DRN-4899998

Financial Ombudsman Service

The complaint

This complaint is about a mortgage Mr B and Ms S took out in 2023 on the advice and recommendation of a mortgage broker firm that is part of Openwork Limited trading as The Openwork Partnership (TOP). The essence of the complaint is that TOP agreed a change of rate with the lender without first informing Mr B and Ms S that only one change was permitted mid-application.

Although the lender later agreed to a second change, Mr B and Ms S say the resultant delay in their house purchase caused a great deal of extra work, extra cost and stress. Mr B and Ms S seek redress for the loss, both financial and non-financial this has caused.

What happened

By way of a provisional decision dated 21 May 2024, I set out my provisional conclusions on this complaint. The following is an extract from the provisional decision.

> "In what follows, I have set out events in rather less detail than they have been presented. No discourtesy's intended by that. It's a reflection of the informal service we provide, and if I don't mention something, it won't be because I've ignored it. It'll be because I didn't think it was material to the outcome of the complaint. This approach is consistent with what our enabling legislation requires of me.
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> It allows me to focus on the issues on which I consider a fair outcome will turn, and not be side-tracked by matters which, although presented as material, are, in my opinion peripheral or, in some instances, have little or no impact on the broader outcome.
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> Our decisions are published and it's important that I don't include any information that might result in Mr B and Ms S being identified. Instead I'll give a summary in my own words and then focus on giving the reasons for my decision.
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> Mr B and Ms S were in rented accommodation, seeking to buy a home together. In March 2023, they asked TOP to arrange a mortgage, and an application was submitted to a lender I'll call C. They were looking for a two-year fixed rate, but at first C said that a two-year deal wouldn't meet its affordability criteria. After Mr B provided additional information about his income, C agreed to lend on a two-year deal, and the initial illustration provided by TOP was for a rate of 5.28%.
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> Whilst the application was being assessed, C replaced the 5.28% two-year product with a new product priced at 4.89%. TOP immediately asked C to switch Mr B and Ms S' application to the lower rate, which it agreed to do. Afterwards, TOP notified Mr B and Ms S of the change, and they expressed their satisfaction. C then announced another new two-year product, this time priced at 4.65%. TOP asked C to switch the application again, but when the mortgage offer was issued on 28 April 2023, it was for the 4.89% interest rate product.

When Mr B and Ms S challenged this, TOP told them that C's policy was to only permit one product switch mid-application, and that if they wanted the 4.65% product, they'd need to begin a fresh application. On learning of the one-switch restriction, Mr B and Ms S complained that TOP should not have put the first switch through without consulting them. They asked their solicitor to pause work on the purchase. They also asked C, as did TOP, to reconsider allowing them access to the 4.65% deal without having to re-start the application.

On 12 May 2023, C emailed TOP to say it was prepared to allow the second switch, and issued another offer to Mr B and Ms S the same day. This offer also reflected a reduction of £10,000 in the purchase price, following negotiations in the wake of the survey Mr B and Ms S had commissioned. However, they only received the offer on 24 May 2023. The conveyancing work recommenced and completion took place on 26 June 2023.

Mr B and Ms S complained that the 26-day delay between 28 April and 24 May meant they had to delay giving notice to their landlord, costing them an extra £3,900 in rent. Taking into account the amount of their time they'd devoted to trying to resolve things, Mr B and Ms S asked for compensation of £1,100, plus a refund of the £250 broker fee, making £5,250 in all.

TOB largely rejected the complaint, but offered £150 compensation for the trouble and upset they'd experienced. When the case came to us, our investigator eventually concluded that TOP should, in addition to paying the £150 compensation, also reimburse Mr B and Ms S the additional rent. TOP has asked for the case to be reviewed by an ombudsman, saying it was Mr B and Ms S' choice to suspend the legal work on the purchase.

