rather headed *"1994 Caribbean Investment Analysis"*.

- There were emails to Mr A and Ms S along with other investors from an adviser at 1994 giving updates about the progress of the Harlequin development. In October 2011 one such email confirmed they'd been on a Harlequin training day. This is a considerable time after Mr A and Ms S had invested, but suggests they were acting in the capacity of more than just an introducer.

Based upon the evidence available to me, I'm persuaded that Mr A and Ms S were advised by 1994 to borrow additional funds on their mortgage on top of the £35,000 they had originally intended. Given the timeline of events and available documentation, I consider it a reasonable conclusion to say they did so on the basis that 1994 recommended they invest in Harlequin.

On the second point, I'm satisfied that 1994 was acting as TenetLime's agent. It has accepted responsibility for the regulated mortgage advice, and as I've explained, I'm persuaded that on balance the advisers were considerably involved in the investment process also.

When considering whether the activities carried out by 1994 were part of the business authorised by TenetLime, I've referred to s.39 FSMA as set out above. It states that a principal is required to accept responsibility for *"business of a prescribed description"*.

Prescribed business, as set out in the interpretation section of FSMA, means prescribed in regulations made by the Treasury. The regulation is the RAO. So it refers to certain regulated activities at a high level, rather than in relation to individual transactions.

In this complaint, the prescribed business that TenetLime accepted responsibility for is detailed within the appointed representative agreement between it and 1994. That agreement is dated 11 September 2007 and sets out that 1994 can carry out *"Business"* as set out within Schedule 1 of the agreement.

The prescribed business TenetLime authorised 1994 to carry out as set out in the appointed representative agreement is:

- Arranging and advising on regulated mortgage contracts.

- Making arrangements with a view to transactions in regulated mortgage contracts.
- Arranging, advising and dealing as an agent on deals in non-investment insurance contracts.
- Making arrangements with a view to transactions in non-investment contracts.
- Assisting in the administration and performance on non-investment insurance contracts.

*"part of"*

s.39(b) FSMA refers to an appointed representative *"…carrying on the whole or part of that business his principal has accepted responsibility in writing".*

A principal is responsible for the acts and omissions of an appointed representative when they are acting within their actual authority. But it can sometimes also be responsible where it accepts responsibility for only 'part of' the business and the appointed representative acts beyond its actual authority.

In the judicial review case of *TenetConnect Services Ltd v Financial Ombudsman Service* [2018], the judge explained that where a consumer had been advised to sell a regulated investment in order to fund an unregulated investment, this would form a single piece of regulated advice.

I believe the judge's conclusions in that case are similarly applicable in this case, and the acts Mr A and Ms S complain about are a single piece of advice. Without the regulated mortgage advice, there would have been no investment into Harlequin. So I think it's right to consider the transactions as being inextricably linked and forming a single piece of advice.

In the recent case of *Anderson v Sense Network* [2018] EWHC 2834, Mr Justice Jacobs said:

> *"138. Most recently, in TenetConnect, Ouseley J applied the decisions in both Martin and Ovrachenko, in circumstances where it was common ground that liability under s.39 "was not to be determined as a matter of the contractual law of agency": see paragraph [61]. The basis of the decision in TenetConnect was that the relevant advice on "unregulated" investments was sufficiently closely linked to the advice on regulated investments, which the AR was authorised to give. The case therefore again supports the proposition that in ascertaining the scope of s.39, and the question of the business for which the principal has accepted responsibility, it is relevant to consider the terms of the agreement between the principal and AR. It is implicit in the decision that if the advice on the unregulated investments had not been sufficiently closely linked to advice which the AR was authorised to give, then there would have been no liability under s.39.*
>
> *139. I also agree with the Claimants that the authorities indicate that it is appropriate to take a broad approach when seeking to identify the "business for which he has accepted responsibility". The fact that there may not be actual authority for a particular transaction, for example because of a breach of an obligation not to offer an inducement (Overcharenko), or because there was no authority to advise on a related transaction (TenetConnect), or because certain duties needed to be fulfilled before a product was offered, does not mean that the transaction in question falls outside the scope of the relevant "business" for which responsibility is taken. Equally, the approach must not be so broad that it becomes divorced from the terms of the very AR agreement relied upon in support of the case that the principal has accepted responsibility for the business in question".*

The test in the *Anderson v Sense Network* judgement is that the principal is responsible when the act or omission is 'sufficiently closely linked' to the activities for which the actual authority was given.

