

Ombudsman determination

CIFO Reference Number: 16-000387

Complainant: [The complainant]

Respondent: [Company Z]

It is the policy of the Channel Islands Financial Ombudsman (CIFO) not to name or identify complainants in any published documents. Any copy of this determination made available in any way to any person other than the complainant or the respondent must not include the identity of the complainant or any information that might reveal their identity.¹

[The complainant] complained about delays in receiving confirmation of a loan from [Company Z].

Background

[The complainant] purchased a commercial site for [redacted for anonymisation purposes] at auction and paid a £90,000 deposit. [The complainant] contacted [Company Z] with a view to arranging a meeting, which subsequently took place on 10 August 2015. At this meeting, [the complainant] went through site plans and discussed cash flow and costings. [The complainant] informed CIFO that at this meeting he advised [Company Z] that there would be a deadline of 22 September 2015 for obtaining the remainder of the funds to complete the purchase.

Due to the size, type and location of the project, [Company Z] subsequently engaged a UK broker to assist in finding a willing lender.

On 12 August 2015, internal emails from [Company Z] described how the project needed funding and mentioned the 22 September deadline. On that same day, [Company Z] asked [the complainant] if he had any other security. [The complainant] responded that there were three properties in the UK.

On 21 August 2015, indicative terms were sent to [the complainant] by [Company Z]. They explained that they had “similar” deals with the lender they had identified. [Company Z] set out what information was required from [the complainant] so that they could provide a formal, credit-approved offer. [The complainant] was required to sign the terms of engagement and pay a refundable commitment fee of £500 to progress matters.

On 25 August 2015, [the complainant] sent details of his yearly income and expenditure to [Company Z]. A day later, [Company Z] emailed him back setting out their fees. They also asked for his CV, and for [the complainant] to review the terms of engagement.

¹ Financial Services Ombudsman (Jersey) Law 2014 Article 16(11) and Financial Services Ombudsman (Bailiwick of Guernsey) Law 2014 Section 16(10)

On 28 August 2015, [the complainant] sent his CV to [Company z], who responded by saying it needed more details. [The complainant] agreed to this and later that day attended a meeting at [Company Z's] offices.

On 1 September 2015, [the complainant] emailed [Company Z] the requested CV and Asset Liability document.

On 10 September 2015, a lender produced terms for [Company Z]. [The complainant] subsequently gave his permission to proceed and the surveyor visited the properties on 16 September.

On 18 September 2015, [the complainant] asked [Company Z] for information about the loan, and received the reply that they were awaiting the return of valuation reports so that a formal offer could be issued.

On 21 September 2015, [the complainant] asked for an update, including whether the valuation reports had been received and whether the package of legal documents could be completed by the lender's solicitors in time. [The complainant] reiterated that he was at risk of losing £90,000 if the funding was not arranged in time. Further correspondence followed on the same day, regarding an extension, ownership of the properties, and the package of legal documents.

On 22 September 2015, valuation reports were received by [Company Z], which indicated that the surveyor's valuation was less than estimated. The lender offered £90,000 less as a result due to a drop in the valuation of the security properties.

[The complainant] submitted that [Company Z] knew the timescale and, as a result of their actions, the transaction could not be completed within the timescale agreed. [The complainant] therefore felt he had no option but to explore other avenues for funding in order to rescue the transaction. [The complainant] arranged funding from a different source and paid £28,400 to the vendor so that the sale could be completed after 22 September. [The complainant] now seeks the £28,400 as a result of delays confirming the availability of the loan. [The complainant] suggested that he lost £28,400 as a result of delays confirming the availability of the loan.

Subsequent submissions

In [the complainant's] response to the case handler's conclusions, [the complainant] suggests that statements made by [Company Z] to CIFO contradict his understanding of events; for example, [the complainant] does not consider himself an experienced property developer and he does not accept that he had simultaneous discussions with another lender.

In addition, there is disagreement between the parties as to the original purpose of the loan. [Company Z] considered it was for developing a property, whereas [the complainant] believes [Company Z] misunderstood and he confirmed that it was merely a bridging loan he was seeking.

The parties disagree as to the timescale of this case and [the complainant] considers that after 34 days [Company Z] concluded that they did not have sufficient expertise to fulfil their duties, so they contacted a third-party broker in the United Kingdom.