It also pointed to an opinion expressed by the investigator that if they had been consulted about the first switch, they would probably still have agreed to it. That being so, Mr B and Ms S are now on a lower rate than they would be if TOP had checked with them first and told them this was their only permitted switch. The resulting saving should therefore be offset against the extra rent.

What I've provisionally decided – and why

I'll start with some general observations.

Although I've read and considered the whole file, I'll keep my comments to what I think is relevant. If I don't comment on any specific point it's not because I've failed to consider it but because I don't think I need to comment on it in order to reach what I think is the right outcome in the wider context.

If the available evidence is incomplete and/or contradictory (or simply disputed) we reach our findings on what we consider is most likely to have happened, on the balance of probabilities. That's broadly the same test that the courts use in civil cases.

It's for us to assess the reliability of evidence, from both sides, and decide how much weight should be attached to it. When doing that, we don't just consider individual documents in isolation. We consider everything together to form a broader opinion on the whole picture.

Our enabling legislation, the Financial Services and Markets Act 2000, provides at section 225 that we are required to resolve complaints "*quickly and with minimum*

formality". We're impartial, and we don't take either side's instructions on how we investigate a complaint. We conduct our investigations and reach our conclusions without interference from anyone else. That means I don't have to address every individual question or issue that's been raised if I don't think it affects the outcome.

In reaching my decision, I will have regard for the law and good industry practice where relevant, but my overarching responsibility is to decide what is fair and reasonable in the circumstances. That can sometime mean reaching a different outcome from what might prevail in court.

We have no regulatory function; that's the role of the Financial Conduct Authority (FCA); nor are we a consumer protection body. We're an alternative dispute resolution body; an informal alternative to the courts for financial businesses and their customer to resolve their differences. We deal with individual disputes – when we're able to – subject to rules laid down *by* the FCA (which are known as the DISP Rules).

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

My starting point here is that TOP's broker knew, or should have known, that C only permitted one mid-application product switch. C had introduced this policy in January 2023 and TOP had been notified of it. That being the case, I find that TOP made a mistake when it asked C to switch from the 5.28% deal to the 4.89% deal without consulting Mr B and Ms S first. Whilst the reduction was clearly beneficial to them in its own right, Mr B and Ms S needed to know they'd only get one opportunity to switch rates, to allow them to make an informed decision on whether this was the moment to use that opportunity.

When a business makes a mistake, we aim as much as possible to put the affected parties (so here that's Mr B and Ms S) in the position they'd be in if the mistake hadn't happened. In the case at hand, that means assessing what Mr B and Ms S would most likely have decided if TOP had informed them C had introduced the 4.89% deal, and that if they accepted it, they would not be allowed another switch on the current application.

It's never easy to judge such things, especially in the light of subsequent events. Also, a business is only liable for a loss that is reasonably foreseeable. So when deciding how Mr B and Ms S would most likely have reacted to being properly informed and advised, I can take no account of hindsight; I can only consider what they knew or could reasonably have known at the time of the first switch.

I've given very careful consideration to what Mr B and Ms S have told us about what they do for a living, and the additional insight their employment gives them into financial markets that might not be available to others. I've also taken account of the fact that during the early part of 2023, the trend in the Bank of England Base Rate (BoEBR), the main driver of interest rates generally, was relentlessly upwards. On 23 March 2023, BoEBR increased from 4.00% to 4.25%. It went up again on 11 May 2023 to 4.50%, and then again on 22 June 0223 to 5.00%.

Of course BoEBR isn't the sole driver, and individual lenders will make adjustments to the pricing of some of their products that might seem to run contrary to the wider trend. That can sometimes happen where a lender is making strategic decisions about its market position. Viewed in that context, a decision such as the one C made to replace the 5.28% product with one priced at 4.89% at a time when the general

trend was upwards aren't unheard of. But they are anomalous, and they are relatively rare.

