

The complaint

Mrs B and the estate of her late husband Mr B complain that Gallery Finance Limited recommended they should take out an equity release mortgage to fund an investment in what they say is an unregulated collective investment scheme (UCIS).

What happened

On 5 September 2018, while on holiday in Tenerife, Mr and Mrs B entered into an agreement with E. It was to buy the right to sub-lease a number of hotel rooms and/or apartments in a number of different locations. Under the agreement, the hotels and apartments were then to be leased back to E. It would manage the properties on behalf of Mr and Mrs B and they would receive the revenue generated by the properties, less the cost of managing and operating the properties and an annual fee.

On 12 September 2018, Gallery Finance gave Mr and Mrs B mortgage advice. It recommended that Mr and Mrs B should take an equity release mortgage for a total of £196,000 - £189,432 of which was to be used for "holiday purchases".

On 17 September 2018, Mr and Mrs B wrote to E to cancel the agreement. On 1 October 2018, they changed their minds and said they wished to go ahead after all.

On 8 October 2018, Gallery Finance emailed Mr and Mrs B to say that their property had been valued at less than estimated. As a result the maximum amount of borrowing was £186,650.

On 10 October 2018, Gallery Finance issued a new key facts illustration for an equity release mortgage of £159,900, with a drawdown facility of £9,500. Mr and Mrs B took out that mortgage.

On 31 October 2018, Mr and Mrs B transferred a total £155,860 to E by bank transfers.

Mr and Mrs B complain that the advice given to them by Gallery Finance was wholly unsuitable for their needs based on their circumstances at the time in question. They claimed:

- They were introduced to Gallery Finance by S.
- S had a business relationship with Gallery Finance to create funds to allow consumers to be able to purchase investments which fit the definition of a UCIS.
- In this case, the funds were created by way of a regulated equity release mortgage.
- Gallery Finance promoted and arranged the finance for Mr and Mrs B so that they could make the investment in a UCIS.
- Gallery Finance did not certify that Mr and Mrs B were suitable for promotion of UCIS.

- There were no other exemptions that applied to Mr and Mrs B – and Gallery Finance did not check that there were any exemptions.
- Gallery Finance did not advise Mr and Mrs B that they were investing in a UCIS and the risks associated with such an investment.
- Gallery Finance did not explain that UCIS were not regulated by the FCA.
- E is now in liquidation.

Mrs B provided her recollections of the sale of the investments. In particular she said that Gallery Finance was present at the meetings when the investment was sold and was involved in selling the investments.

The investigator said that under our jurisdiction we could only consider activities carried on from an establishment in the UK. So we couldn't consider the alleged promotion of or involvement in the sale of the holiday product while Mr and Mrs B were outside the UK.

The investigator said that by the time Gallery Finance in the UK were involved, Mr and Mrs B had already entered into the contract with E – so there was no promotion of the investment in the UK. He considered that Gallery Finance recommended a mortgage that met Mr and Mrs B's stated needs and circumstances. He did not consider the complaint should be upheld.

Mrs B's representative did not accept what the investigator said. That included that when Mr and Mrs B cancelled the agreement, the only contact they had after they'd cancelled was with Gallery Finance operating out of the UK, who allayed their fears about the advice given to them in Tenerife. It is more likely than not that Gallery Finance gave Mr and Mrs B investment advice in the UK.

That didn't change the investigator's mind and the case was passed to me for a decision.

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.

Jurisdiction

The FCA's DISP Dispute Resolution: complaints rules set out which complaints I can and can't look at. The scope of our jurisdiction depends on the type of activity, whether the complainant is eligible, whether the complaint was referred in time and – importantly here – the place where the activity took place.

Gallery Finance is in our compulsory jurisdiction, Mrs B and the estate of Mr B are eligible complainants and the complaint has been brought in time.

