

The complaint

Mrs B complains that Aviva Life Services UK Limited mis-sold an equity release mortgage.

What happened

In 2003, Norwich Union Life Services – which is now part of Aviva and I will refer to it as Aviva in my decision – recommended that Mrs B and her now late husband should take out an equity release mortgage. Aviva said that Mr and Mrs B should borrow £15,000 on an equity release mortgage:

- £4,000 for a new bathroom
- £2,500 for a new garden wall
- £6,000 for gifts to children
- £1,500 for a holiday
- £1,000 for costs of setting up the mortgage

Mrs B's son complains on her behalf that the equity release mortgage was unsuitable for his parents. He said:

- Mr B was not very well at the time of the advice and suffered with his mental health.
- Mr and Mrs B were not financially literate and relied on the advice they were given.
- Mr and Mrs B always intended to downsize in the short term – and they did so in 2007.
- Mr and Mrs B had savings of over £10,000 and a bond for over £20,000.
- The reasons for taking the mortgage were all short term things.
- The interest rate was over 7% - that means the loan has grown to over £60,000.
- Mr and Mrs B had sufficient savings to pay for the things stated in the recommendation letter outright without putting themselves in long term debt at a high rate of interest. Their lack of financial knowledge meant they were not fully aware of their decision, which was made by Mr B on behalf of Mrs B.

Subject to any further submissions, my provisional decision was that I intended to uphold the complaint. My provisional findings, which form part of this complaint, were:

This complaint has been brought outside the time limits in our rules. But Aviva has consented to us considering the complaint. Aviva has confirmed that although the loan is with Aviva Equity Release UK Limited – it was sold by a firm which is now part of Aviva Life Services UK Limited.

Mrs B received advice from Aviva in 2003. This was before mortgage regulation. The sales paperwork said the sale of the equity release mortgage was covered by the Mortgage Code (the Code). The service level provided was "advice and recommendation". That is defined by the Code as "advice and recommendation as to which mortgage is most suitable for you. When giving advice, we will take care to help you select a mortgage to fit your needs by asking for relevant information about your circumstances and objectives. Our advice will also depend on your particular requirements and on the market conditions at the time."

But the mortgage that Aviva recommended was regulated by the Consumer Credit Act 1974. Therefore the Code did not apply to the sale of this mortgage. Nevertheless, it is clear that Aviva was giving Mr and Mrs B advice. It had a duty to do so with reasonable care and skill. And the sales paperwork set out that Aviva was applying the sales standards in the Code and that it was considering what was "most suitable" for Mr and Mrs B. It was reasonable for Mr and Mrs B to proceed on the basis that Aviva had considered what was most suitable for their needs, circumstances and objectives. I have no reason to doubt that they relied on that advice and it was reasonable for them to consider that Aviva was recommending the right thing for them.

Aviva was not merely giving information about equity release mortgages to Mr and Mrs B – it was giving them advice. Nor was it simply arranging a mortgage to give them what they wanted. It was recommending a mortgage that was "most suitable" for them, taking into account their stated needs and circumstances.

The recommendation letter said that Mr and Mrs B's "risk profile" was that they "wish to minimise the risk of eroding equity within [their] property and [they] aim to retain a reasonable amount of equity for [their] future use, whilst receiving just enough capital for your immediate needs".

It appears that Mr and Mrs B were given a choice of a number of statements to choose from to decide what their risk profile was. It's not entirely clear that is a fair and reasonable way to find out what a potential borrower's priorities are. But taking it at face value, Mr and Mrs B's priority was to keep as much equity in their home as possible. They only wanted to borrow enough for their immediate needs.

The difficulty here is that there is no explanation why there was an immediate need for any of the things Mr and Mrs B were raising money for. Potentially there could have been an immediate need for the home improvements and the holiday. But it is difficult to see why there was an immediate need for gifts to children (which made up 40% of the amount borrowed). It seems less likely that there was an immediate and specific need for the gifts. I say that as the gift was £2,000 to each of their three children. So it does not seem that the amount was tailored so that the children could meet a specific objective. Bearing in mind Mr and Mrs B's stated objectives, it would have been reasonable for Aviva to explore why there was an immediate need for those amounts.