Finally, [the complainant] informed CIFO that [Company Z] tried to obtain the wrong finance between 21 August and 1 September 2015. According to [the complainant], in his letter to CIFO dated 11 August 2017:

“The [commercial] site purchased at auction needed funding, within 6 weeks, to enable [the complainant] to complete the purchase. A full developmental facility, requiring extensive supplementary information, should not have been ‘brokered’.”

[The complainant] reiterated his view that [Company Z] did not use their best efforts to secure funding and wasted time by not understanding the transaction and seeking to obtain inappropriate, incomplete funding.

Analysis

As a result of the subsequent submissions made by [the complainant], it appears that there is a disagreement between the parties regarding the appropriate date from when [Company Z] sought to secure a loan for [the complainant].

There is an allegation by [the complainant] in his letter to CIFO dated 11 August 2017 of a *“deceitful, deliberately misleading”* statement which may possibly be *“fraudulent”*. This relates to the remark by [Company Z] that [the complainant] was an experienced and successful property developer.

[The complainant] also wrote that [Company Z] were *“unquestionably wrong”* on a further point about a lack of finances and tight timescale which put the project concerned at risk. Furthermore, [the complainant] highlights the contents of an internal email at [Company Z] dated 12 August 2015, which he describes as *“factually incorrect.”*

Given this dispute over the factual basis and the allegation by [the complainant] of potential fraudulent conduct by [Company Z] in its representations to the CIFO regarding this complaint, I have concluded that there is a more appropriate forum available other than CIFO. In determining that it is more appropriate for the subject matter of the complaint to be dealt with by a court, I am mindful of CIFO’s policy on factors for the rejection of complaints. In particular, CIFO should consider:

- *“whether the decision regarding the merits of the complaint, due to a lack of other evidence, turns solely upon the competing recollections and credibility of the parties;*
- *whether there is a reasonable expectation for the financial services provider to have documented evidence relevant to the complaint;*

- *whether, in the opinion of the ombudsman, CIFO would be able to reach a fair and reasonable conclusion of the complaint given the circumstances and the evidence available; and*
- *whether the cost and time associated with resolving the matter in court to enable to provision of evidence on oath would be fair and reasonable taking into account the circumstances and loss claimed.”*

I have assessed the merits of the complaint and consider that the informal procedures of the Ombudsman process are not suitable for the full examination of witnesses that would be necessary to establish all the relevant facts of the case. There are contradictions in the account given of the underlying facts. It follows that I would not be able to reach a fair and reasonable conclusion of the complaint given the circumstances and the evidence available. Furthermore, the time and cost associated with resolving the matter in court would be proportionate to the significant level of financial prejudice allegedly suffered by [the complainant]. Therefore, I have concluded that the advantages of evidence given under oath outweigh the benefits of CIFO’s less formal procedure.

As [the complainant] has not given up any of his legal rights in referring his complaint to our office, [the complainant] may wish to consult legal counsel to consider pursuing his claim through the courts where witnesses could be compelled to attend and be subject to cross-examination.

In addition, the complaint also raises the question of what constitutes the “best efforts” of a broker when seeking to obtain finance for a customer. In the absence of any regulatory guidance in [the jurisdiction] regarding what would be considered “best efforts” by a broker, I consider that a court would be the more appropriate forum to address this issue in light of the complex circumstances of this case.

Final decision

My final decision is that this complaint would be more appropriately resolved in a forum other than the CIFO scheme.

[The complainant] must confirm whether he accepts this determination either by email to ombudsman@ci-fo.org, or letter to Channel Islands Financial Ombudsman, PO Box 114, Jersey, Channel Islands JE4 9QG, by **21 September 2017**. The determination will become binding on [the complainant] and [Company Z] if it is accepted by this date. If we do not receive an email or letter by the deadline, the determination is not binding. At this point [the complainant] would be free to pursue his legal rights through other means.

If there are any particular circumstances which prevent [the complainant] confirming his acceptance before the deadline of 21 September 2017, [the complainant] should contact me with details. I may be able to take these into account, after inviting views from [Company Z], and in these circumstances the determination may become binding after the deadline. I will advise both parties of the status of the determination once the deadline has passed.

Please note there is no appeal against a binding determination, and neither party may begin or continue legal proceedings in respect of the subject matter of a binding determination.

Douglas Melville
Principal Ombudsman and Chief Executive

Date: 22nd August 2017