I accept that Gallery Finance was carrying out a regulated activity in Tenerife. I agree that, at least, it was making arrangements with a view to a regulated mortgage contract. I also agree that as Mr and Mrs B were resident in the UK and the property was in the UK, it was a regulated activity, even if the arrangements were made in Tenerife.

But I must go on to consider DISP 2.6 What is the territorial scope of the relevant jurisdiction? It says, as relevant:

(1) The Compulsory Jurisdiction covers complaints about the activities of a firm (including its appointed representatives), of a payment service provider (including agents of a payment institution), of an electronic money issuer (including agents of an electronic money institution), of a CCTL firm, of a designated credit reference agency or of a designated finance platform which:

(a) (except for regulated claims management activities and activities ancillary to regulated claims management activities) are carried on from an establishment in the United Kingdom;

For me to consider this complaint, it not only must be about an activity we can consider under the rules, but it must also be an activity that is carried on from an establishment in the UK. That means I can't consider any acts or omissions by Gallery Finance that took place in Tenerife. That is because those activities were not carried on from an establishment in the UK.

So this means that almost all – if not all – of the complaints that Mrs B and the estate of Mr B have made are outside our jurisdiction. The complaint they are making is that Gallery Finance was involved in the selling of the investment in Tenerife – and even if it wasn't involved in the investment, it promoted or induced Mr and Mrs B to enter into the investment by arranging a mortgage for them to finance it. If it hadn't done that, Mr and Mrs B would not have been able to buy the investment. So the CMC said that the inducement took place in Tenerife. But that is not an activity carried on from an establishment in the UK. I can't see that Gallery Finance carried on any activity in the UK until 12 September 2018 – and by that time Mr and Mrs B had already agreed to enter into the investment.

In saying that, I note that Mr and Mrs B changed their mind about the investment after that point and Mrs B said were only persuaded to continue by Gallery Finance from the UK. I will deal with the below.

Did the UK mortgage advice promote the investment?

The CMC said Mr and Mrs B were induced to enter into the investment (which they consider is a UCIS) as a result of that advice. They said Mr and Mrs B originally agreed to buy the investment because Gallery Finance had told them that funds would be available. But as I've explained, we can't consider a complaint about activities carried on from an establishment not in the UK – and this part of the complaint is about alleged acts and omissions by Gallery Finance in Tenerife. They said, that was before Gallery Finance carried out any activity in the UK in respect of this

I don't think Gallery Finance promoted the investment or induced Mr and Mrs B to enter into it by recommending they take a lifetime mortgage on 12 September 2018 – for largely the same reasons given by the investigator. Mr and Mrs B had already agreed to enter into the investment by the time Gallery Finance gave them advice from an establishment in the UK. I don't consider that by recommending a mortgage it was promoting or inducing Mr and Mrs B to enter into a UCIS – the promotion and inducement stage had passed by that time as they'd already entered into a contract to buy the investment. That may or may not have been as a result of acts or omissions by Gallery Finance in Tenerife – but I can't consider those points.

However, the evidence we have is that Mr and Mrs B cancelled the agreement they had with E after they'd received advice from Gallery Finance. Mrs B's representative said that the reason Mr and Mrs B changed their mind and went ahead with the investment is because

Gallery Finance spoke with them from the UK and allayed their fears about the investment. Mrs B said she spoke to it maybe four times over two weeks – and it was Gallery Finance who convinced them to go ahead. Therefore Gallery Finance had promoted the UCIS and given investment advice while in the UK.

Mrs B's representative accepts that they have no documents to support what they say. Gallery Finance said that it did not discuss the investment with Mr and Mrs B or promote it in anyway. It pointed out that Mrs B had not mentioned the conversations she alleges now took place in her original evidence.

The cancellation of the agreement by Mr and Mrs B and their decision to change their minds was an important point and clearly relevant to this complaint. The representative B said that Gallery Finance's promotion of the investment was a significant factor in the decision to change their minds. In view of that I might have expected that to form part of Mrs B's original statement – but the statement does not mention that at all. And Mrs B accepts that her recollections from September/October 2018 were made in 2023 – almost five years later.