So just because TenetLime didn't give 1994 actual authority to provide Mr A and Ms S with investment advice, it doesn't mean that it isn't responsible for it. It all depends upon whether the mortgage advice and investment advice are sufficiently closely linked.

As I've explained above, based upon the evidence provided to me, I'm persuaded that 1994 gave advice to Mr A and Ms S to invest in Harlequin. And in order to do so, recommended they borrow extra funds against their home by way of an interest-only mortgage.

Mr A and Ms S initially wanted, and were quoted for a £35,000 mortgage, but following 1994's recommendation, they borrowed an extra £62,000 which was invested in Harlequin. Whilst I appreciate that TenetLime maintain the extra funds were required for home improvements and a motorhome, I've already explained why I don't think that was actually the case, and that Harlequin was recommended and was always the intended use for the proceeds.

Because TenetLime has accepted responsibility for part of the advice complained about, I consider it is responsible for the advice as a whole – both mortgage and investment. The two pieces of advice are sufficiently closely linked and Mr A and Ms S wouldn't have made the investment without the mortgage advice and additional borrowing recommended by 1994.

Given my conclusions on who carried out the advice and that TenetLime is responsible, I have jurisdiction to review the complaint as a whole. So I have also considered the merits of Mr A and Ms S complaint about the investment as well as the mortgage.

***investment suitability***

Having reviewed everything and considered what's fair and reasonable in the circumstances of this complaint I've reached the conclusion that it was not a suitable recommendation for Mr A and Ms S to borrow against their home to invest in Harlequin.

Harlequin was a high-risk esoteric investment that would have only been suitable for a small number of investors. The £63,000 paid by Mr A and Ms S was only a 30% deposit for the off-plan development and the balance of £147,000 would be due for payment at staged completion dates. So Mr A and Ms S would have needed pay the remaining balance or secure further borrowing if the development had successfully been completed.

At the time of the advice, Mr A and Ms S were in a comfortable financial position, having substantial equity in their home, a holiday home in Cyprus and savings. However, the Harlequin investment posed a greater risk than they had capacity to take. Ms S received a modest pension income, and they were not in a position to make up any losses.

Mr A and Ms S had believed the investment would effectively fund itself. As Harlequin would pay to maintain the mortgage interest, and it was marketed on the basis that once completed, the value would be sufficient to secure borrowing against the overseas property, or sell at a profit.

The position is that the UK sales arm of Harlequin has gone into liquidation and the investment properties were never built. Mr A and Mrs S say their investment is now worthless with little or no prospect of realising any value in the future.

I've not seen anything to suggest Mr A and Ms S had any experience in, or had wanted to take such a high level of risk with the investment. But even if they had, I don't think it's a suitable recommendation to borrow against a residential home to take such a risk. Had the risks been fully explained, I don't think Mr A and Ms S would have made the investment into Harlequin.

Mr A and Ms S had originally gone to 1994 to secure a mortgage for £35,000 to raise funds to help their daughter buy a home. That is the basis of the original mortgage application and offer. As I think they should never have been advised to invest in Harlequin, the fair and reasonable way of putting

things right would be to ask TenetLime to put Mr A and Ms S in the position they would have been in were in not for the unsuitable advice.

