complaint

Mr O and Mrs O have complained to Thinc Network Services Limited ("Thinc") about mortgage and investment advice they say was received from Diamond Estates NI Ltd ("Diamond") in 2008.

background

Diamond was an appointed representative ("AR") of Thinc at the time advice was given. Represented by a firm of solicitors, Mr O and his mother, Mrs O, complained in 2015 that the advice was unsuitable and unaffordable for them.

They took out a mortgage for £135,000 on an interest-only basis. From the proceeds of that mortgage, Mr O and Mrs O cleared an existing mortgage of £97,139 and were left with a balance of £37,383. Mr O and Mrs O then paid £32,000 as a deposit for an off-plan property development in the Caribbean ("Harlequin").

Thinc responded to the complaint initially stating that the adviser had provided suitable mortgage advice, and the intended use of those funds was the responsibility of Mr O and Mrs O. It also explained why it considered the complaint has been brought outside of the permitted timeframes.

Another ombudsman previously considered whether the complaint had been made too late and is within our jurisdiction. She concluded the complaint was made in time and that one of our investigators should review its merits.

The investigator who looked into the complaint concluded it should be upheld. She said Thinc had accepted responsibility for the mortgage advice given, and the advice to invest in Harlequin was connected to that and so Thinc is responsible for the overall advice as a whole.

To put things right, the investigator recommended Thinc pay compensation broadly comparing Mr O and Mrs O's current position with what it would have been had they not borrowed extra money on the mortgage and invested in Harlequin.

Mr O and Mrs O accepted the investigator's recommendation. Thinc did not – and detailed responses were provided by its solicitors. I haven't set everything out in full here, but in summary it said:

- The matter of jurisdiction is still live, and it considers the complaint was made outside of the timescales set out in the DISP rules which govern this Service.
- There is no formal documentation from the time which evidences that Diamond provided any investment advice, and the role of another business in the paperwork should be considered.
- The evidence does not show that Mr O and Mrs O raised any capital when they re-mortgaged in 2008, and the full £135,000 borrowing was used to redeem the existing mortgage.
- Even if Diamond did provide investment advice, Thinc is not responsible as the AR agreement between them only allowed investment advice in relation to AXA UK products.

- In the event the complaint is upheld, any redress should only be in relation to losses flowing from the mortgage advice, and not the investment or additional capital borrowed.
- The redress recommended by the investigator, provides a deduction for additional capital that Mr O and Mrs O have had the benefit of. So it should also be considered whether they gained any interest, investment returns, or debt savings having had the benefit of those funds for 11 years.

As no agreement could be reached, I've now been asked to review everything afresh and make a decision.

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've reached much the same conclusions as the investigator – and I'll explain why.

I should note that in its response to the investigator's view, Thinc's solicitors made reference to not having seen some of the documentation relating to Mr O and Mrs O's complaint. In particular, they've referred to the documentation relating to the investment in Harlequin. I also note they've disagreed with the amount of the existing mortgage Mr O and Mrs O had – and redeemed using the new mortgage borrowing in 2008. I requested that the investigator provide Thinc with the relevant documents relating to these issues.

Thinc's solicitors responded saying that it accepted that it appears Mr and Mrs O borrowed an additional sum over their existing mortgage. But it re-iterated why it feels the complaint is out of time, and why Thinc's responsibility is limited to the mortgage advice.

jurisdiction time limits

Although a previous ombudsman has considered whether our Service can deal with the merits of the complaint and decided the complaint was made within the relevant time limits, this is an issue which I'm required to review and take further account of in reaching my decision.

The rules setting out the time limits which allow our Service to consider a complaint can be found in DISP 2.8.2R. It states that a complaint is out of time and cannot be considered if referred to our Service more than:

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

Mr O and Mrs O referred their complaint to this Service in December 2015, so more than six years after the advice they complain about. The previous ombudsman concluded that the complaint was made within three years of when Mr O and Mrs O knew (or ought to have known) they had cause for complaint and set out reasons why.