Neither the letter cancelling the agreement or the email reversing that decision were sent to Gallery Finance – and neither mentions Gallery Finance. And there is no documentary evidence that Gallery Finance was involved in promoting the UCIS or persuading Mr and Mrs B to go ahead with it.

While the emails we do have show that there was a phone call between Gallery Finance's director and Mr B – that was after Mr and Mrs B had reversed the decision. And none of the other emails between Mr and Mrs B and Gallery Finance could be interpreted as promoting the investment – they deal solely with the mortgage.

I'm not persuaded, on balance, that Gallery Finance promoted the investment from the UK after Mr and Mrs B changed their mind. There is very little persuasive evidence to support that – and the evidence we do have does not support that Gallery Finance in the UK dealt with anything other than the mortgage.

I am sorry to disappoint Mrs B. She has clearly lost out significantly because of the investment she took out in Tenerife and has been left incurring interest on a lifetime mortgage. But, for the reasons I've explained, I don't have the power to look at any activities that took place in Tenerife – and that is largely what this complaint is about. And the evidence we have does not support that Gallery Finance did not act fairly or reasonably while carrying out activities from the UK.

Mortgage advice

I can't see that the original complaint makes any points about the suitability of the lifetime mortgage itself for Mr and Mrs B.

The CMC's response to the investigator's view focuses on events in Tenerife. They did not disagree with the findings the investigator reached that it was not unfair or unreasonable for Gallery Finance to recommend a lifetime mortgage. It said:

"We agree that a mortgage with a method of repayment, does not require Gallery to consider the suitability of the purchase. Our claim is that Gallery's involvement in the promotion of the investment is the issue."

I can't see that the complaint is about the suitability of the mortgage advice – insofar as that activity was carried on in the UK.

Conclusion

I note the additional points made by Mrs B's representative and the email from the police they provided. But I am only considering a complaint about Gallery Finance. I can't consider a complaint here about the acts or omissions of other businesses – even if there is a link between them and a director of Gallery Finance.

Our rules only permit me to consider complaints about an act or omission by a firm. The firm – the authorised person – here is Gallery Finance. I can't see that the rules allow to me to hold Gallery Finance liable for acts or omissions by other businesses, just because of the links set out by Mrs B's representative.

I know that the representative is making these points to, amongst other things, establish a link between Gallery Finance and the other businesses involved in the selling of these investments and to show what Gallery Finance knew about the sale of the investment. But I am not the regulator. My role is to resolve individual complaints between consumers and financial businesses. I couldn't uphold this complaint just because there might have been various technical breaches of regulations by Gallery Finance. Those breaches would not make any difference to my finding on jurisdiction. And the alleged breaches took place outside the UK. I've already explained that is not covered by our jurisdiction.

I don't consider the representative's point about vicarious liability helps them whichever way I look at things. The representative said that S and other businesses involved in selling the investments were appointed representatives of another business where the director of Gallery Finance is CEO. It would seem that any complaint about their wrongdoing would be best placed to their principal firm – there was a formal principal and appointed representative relationship in place. The fact that Gallery Finance and the principal firm share a director would not make Gallery Finance liable for S or other firms' acts or omissions.

In any event, the acts or omissions being complained about – the sale and promotion of the investments in Tenerife – regard activities being carried on from outside the UK. So even if we could hold Gallery Finance liable for things done by other businesses (and I don't consider we can here) it wouldn't change that the activity being complained about was carried on from an establishment that was not in the UK and so it outside our jurisdiction

My final decision

We can't consider this complaint as it is largely about activities that took place outside the UK.

I don't consider that Gallery Finance Limited was promoting a UCIS when it gave mortgage advice in the UK.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B and the estate of Mr B to accept or reject my decision before 6 February 2024.

Ken Rose
Ombudsman