Whilst I can't be certain what else Mr A or Ms S would have done, I consider it likely they wouldn't have borrowed any money to invest, or made any investment into Harlequin at all. They weren't looking to make an investment, but had approached 1994 to borrow funds to help their daughter buy a home. So I think it's likely they would have just proceeded with the £35,000 mortgage initially applied for.

**my provisional decision**

For the reasons set out above, my provisional decision is that I intend to uphold the complaint against TenetLime Ltd. To put things right it should pay to Mr A and Ms S:

F) The £1,000 deposit paid to secure the Harlequin investment.
G) The £62,000 additional mortgage borrowing taken to invest in Harlequin.
H) Any interest payments Mr A and Ms S have paid to service the £62,000 mortgage, but less any contributions they have received from Harlequin towards those costs.
I) 8% simple interest per annum on the amounts calculated at C), from the date each payment was made, to the date of settlement.
J) £500 for the trouble and upset of having an interest-only mortgage without the repayment vehicle that they hoped and expected to use, and so meaning there was a realistic prospect of having to sell their home.

EXTRACT FROM FIRST PROVISIONAL DECISION

**background**

In 2009, Mr A and Ms S approached a representative of TenetLime to discuss taking out a mortgage on their property. At that time, the property was mortgage free. They wanted to borrow £35,000 for home improvements and a vehicle purchase, and initial discussions took place on that basis.

However, Mr A and Ms S ended up borrowing £97,000 on interest only terms. They say that the extra £62,000 was used as a deposit to fund an investment in a resort in the Caribbean. Through a scheme run by a company called Harlequin, Mr A and Ms S put down a deposit on a property on the resort. At that stage, neither the property nor even the resort had been built. The intention was that the rest of the purchase price would be paid on completion by raising further finance. Harlequin agreed to pay the mortgage payments until the property was completed.

Harlequin made the payments for some time but these stopped. The property and resort have never in fact been completed and the UK sales arm of Harlequin has gone into liquidation. Mr A and Ms S say that their investment is now worthless. They complain about the mortgage advice they were given. They say that the mortgage adviser suggested and sold the investment to them; and they would never have taken it otherwise. They say that he persuaded them to increase the mortgage balance to fund it. They say that, as a result, they have been left with an unsuitable mortgage they have no means of paying back at the end of the term.

TenetLime says that its adviser didn't sell the investment he merely introduced them to it. It says that it isn't responsible for the investment anyway, as it's an unregulated investment and it has only accepted responsibility for the adviser's mortgage activities.

TenetLime also says that the mortgage was suitable. It achieved Mr A and Ms S's objectives and the repayment strategy was an ISA, not the Harlequin investment. It noted that Mr A and Ms S returned to the adviser for a re-mortgage in 2011. It says that, as far as its adviser was concerned the mortgage was only for the purpose of the home improvements and the vehicle, costs which Mr A and Ms S had told the adviser had increased. As far as the adviser was concerned, the mortgage was never intended to fund the investment.

One of our adjudicators recommended the complaint be upheld, and so TenetLime asked that an ombudsman review it.

An ombudsman made a provisional decision saying that the complaint should be upheld. A copy of that decision is attached below. In summary he said;

- TenetLime's adviser was significantly more involved in the sale than as a mere introducer.
- Mr A and Ms S's intention in taking out a mortgage was to borrow £35,000. The increase of £62,000 was to invest in the Harlequin property, and that decision was made at the instigation of TenetLime's adviser.
- Nothing in the paperwork at the time referred to the investment as the repayment strategy for the mortgage. But there was no other repayment strategy either. TenetLime says that Mr A and Ms S had an ISA worth £100,000 – this was referred to in the later 2011 mortgage fact find. But there is no reference to it in the 2009 documents.
- He was not persuaded that there was a £100,000 ISA.
- In arranging an interest only mortgage, TenetLime's adviser should have checked the repayment strategy, and whether it was plausible, realistic and affordable. This wasn't done, and no repayment strategy for the additional £62,000 of the 2009 mortgage was recorded at the time.
- The strategy TenetLime says was in place in fact wasn't. Nor was it considered by its adviser at the time. There was no evidence of any assessment of a repayment strategy, or advice given about it, for the additional £62,000.