I've reviewed everything provided by Thinc's solicitors and understand they believe Mr O and Mrs O should have reasonably had a cause to complain at an earlier point in time. When they invested in Harlequin in 2008 it was expected that the property development would have been completed and sold; enabling them to repay the mortgage borrowing.

It appears the Harlequin agreement gave details of staged milestones and an expected completion date of 'summer 2011'. Although the development was not completed at that time, in this instance I'm not persuaded Mr O and Mrs O ought to have had cause for complaint. It's not uncommon for property development projects to overrun, and there were ongoing reassurances given to investors that things were progressing. But the key issue for me is that Harlequin was paying to service the mortgage interest payments for Mr O and Mrs O, and whilst this happened they were not incurring any personal expense. So I'm satisfied they would have been reassured that the investment would work out and repay the mortgage as expected eventually.

I believe the situation likely changed in early 2013 when Harlequin stopped making payments to maintain the mortgage interest. At this point things weren't working as they'd expected, and it was costing them funds personally to meet the mortgage payments.

So I consider Mr O and Mrs O ought reasonably to have had cause for complaint from that point onwards – but they raised those concerns within three years from that time. So whilst I understand the points made by Thinc (which I haven't set out in full here but have considered), I'm satisfied it is a complaint I can deal with.

is Thinc responsible for the acts complained about?

Mr O and Mrs O have complained they were given unsuitable advice by Diamond, and that because it was an AR of Thinc at the time, it is Thinc which is responsible for that advice.

DISP 2.3.1R states that 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 and Markets Act 2000 ("FSMA") says:

> *"s.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, a principal is required to accept responsibility for the business being conducted by its AR. The words *"part of"* in s.39 a principal firm to accept responsibility for only part of the *"business"* conducted by its AR – and case law has confirmed how this applies in certain circumstances.

So for me to decide whether Thinc is responsible for the advice Mr O and Mrs O complain about there are several points I must consider:

- what are the acts about which Mr O and Mrs O have complained about?
- were those acts done in the carrying on of a regulated activity?
- did Diamond carry out those acts?
- is Thinc responsible for the acts carried out by Diamond (as its AR)?

what are the acts about which Mr O and Mrs O have complained about?

As set out above, Mr O and Mrs O complain about mortgage and investment advice. They say they were advised to take out mortgage borrowing to make an overseas, off-plan property investment in Harlequin.

were those acts done in the carrying on of a regulated activity?

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 and selling a particular investment which is a security or 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 (such as the Harlequin investment).

So the acts Mr O and Mrs O complaint about are regulated activities.

did Diamond carry out those acts?

Thinc has accepted that Mr O and Mrs O were provided with mortgage advice by Diamond, and so this is not in dispute. But the complaint is that Diamond also provided the advice to invest in Harlequin.

The investigator who reviewed everything was persuaded that Diamond did also give the investment advice to Mr O and Mrs O. Though she did also note there was a reference to another business in the property investment literature, and that business had no affiliation with Thinc.

Thinc's solicitors have said the potential involvement of the third party business should be considered further to determine whether the adviser was acting for Diamond or that other business.

I note that a third party business that was linked with Diamond is prominently referred to at the top of some of the property investment literature. But that literature is in relation to a different property development in Spain, not the Caribbean development they invested through Harlequin. So it's quite possible the third party business was purely an agent for

promoting alternative property investments (which Mr O and Mrs O did not opt to proceed with).

I've reviewed the information available to me and haven't seen anything to suggest the third party business was involved in providing Mr O and Mrs O any advice – about either the mortgage or investment. In a credible statement about what happened at the time, Mr O and Mrs O say the Diamond adviser visited their home and jointly discussed the mortgage and investment. And were it not for the Harlequin investment advice there would have been no need for the mortgage.

So overall, I'm persuaded that Mr O and Mrs O received advice about the mortgage and investment in Harlequin from Diamond. Were it not for the mortgage proceeds, the investment could not have gone ahead, and the fact that Harlequin made payments to help service the mortgage, means I'm satisfied the advice was all closely linked.

is Thinc responsible for the acts carried out by Diamond (as its AR)?

The rules about what complaints our Service can deal with are set out in the Dispute Resolution Rules ("DISP") in the FCA Handbook. The guidance at DISP 2.3.3G says:

> "*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)"*.