Whatever extra insights Mr B and Ms S might have had access to through their respective occupations, I'm not convinced that, if informed by TOP that switching from 5.28% to 4.89% was their only opportunity to improve on their mortgage deal, their response would have been to say *"no, let's hang on to see if C reduces its rate again".* Nor do I think it very likely that TOP would have advised them to do that. I find it more likely than not that if TOP had done what it should have done. Mr B and Ms S would have reached the same conclusion as it did on their behalf; i.e. that switching from 5.28% to 4.89% was the thing to so.

That being so, it's reasonable to conclude that much of the delay and disruption that followed wouldn't have occurred. The application would still have proceeded to offer on 28 April 2023, priced at 4.89%, and the legal work on the purchase transaction would have continued uninterrupted, resulting in an earlier completion date that meant Mr B and Ms S avoided incurring the extra £3,900 in rent. But it would also mean they'd have completed the house purchase with a mortgage priced at 4.89% for the first two years, rather than the 4.65%. they've ended up with.

So yes, Mr B and Ms S have incurred a financial loss in the form of the extra month's rent, but they've also accruing a financial gain in the form of paying significantly less interest over the first two years of the mortgage.

On that point, I've noted what TOP has said about it being Mr B and Ms S' decision to pause the conveyancing work whilst the interest rate issue was resolved. Overall, though, I don't think it was unreasonable of them to do so, in the circumstances. They couldn't know at that stage how the issue over the interest rate would be resolved, how long it might take or even if it could be at all.

It was Mr B and Ms S' choice to pause the conveyancing, but I'm not convinced they made it in the certain knowledge it would cost them a month's extra rent. Overall, then, I find that the extra month's rent, which I've seen persuasive evidence of, is a loss that Mr B and Ms S can reasonably hold TOP responsible for, but fairness requires that it be offset by the benefit they're accruing from paying 4.65% on their mortgage rather than 4.89%.

TOP says Mr B and Ms S benefitted from being able to negotiate a lower price whilst the mortgage situation was being resolved. They've countered that by saying that but for the problems with the mortgage rate weakening their bargaining position with the vendor, they could have sought a bigger reduction given the amount of remedial work revealed by the survey. Overall, I find this to be too uncertain, and requiring too much in the way of speculation, for me to make a finding either way on whether and to what extend Mr B and Ms S' eventual purchase price was affected by the events of the complaint. I have therefore disregarded it altogether from my consideration of fair redress.

As far as the broker fee of £250 is concerned, TOP charged that fee for sourcing a mortgage for Mr B and Ms S. Whilst things clearly didn't go as they should have, Mr B and Ms S have their mortgage, so they've received the service the fee paid for. I therefore don't find that it should be refunded.

That leaves the question of compensation for Mr B and Ms S' time, trouble and upset. Assessing compensation isn't an exact science; everyone's reaction to events is unique to them. It's clear from their testimony that Mr B and Ms S have found this

episode stressful and time-consuming, and I appreciate that. TOP offered £150, which I don't consider to be enough.

Taking into account the protracted nature of the dispute and the additional aggravation added to what is the already stressful process of buying a property and moving house, I consider £400 to be fair.

I said at the outset that I wouldn't be commenting on every single point, and I haven't. I have, as I said I would, confined myself to those matters that I consider have a material effect on the outcome. I can see how strongly Mr B and Ms S feel. That's a natural, subjective reaction, and entirely understandable.

Be that as it may, I have to take a different approach. I'm impartial and I have to look at things objectively, sometimes taking a step back from the minutiae, focussing on the broader picture. That's what I've done. Having done so, for all the reasons I've set out, I can't find in Mr B and Ms S' favour, to the extent they are seeking.

I will however make a further observation. There's more (and sometimes less) to complaint resolution than simply deciding who's right or who's wrong. It's not just about winning the argument or indeed pursuing the argument to its ultimate legal conclusion; sometimes it's about compromising to reach a *fair* conclusion. In my view, I've done that here.