So he said he was minded to uphold the complaint and suggested how redress should be calculated. The extract from the provisional decision attached below sets out the full reasoning along with the redress proposed.

Mr A and Ms S accepted the provisional decision.

TenetLime did not and made a number of comments. In particular it said;

- Its adviser did not give investment advice. That was given by a third party.
- There was an alternative repayment vehicle, the ISA.

Our adjudicator then made some further investigation including obtaining documents from the original mortgage lender including the mortgage application. Mr A and Ms S also provided a copy of the mortgage offer from 2009.

TenetLime also obtained a statement from the agent Mr A and Mrs S say they were introduced to. In this statement the agent says that he was an unregulated agent of Harlequin and that he arranged the purchase of the property for them, and not the adviser from TenetLime.

I've now reconsidered all the evidence.

**my provisional findings**

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I'm not satisfied that the conclusions the ombudsman reached earlier are still valid. There is material new evidence which is significant. In particular;

- The mortgage application from 2009 says that the mortgage funds were for home improvements. When the loan was increased by £62,000 it says that this was to buy a motor home and a new conservatory and the costs of each is set out.
- The application also suggests that the intended mortgage repayment vehicle was the sale of Mr A and Ms S's main residence. And not the Harlequin property.
- The 2009 mortgage offer also says that the intended repayment vehicle was the sale of their main residence.
- The agent's statement says that he was responsible for the sale and not TenetLime's adviser.

When commenting on these documents Mr A and Ms S have said that;

*"As to the repayment plan, we were advised that this was not deemed necessary as Harlequin Properties would be paying the mortgage until the overseas property was complete and earning by means of rental charges. Harlequin would then deduct the mortgage payments and we would get the surplus.*

*If a repayment plan was needed for mortgage purposes then we did tell them that we would sell our house or the property we had in Cyprus which is valued at around £200.000.00. As to the earlier offer we did have savings which would have covered this if needed, (this was not an ISA!)."*

So it seems there was discussion about the repayment vehicle at the time and this included discussion of the possibility of the sale of their main residence as a potential method of repayment. This is the repayment vehicle recorded on the mortgage documents. And it transpires that Mr A and Mrs S had other assets, including an existing foreign property, which could be sold if necessary.

Given this evidence it seems that the TenetLime's adviser did give consideration to the repayment vehicle and that there were plausible and realistic methods of repayment even if the Harlequin investment did not succeed.

The TenetLime adviser wasn't required to make 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. 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".* But in this case it seems there had been advice about the purchase from a third party agent.

Although the adviser was not responsible for the investment advice, as part of the mortgage advice he should have assessed whether there was a realistic strategy for paying off the mortgage. I'm not satisfied that the Harlequin investment was the repayment vehicle. I think it was the main residence as the documents suggest and this was realistic in my view.

But even if the Harlequin investment had been the primary repayment vehicle, it seems that there were other plausible repayment methods available should that have been considered too risky for Mr A and Mrs S. So I don't think I can conclude that any failure to advise on the risks associated with using the Harlequin investment as a repayment vehicle caused Mr A and Ms S to take the mortgage.

I think it's likely that they would've gone ahead anyway given the advice they'd received from the third party agent, and given the other means they had available to repay the mortgage if necessary. On balance I believe they would reasonably just have confirmed the availability to use alternative assets to enable the mortgage to be secured.

Mr A and Ms S believed in the likely success of the Harlequin investment they wished to make. The Harlequin agent has confirmed that he provided the investment advice and the mortgage adviser merely introduced them to him.

So for these reasons, I don't intend to uphold this complaint.

**my provisional decision**

My provisional decision is that I don't uphold Mr A and Ms S' complaint against TenetLime Ltd.