So a principal is answerable for complaints about the acts or omissions of its AR in relation to the business it has accepted responsibility for.

ARs are not employees of the principal firm. They are independent and might not act only for the principal firm. Sometimes those who operate as ARs operate other businesses also. So sometimes it is clear that a person who happens to be an AR does something on his own account (or in some other capacity), rather than as business for the principal.

In the case of *Emmanuel v DBS Management Plc* [1999] Lloyd's Re P.N 593 a principal (under the s.44 Financial Services Act 1986) was held not to be liable for activities that were held to be outside the scope of the business the principal had accepted responsibility for. In that case the claimant had been advised to subscribe for shares in and lend money to the AR itself.

Another example is in the case of *Frederick v Positive Solutions* [2018] EWCA Civ 431. That case concerns agency rather than s.39 appointed representative issues. Nevertheless the case gives an example of a person having a connection with a regulated business and doing something on their own account. In that case the person who was an agent for Positive Solutions (for some purposes) was held to be engaging in a *"recognisably independent business of his own"* – a property investment scheme.

In this complaint, Thinc has confirmed that it accepted responsibility for the mortgage advice given by Diamond as its AR. But Thinc's solicitors have stated that it cannot be responsible for any advice to invest in Harlequin, and it was not business that was accepted or permitted within the AR agreement between Thinc and Diamond.

The agreement set out that Thinc did accept responsibility for Diamond's investment advisory business – but only for business placed through a single provider, AXA UK. This is something I've considered.

what does "accepted responsibility" mean here?

It is important to keep in mind here that I am talking about appointed representatives acting in their capacity as appointed representatives. So I am discussing a creation of statute not common law agency.

I note the following comments made by the courts:

Page v Champion Financial Management Limited [2014] EWHC 1778, Mr Simon Picken QC sitting as a Deputy Judge of the High Court said:

> *"12…at the hearing before me [counsel] confirmed that he was not seeking to argue that Section 39(3) gives rise to vicarious liability in the strict (legal) sense. This was a sensible concession since it is clear that Section 39(3) does not entail the imposition of vicarious* liability: see, by way of illustration, *Jackson & Powell on Professional Liability* (7th Ed) at paragraph 14-017."

In *Ovcharenko v Investuk* Ltd [2017] EWHC 2114, HHJ Waksman QC said:

> *"49 … Section 39(3) renders an entirely separate statutory liability and has nothing to do, on the face of it, with the law of agency. It does not require an agency to be proved before it can be activated…"*

In that case the judge did also make clear that there might also be an agency relationship between the principal and the appointed representative depending on the facts of the case. However for present purposes it is important to concentrate on the precise terms and scope of the appointed representative status rather than common law agency principles.

As mentioned above, at the relevant time s.39 said:

> *"(1) If a person (other than an authorised person) –*
>
> *(a) is a party to a contract with an authorised person ("his principal") which –*
>
> *(ii) permits or requires him to carry on business of a prescribed description, and*
>
> *(ii) complies with such requirements as may be prescribed, and*
>
> (a) *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."* (my emphasis)

So under s.39 the principal (Thinc) is required to accept responsibly for *"that business"* which is a reference back to *"business of a prescribed description"*.

I refer to the first instance decision in the case of *Anderson v Sense Network* [2018] EWHC 2834, which was recently considered by the Court of Appeal (*Anderson v Sense Network Limited [2019] EWCA 1395).* That case makes it clear that the words *"part of"* in s.39 allow a principal firm to accept responsibility for only part of the generic *"business of a prescribed description".*

I will first deal with the meaning of *"business of a prescribed description"* and then deal with the *"part of"* point.

"business of a prescribed description"

Prescribed business, as set out in the interpretation section of FSMA, means prescribed in regulations made by the Treasury. This is the RAO as referred to above. So *"prescribed business"* is business which is defined at a high level. It means business in the sense of certain regulated activities – not in the sense of an individual transaction.

So it means advising on mortgages and advising on investments – it doesn't mean advising Mr O and Mrs O on their particular investments.