If Mr B and Ms S ultimately reject my final decision, then subject to any time limits or other restrictions a court might impose, Mr B and Ms S's recourse to a legal remedy of their own against TOP over the subject matter of this complaint won't have been prejudiced by our consideration of it. But of course they will need to weigh up the likelihood of a successful outcome and the potential costs they'll face if not successful."

I gave the parties two weeks to add anything further before I finalised my decision. TOP argued that there was a suspicion that the conveyancing work was delayed by the renegotiation of the purchase price (or some other as yet undisclosed reason) rather than the interest rate error. It asked that we obtain evidence of the instruction to pause the legal work and allow TOP to see it before the case is concluded.

Mr B and Ms S expanded on their argument that they had access to data that was indicative, during a period of great instability and uncertainty, that a further reduction in rates was more likely than an increase, and that TOP was very much aware of their desire to take advantage of a reduction when it came.

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.

The first observation to make is that not all of the material that the parties have submitted in response to the provisional decision is new. Some of it is, but a significant proportion duplicates information I'd already seen and taken into account. Nonetheless, I've considered all of it, and having done so, I'm not persuaded to depart from my provisional decision. I'll explain why.

This is not the first time TOP has sought to direct our investigation by setting out its requirements on the evidence we should obtain. Whilst I should not have to, I remind TOP of what I said in the provisional decision about conducting our investigations and reaching our

conclusions without interference from anyone else. It's for me to judge whether further evidence is needed, and here, I don't consider that to be the case.

It's not the role of this service to go looking for evidence to support TOP's speculation. If it had evidence that the pause in conveyancing was driven by something other than its error over the interest rate, it was incumbent on TOP to produce it.

It seems unlikely that the pause in conveyancing was to facilitate fresh negotiations on the purchase price. The independent survey that revealed the defects and the likely cost of rectifying them, was only carried out on 4 May 2022, *after* the problem with the interest rate arose and the complaint had started. Meanwhile, TOP's suggestion that some other unspecified event caused Mr B and Ms S to pause the conveyancing is unspecific and entirely speculative.

The new material TOP has provided seeks to argue that negotiating the price reduction delayed the conveyancing. I've looked at the various email exchanges around this; all things considered, whilst the price change might have extended the pause in conveyancing slightly (but not by enough to make a difference to the extra rent cost) I don't think it caused the pause in the first place.

Turning to the consumers' response, the first point to make is the mortgage transaction they undertook is defined as an advised sale process in the FCA's Mortgage and Home Finance: Conduct of Business Sourcebook (MCOB). Whether and to what extent Mr B and Ms S relied on any advice received, in particular to do with the interest rate they took, was a matter for them.

On reading Mr B and Ms S' evidence of phone conversations between Ms S and TOP in February 2023, I asked if TOP had recordings of the calls I could listen to. It didn't, but the advisor strongly denied that the conversation content was as described. Without a recording, I have no way of reconciling two such contradictory positions.

I'll come back to that, and the wider issue of rate trends in early 2023, later. But next I need to address a comment Mr B and Ms S made about my finding that TOP knew about and should have told them C would only permit one rate switch. They say that's an oversimplification and that my narrative of the case needs to specify that TOP repeatedly told them they could have unlimited changes. I've noted their comments, but it's for me, not the parties to a complaint, to decide what my narrative should say.

Meanwhile, when I'm deciding the extent to which TOP did or didn't do what it should have done, I'm not guided by what Mr B and Ms S say they would have done in their roles.
On the subject of which fees should be included in the redress, £250 is the fee Mr B and Ms S paid TOP to receive a mortgage. They received the mortgage, so the service the fee paid for was provided. They are due redress for the impact on them of the service's shortcomings, which I deal with elsewhere, but not a refund of the fee itself. As for the fee C paid TOP, I'm not persuaded by the notion that it comes out of Mr B and Ms S' pocket by being priced into C's profit margin.

I return now to the crux of the case; what I think Mr B and Ms S would most likely have done if TOP had told them about C's rate reduction, and that if they took it, it was the only one they could have. I know how important this is to Mr B and Ms S, and I've noted how troubled they feel that I have not agreed with them. But just because I haven't doesn't mean I've ignored or disregarded what they've said and provided.

