DRN-4355523

The complaint

This complaint is about Mr M and Mr R's attempts to arrange mortgage finance on the advice and recommendation of Elmco Ltd trading as The Mortgage Brain (TMB). The intended purpose of the finance was to fund the acquisition of a new-build property. The transaction ultimately fell through, even though Mr M and Mr R had exchanged contracts on the new property. This left them having to pay £125,000 to the developer for failing to complete. They're seeking to recover that loss, along with other costs, from TMB on the grounds that that errors and omissions in its part were the cause of the transaction falling through.

What happened

The events leading up to, and arising out of, the complaint are complex and the evidence in the case is detailed, running to more than 3,500 pages of documents, all of which I've read. There's a lot of duplication and some of the documents are more relevant to the case than others. Some of the early email exchanges relate to a debt-consolidation re-mortgage rather than the transaction that is the subject of the complaint, albeit the latter was already in its early planning stages. Also some of the email content was redacted, seemingly because it related to unconnected third parties.

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.

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.

Our decisions are published and it's important that I don't include any information that might result in Mr M and Mr R being identified. Instead I'll give a summary in my own words (and rounding the figures where relevant) and then focus on giving the reasons for my decision.

Mr M and Mr R first approached TMB in 2016 about the proposed purchase, which was anticipated would take place in 2018. They already owned several properties, and their plan involved selling two of their existing properties. In July 2017, Mr M and Mr R contacted TMB seeking reassurance that their plans could proceed. In October 2017, Mr M and Mr R exchanged contracts with the developer on the property they intended to purchase once it had been built.

Dialogue continued through 2018 and early 2019. In addition to the sale proceeds of the two properties being sold, the purchase would be funded by raising new finance on what was at that time their home. They intended to re-mortgage that property to a buy-to-let (BTL) basis. The remaining funds would be raised as a residential mortgage on the new

property. The existing property that was to be retained and re-financed was also subject to second charge lending, which Mr M and Mr R intended to keep in place.

Offers for both mortgages were obtained, but in the latter part of 2019, it was identified that both offers included conditions that Mr M and Mr R hadn't anticipated being required to meet. Having to do so, they argue, made the offers unsuitable. TMB succeeded in persuading the two lenders to drop the problematic conditions, albeit in the case of the BTL, this was conditional upon the existing second charge holder being willing to execute a deed of postponement to allow its debt to remain in place ranked behind the new first charge.

Unfortunately the second-charge holder wasn't willing to do this. TMB tried to renegotiate a new offer from the BTL lender but this was aborted in early 2020. In March 2020, the developer served notice of completion on Mr M and Mr R, which they were unable to meet. They forfeit a deposit of £125,000

In May 2020, a firm of solicitors (I'll refer to this firm as "W") served a Preliminary Notice of Claim pursuant to the Pre-Action Protocol, alleging professional negligence on TMB's part. This was followed up in July 2020 with a formal claim letter, claiming damages for the lost deposit of £125,000, any other remedy the developer might seek to recover, broker fees of £1,730, interest on those sums, plus reimbursement of the legal costs of pursuing the claim and compensation for inconvenience and distress.

TMB treated the letter as a complaint, and issued a final response to W on 21 September 2020, rejecting the complaint and referring Mr M and Mr R to this service. The letter explained that if Mr M and Mr did wish to refer the complaint to us, they needed to do within six months of the final response; i.e. by 21 March 2021.

Mr M and Mr R contacted us on 15 March 2021, so within the six-month window, but said they weren't yet ready for us to commence an investigation. They told us they wanted to see if matters could still be resolved between W and a firm of solicitors I'll refer to as "R" that TMB had instructed to represent it in the dispute. The next we heard on the case was in May 2023 when W wrote to tell us it now wished us to look into the complaint. The investigator who did so wasn't persuaded the complaint should succeed. Mr M and Mr R asked for the case to be reviewed by an ombudsman.

What I've decided – and why

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

I'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. My remit is to take an overview and decide what's fair "in the round".

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. 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.

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*". Here, both parties have chosen to instruct solicitors to argue their respective positions. That's their prerogative, provided both parties accept they must meet the costs involved. It's only in the most exceptional of circumstances that we award legal fees, where we consider a complainant could not present their case themselves, which I don't find to be the case here. Both sets of solicitors have, unsurprisingly, presented their respective client's cases in very legalistic terms. 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 everything that both parties have said and provided; having done so I'm not persuaded the underlying dispute is quite as complex as it has been made to look. I'll explain why.

The first point to make is that, by exchanging contracts when they did, Mr M and Mr R committed themselves to completing the purchase, and the potential costs if they didn't, long before TMB was in a position to start meaningful work on sourcing the finance for them. Also, despite what W claimed at one stage, I don't find that Mr M and Mr R exchanged when they did as a result of and advice or recommendation TMB gave them.