The prescribed business that Thinc accepted responsibility for is set out in the AR agreement between it and Diamond. It states that the scope of permissions includes advising and arranging investments, and advising on regulated mortgage contracts.

However, it does appear that Thinc intended to limit the investment advice Diamond was permitted to give, as the AR agreement continues to state that investment advice is in relation to a 'Single Provider', unlike the mortgage advice which could be 'Whole of Market'. This is consistent with Thinc's representations, that it accepts responsibility for the mortgage advice, but not the investment advice (as it wasn't in relation to AXA UK products).

However, I don't consider that restriction means that our Service does not have jurisdiction to look at the complaint Mr O and Mrs O have made. Although Thinc may not have given Diamond actual authority to provide Mr O and Mrs O advice to invest in Harlequin, it doesn't mean they aren't responsible for it.

These types of restrictions have been considered by the Courts. In *Ovcharenko v Investuk*, HHJ Waksman said the following (where D1 was the appointed representative and D2 was the principal).

First the court set out the purpose of the statutory provision it was interpreting. The judge said:

> *"21 Section 39(3) then says:*
>
> *(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.*
>
> *That, therefore, is a statutory attribution of liability against, here, D2 for the activities of D1 in the way I have described."*

Then the judge said:

> *33 … the whole point of section 39(3) is to ensure a safeguard for clients who deal with authorised representatives but who would not otherwise be permitted to carry out regulated activities, so that they have a long stop liability target which is the party which granted permission to the authorised representative in the first place. In my judgment, section 39(3) is a clear and separate statutory route to liability. It does no more and no less than enable the claimant, without law, to render the second defendant liable where there have been defaults on the part of the authorised representative in the carrying out of the business and which responsibility had been accepted…*
>
> *34 …[counsel for D2] has relied upon certain other provisions within the authorised representative agreement. … He relies on paragraph 4.3 which is simply a promise by D1 to D2 that it will not do anything outside clause 3….*
>
> *35 All that does is regulate the position* inter se *between D1 and D2. It says nothing about the scope of the liability of D2 to the claimants under section 39(3). The same point can be made in respect of clause 4.7 which says, "The representative will not carry out any activity in breach of section 19 of FSMA* [sic – this should be s.39 as per the quote from clause 4.7 in paragraph 9 of the judgment and the following description of the clause] *which limits the activities that can be undertaken or of any other applicable law or regulation". Again, that is a promise made* inter se*.*
>
> *36 The reason for those promises is obvious. D2 will be, as it were, on the hook to the claimants as in respect of the defaults of D1 and if those defaults have arisen because D1 has exceeded what it was entitled to do or has broken the law in any way, then that gives a right of recourse which sounds in damages on the part of D2 against D1. If* [Counsel for D2] *was correct, it would follow that any time there was any default on the part of an authorised representative, for example, by being in breach of COBS, that very default will automatically*
> *take the authorised representative not only outside the scope of the authorised representative agreement but will take D2 outside the scope of section 39(3) , in which case its purpose as a failsafe protection for the client will be rendered nugatory; that is an impossible construction and I reject it."*

The judge in *TenetConnect v Financial Ombudsman Service* [2018] EWHC 459 (Admin) agreed with the above. In that case the principal had argued that it was not responsible for advice to invest in an investment in which it did not authorise the appointed representative to deal. The judge said:

> *"…the decisions in Martin v Britannia and in Ovcharenko are clearly against* [Counsel for TenetConnect]*. The fact that* [the appointed representative] *had no actual authority, express or implied, to act as he did on Tenet's behalf, nor was he held out by Tenet as having such authority, does not answer the s.39(3) issue."*

So it's clear the courts think that at least some conditions on the authority given to an appointed representative in a s.39 agreement only apply as between the parties. Does that mean all terms in the contract apply in that way? The answer to that question is no because of the words *"part of"* in s.39.