Mr B and Ms S say they didn't expect their position to be questioned, which rather gives the impression, perhaps unintentionally, that they thought I'd simply take them at their word. But

that's not how this service works. I have to consider everything, and to reiterate something I said in the provisional decision, it's for me to assess the reliability of evidence, from both sides, and decide how much weight should be attached to it. I don't just consider individual pieces of evidence in isolation; I consider everything together to form a broader opinion on the whole picture.

It's also important to remember there's a distinction to be made between believing (or not believing) someone and being persuaded (or not persuaded) by the strength of their argument. Ultimately, a case turns on what the evidence leads me to find to be more likely on the balance of probabilities.

I said earlier that there's no recording of Ms S' conversation with TOP in February 2023, and the evidence from both sides about what was discussed is wildly contradictory. Trying to decide between two such differing testimonies goes beyond assessing likelihood on the balance of probabilities; it strays into speculation, which I don't propose to do. That said, I do have the email traffic between the parties from the time.

Mr B and Ms S are absolutely right when they say late 2022 and early 2023 weren't normal times in the UK financial markets. These were very unstable times, and I accept entirely that Mr B and Ms S were highly sensitised towards monitoring that situation, were well-placed to do so, and had made TOP aware of this. They were watching closely to see if trends in the wholesale markets might feed through into the retail markets, and of course it's now a matter of record that their lender, C, reduced its rates.

But, as I said in the provisional decision, compared with the wider trend in the retail mortgage market, this was an anomaly. And even if C wasn't the only lender to "buck the trend", it was one of very few willing to lend to Mr B and Ms S, due to their particular income situation. Indeed, as Mr B and Ms S point out, C was resistant to lending on the 4.89% two-year deal but changed its mind after further proof of income was submitted.

For all the uncertainty and instability, and jockeying for positions for individual lenders, the primary driver of the retail mortgage market was the upward movement in BoEBR. And on that point, I don't agree with Mr B and Ms S that my use of BoEBR changes contradiction my point about not relying on hindsight. The movements I referenced in the provisional decision were those that happened whilst this transaction was in progress.

Mr B and Ms S have supplied articles from the time that talk about likely reductions in interest rates. But if they had been seeking to argue the contrary position, they would just as easily have been able to find similarly confident articles arguing for increases in rates. That's what happens when markets are uncertain and unstable; commentators routinely argue contrary positions.

Putting everything together, whilst I accept Mr B and Ms S were focussed on securing the best rate they could for their mortgage, and were tracking markets closely in anticipation of rate falls, I'm ultimately not persuaded that they would not have said yes to the 4.89% deal if TOP had presented it to them as their only opportunity to switch deals before the mortgage completed. In conclusion, my decision on the detriment (financial and non-financial) they've suffered, and how it should fairly be put right, remains unchanged.

My final decision

My final decision is that I uphold this complaint, by ordering Openwork Limited trading as The Openwork Partnership (TOP) to pay Mr B and Ms S redress comprised of A less B* where:

- A is one month’s additional rent of £3,900;
- B equals the interest saving to Mr B and Ms S over the life of their initial mortgage product as a result if it being 4.65% rather than 4.89%.

*In the event B is great than A, Mr B and Ms S will not have incurred a loss overall so no redress will be due to them.

Separately, and regardless of the outcome of the calculation of A less B, I also order Openwork Limited trading as The Openwork Partnership to pay Mr B and Ms S £400 compensation.

If Mr B and Ms S want further guidance on referring the matter to the FCA or taking legal action, they will need to speak to the FCA and/or their legal representative. My final decision concludes this service’s consideration of this complaint, which means I’ll not be engaging in any further discussion of the merits of it.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr B and Ms S to accept or reject my decision before 7 August 2024.
Jeff Parrington
Ombudsman