An email from TMB dated 1 November 2017 (prompted by Mr R's name "popping up" in a diary entry) asks if it was time to begin work on arranging the mortgages. Mr R replied the next day informing TMB that he and Mr M had already exchanged contracts on the property purchase, albeit likely completion was delayed until the first quarter of 2019. TMB was aware before then that Mr M and Mr R might exchange contracts, but none of the preceding email exchanges suggest TMB encouraged or recommended they do so.

It was, in my view, Mr M and Mr R's choice, and theirs alone. It was a decision they were entitled to make; but it was also their choice. I imply no criticism of them for doing so and none should be inferred. But I can't hold TMB responsible for the consequences of the choice they made.

Despite the long and convoluted set of events that led to this complaint, my task in determining it is simpler than it might seem. If I'm to find in Mr M and Mr R's favour and make the award against TMB they're seeking, I have to be satisfied of two things:

- that there were errors and omissions on TMB's part in how it handled their mortgage application; *and*
- that such errors and omissions are the sole or primary reason Mr M and Mr R failed

to complete on the purchase and therefore incurred the costs they're seeking to have recovered, and other external factor didn't play a contributory part.

The latter is not entirely a binary question. Ultimately, the test I have to apply is this: notwithstanding other factors, but for any shortcomings there may have been on TMB's part, is it more likely than not that Mr M and Mr R could have complied with the notice of completion served on them, thus avoiding incurring the costs they're claiming?

As they are the party bringing the complaint, Mr M and Mr R's version of events has to be *more likely* than the alternative, not just simply *as likely*. Having taken everything into account, I'm not persuaded that, if TMB had acted as promptly as Mr M and Mr R say it should have, they would more likely than not have been able to complete the purchase when required to.

I say this because this was a complex transaction involving many factors, most of which were outside TMB's span of control. Mr M and M R spent much of the time that elapsed juggling options, and changing their minds about which property to sell and which to retain and rent out. Each of them had multiple income streams that required verification, and in some cases, evidence that tax returns had been agreed, and the resulting tax bills had been paid.

And it wasn't just that TMB needed to persuade two different lenders to agree to lend on the terms Mr M and Mr R required. This was an immensely difficult task given the underwriting challenges the applications presented, so much so that TMB's broker told Mr M and Mr R he was even prepared to take his laptop with him on honeymoon in 2019, to keep an eye of how the applications were progressing.

In addition, a third lender had to be willing to execute a deed of postponement (which it wasn't) and two other properties needed to be sold at the right time and for the right price (which they weren't).

All of those elements had to go exactly to plan if the property acquisition was to have a reasonable chance of succeeding as planned. In my view, if even one component didn't go as it needed to, that would be enough to reduce the likelihood of success below the threshold needed for me to uphold the central thrust of this complaint.

Given all the other variable factors over which TMB had no influence, I can't fairly and reasonably find that Mr M and Mr R have met the *more likely than not* test.

It's possible that TMB could have identified the issues that delayed the transaction sooner than it did. But by the same token, so could Mr M and Mr R reasonably have done so; they are far from being novices in the field of property acquisition. So might their solicitors have identified the potential problems sooner; they had the same degree of responsibility to Mr M and Mr R on the legal aspects of the transaction that TMB had on the financial aspects.

Again, I imply no criticism of the solicitors and none should be inferred. I make the point merely for context, as part of my conclusion that errors and omissions on TMB's aren't the sole or even the primary reason Mr M and Mr R failed to complete on the purchase when required to do so.

Mr M and Mr R clearly had high hopes for this property acquisition, and I understand why they would. However, and without wishing to sound unkind, for all the complexities of their wider financial arrangements, and despite TMB's best efforts on their behalf, they didn't have, and couldn't raise, enough money to pay for the property they'd committed to buying in 2017 or a lower-priced alternative, when the seller asked them to do so in 2020.

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 M and Mr R feel. They see error or wrong-doing in almost everything the broker has done (or not done).

That's a natural, subjective reaction, and entirely understandable. It's also natural to emphasise individual statements or comments that appear to support a particular viewpoint, whilst at the same time paying less attention to those that support the opposite viewpoint. But look hard enough and it's possible to find inconsistencies and/or anomalies in what both sides have said and done from time to time.

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 M and Mr R's favour.

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.

Given the quantum involved, there's a strong possibility that this case may go to court, if Mr M and Mr R ultimately reject my final decision. And if that happens, then subject to any time limits or other restrictions a court might impose, Mr M and Mr R's recourse to a legal remedy of their own against TMB 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.

My final decision

My final decision is that I don't uphold this complaint or make any order or award against Elmco Ltd trading as The Mortgage Brain.

My final decision concludes this service's consideration of this complaint, which means I'll not be engaging in any further consideration or discussion of the merits of it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M and Mr R to accept or reject my decision before 24 October 2023.
Jeff Parrington
Ombudsman