"part of"

This was considered in *Anderson v Sense Network* [2018] EWHC 2834 and more recently confirmed by the Court of Appeal in the same case. The judge, Mr Justice Jacobs, said:

"133. …There is no indication in the wording of section 39, or in the case-law, that indicates that the business for which responsibility is accepted is to be determined not by reference to the contract, but by reference to the authorisations granted to the principal which are to be found in the Financial Services register…

136. I agree with the Claimants that liability under section 39 (and its predecessor) cannot simply be answered by asking whether a particular transaction was within the scope of the AR's actual authority…

137. In Ovcharenko, HHJ Waksman QC considered the scope of Clause 3.2 of the AR agreement in that case, and went on to hold that the relevant investment advice was "firmly encompassed by the permitted services in the authorised representative agreement": see paragraph [32]. He said that the "business for which responsibility had been accepted encompasses the services set out in Clause 3 of the authorised representative agreement". Thus, section 39 was engaged notwithstanding other provisions of the AR agreement which imposed obligations or restrictions upon the AR; specifically, not to offer inducements, and an obligation not to do anything outside clause 3. The judge considered that these restrictions were matters which applied between the principal and the AR inter se, and did not affect liability under s.39.

138. Most recently, in TenetConnect, Ouseley J applied the decisions in both Martin and Ovcharenko, 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 section 39, and the question of the business for which the principal has accepted responsibility, it is relevant to consider the terms of agreement between the principal and the 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 section 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 breach of an obligation not to offer an inducement (Ovcharenko), 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.

140. In the present case, I agree with Sense that the scheme, and advice in connection with that scheme, were well beyond the scope of the "business" for which Sense accepted responsibility pursuant to the AR agreement. It is beyond serious argument that the activities of MFSS and Mr. Greig in relation to the scheme, both in terms of operating it and advising upon it, were wholly unauthorised. It is no part of the ordinary business of a financial adviser to operate a scheme for taking deposits from clients. As the Claimants' expert, Mr. Morrey, said: "operating the scheme, so having the monies under your control, clearly is not the work of a financial adviser". Mr. Ingram's evidence was that he knew that a firm of financial advisers should not be involved with the scheme, including because the firm was not allowed to handle client money and that the scheme was business of a kind that a properly regulated firm should not be involved with. Mr. Ingram was referring to the express prohibitions in clause 5.3.6 and 5.3.7 against MFSS accepting or holding or handling client money."

All this means that a principal is responsible for the acts and omissions of an appointed representative acting within their actual authority. It also means that sometimes a principal is responsible when the appointed representative acts beyond their actual authority. And sometimes a principal is not responsible when the appointed representative acts beyond their actual authority. And the test in the *Anderson v Sense Network* judgment 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.

Thinc has confirmed it accepted responsibility for the mortgage advice, but its solicitors have stated that the investment was not inextricably linked to the mortgage advice. So this has been a key issue for me to consider.

I understand Thinc believes it's unlikely that Diamond (as its AR) gave investment advice, and that any investment advice was completely independent to the mortgage advice. But I'm persuaded otherwise.

Although Thinc says Mr O and Mrs O appear to have decided to invest in Harlequin before obtaining mortgage advice, I disagree. The account of events given by Mr O and Mrs O was that they were cold called and then visited at their home by the adviser. They say that he told them about the Harlequin investment and how it could be funded by interest-only mortgage borrowing.

I've not seen anything to suggest Mr O or Mrs O had any other means of funding Harlequin, or that they were looking to make any investment before the Thinc adviser visited them. In fact, were it not for the mortgage, I don't think any investment would have gone ahead. This is further supported by the fact that a feature of Harlequin was that it would make payments to service the interest needed to maintain the mortgage.

So overall, I'm satisfied Mr O and Mrs O were given advice about the mortgage and Harlequin investment at the same time. And as the investment could not have been made without the mortgage proceeds, I consider it reasonable to conclude the two pieces of advice to be sufficiently closely linked. For these reasons I conclude that Thinc is responsible for the acts of its AR, Diamond – and so I can consider the complaint about the acts complained about as a whole.

my findings on the merits of the complaint

I have considered what is fair and reasonable in the circumstances of this complaint having taken everything into account. Having done so, I have concluded the complaint should be upheld – and I'll explain why.

The complaint is about both mortgage and investment advice. In relation to the mortgage, the adviser was required to make sure the mortgage was suitable for Mr O and Mrs O's circumstances. His obligations were set out within the Mortgages Conduct of Business Sourcebook ("MCOBS") that applied at the time.

It's quite possible, and in fact likely, that the mortgage itself may not have been suitable. As the adviser was required to ensure it was affordable and met the needs and circumstances of Mr O and Mrs O – which included considering how it would be repaid. But I've not been required to explore this further, as I've concluded that I can consider the investment advice (which covers the same losses), and that was unsuitable.

Harlequin was a high-risk overseas property development scheme which would have only been suitable for a small number of people. It was unregulated and there were a number of reasons why the investment could fail. The development was off-plan, was exposed to currency fluctuations, and, as Mr O and Mrs O were only paying an initial deposit, it was dependent upon them obtaining further borrowing in order to complete the purchase.

Even if had the development had been completed, there were no guarantees they'd be able to sell the investment property – or at what price.

Mr O and Mrs O weren't sophisticated investors with a diverse portfolio. They were borrowing money against a family home and had no savings. They both had modest incomes and were reliant on being able to secure further substantial borrowing to fund completion of the investment.

Overall, the investment was clearly too high in risk for Mr O and Mrs O and there were too many things that could go wrong and cause the investment to fail. This means they would end up in the position which they now find themselves of not being able to repay the mortgage capital they borrowed.

As the Harlequin investment was so closely linked to the mortgage, I am convinced they would not have taken the mortgage or made any other investment had they not proceeded with the Harlequin investment.

putting things right

I have concluded Thinc is responsible for both the mortgage and investment advice, and that the advice was unsuitable for Mr O and Mrs O. So to put things right I consider they should be put back into the position they would likely have been in were it not for the unsuitable advice.

Whilst I can't be certain exactly what else Mr O and Mrs O would have done, on balance I believe they would not have borrowed more money to invest. So they would have either continued with their existing repayment mortgage, or re-mortgaged on similar terms.

To fairly compensate Mr O and Mrs O in a way that I consider to be fair and reasonable, Thinc should pay them the following sums:

A) The difference between the current balance of Mr O and Mrs O's current mortgage, and what the balance would have been (at the date of settlement) had they kept their existing mortgage on a repayment basis with no additional borrowing.
B) £1000 representing the reservation fee deposit paid to secure the Harlequin investment.
C) £500 for the trouble and upset Mr O and Mrs O have experienced whilst having a mortgage debt on a family home that they had no means of repaying.

Less;

D) Any payments Mr O and Mrs O received from Harlequin towards servicing the mortgage.
E) £5,383.69 (being the amount of additional borrowing Mr O and Mrs O took out that wasn't invested in Harlequin) and that they've had the benefit of.

I have also considered that if Mr O and Mrs O had continued with a capital repayment mortgage, they would have needed to pay higher monthly payments up until now. Although they have had the benefit of that extra money each month, I'm satisfied they spent it with a reliance on the advice they received that it was disposable funds available to them. So whilst I could ask Thinc to make a deduction for those sums, I don't think it'd be fair and reasonable to do so.

I also understand Thinc has requested any benefit Mr O and Mrs O have had from the extra £5,383.69 they borrowed at E above should be taken account of – as they could have gained from investment returns or made debt savings. But I've tried to put things right in the simplest way possible whilst being fair and reasonable to both parties. So whilst I could ask Thinc to forensically trace any benefit to make a deduction for those sums, overall, I don't think it is needed.

For the purpose of putting things right, I've worked on the basis that the Harlequin investment has a nil value. If this changes, or if any funds are distributed in relation to the Harlequin deposit at a later date, Thinc will be entitled to those funds. Thinc may request Mr O and Mrs O either assigns the investment to it or give an undertaking that they will transfer any future benefit. Thinc must pay the costs associated with any such assignment or undertaking.

my final decision

My final decision is that I uphold Mr O and Mrs O's complaint against Thinc Network Services Limited.

To put things right is should pay to them the compensation set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O and Mrs O to accept or reject my decision before 15 February 2020

Ross Hammond
ombudsman