The minimum amount that Aviva would lend was £15,000. That is exactly the amount Mr and Mrs B borrowed. That might be a coincidence. Or it could reflect that Mr and Mrs B were coached to increase their borrowing to correspond with the minimum amount. I note that Mrs B's son said it was Mr B that was responsible for arranging the mortgage and that they were both financially unsophisticated. I appreciate we are considering events from almost 20 years ago, Mr B has passed away and Aviva has not provided any evidence to support what the adviser did. I don't think we are going to get any more information about that.

The fact find said that Mr and Mrs B had savings of £14,500 in a bank account and over £21,000 in an investment bond. It also said that existing savings and investments were already utilised and were used for income and growth and that they considered they needed

all of the £14,500 for an emergency fund. Their stated joint income was £1,334 (including £80 from investments) a month against outgoings of £1,120.

The recommendation letter said that Mr and Mrs B did not want to use their existing savings and investments because they were being used for income and emergency funds. It said that the emergency funds were higher than Aviva would usually recommend but that is what Mr and Mrs B wanted.

From the evidence available to me there is no reason why Mr and Mrs B would need emergency funds of £14,500. That would cover more than a year of their outgoings. Aviva said it would usually recommend £10,000 – but it's not clear why that amount was needed or the right amount for Mr and Mrs B. I don't consider the recommendation letter demonstrates that there was an adequate discussion with Mr and Mrs B about why they needed £14,500 in emergency funds or that it was a sound basis on which to recommend that they take an equity release mortgage.

Mr and Mrs B also had money in a bond. But both the fact find and recommendation letter don't identify what the return was on the bond or whether Mr and Mrs B were tied into it and if so for how long. The fact find shows that Mr and Mrs B receive £80 in investment income. I have assumed that this is from the bond. I say that as there are no other investments mentioned on the fact find.

The return on the savings and bond are not recorded anywhere and nor is whether there was any penalty if Mr and Mrs B used the funds from the bond. I note that Mr and Mrs B's outgoings were affordable even without the bond income. It's not clear why Aviva did not look into whether they could access some or all of the funds from the bond.

I don't consider that there is evidence that sufficient consideration was given to using Mr and Mrs B's existing savings to fund what they wanted to do. I consider it would have been reasonable for Aviva to do so, bearing in mind what Mr and Mrs B's stated objective was to retain as much equity as possible and only to borrow what there was an immediate need for. It seems that Mr and Mrs B would have been able to fund the home improvements and holiday (£8,000 in total) and still be left with £6,500 in accessible savings – equivalent to almost six months expenditure.

Nor were any other options considered such as using some of their savings and topping up with an unsecured loan – or even raising all of the money by way of a personal loan. Mr and Mrs B had surplus income each month, which would have been sufficient to fund a loan.

Aviva has not put forward a persuasive argument why borrowing £15,000 with compound interest on a lifetime mortgage was the most suitable thing for Mr and Mrs B when they had sufficient funds available to them to meet the cost of what they had an immediate need for. It did not establish there was an immediate need for the gifts to family.

I consider if Aviva had acted fairly and reasonably that it would not have recommended an equity release mortgage to Mr and Mrs B. They had sufficient savings available to fund what they appeared to have an immediate need for (the home improvements and holiday). That would have left them with savings equivalent to almost six months expenses. The only explanation given for not using the savings was that is what Mr and Mrs B wanted for "income and growth" and that is higher than Aviva would usually recommend. I don't consider that went far enough.

Looking at the information available to me there is not any clear explanation why an equity release mortgage was the right thing for Mr and Mrs B when they had enough money to pay for the things they had an immediate need for from their savings. The cost of the equity

release mortgage was always going to be more expensive than any benefit they received from keeping an equivalent amount in savings and that wasn't sufficiently highlighted to them – particularly as the recommendation said that Mr and Mrs B wanted "growth" from their savings. And there is no explanation why short term lending was not considered to make up any shortfall.

I consider if Aviva had acted fairly it would not have recommended an equity release mortgage to Mr and Mrs B. They've had the benefit of the money they borrowed. So Aviva can keep a charge against Mrs B's home for the principal amount borrowed – but less any interest and charges that were added to the loan. And it should not apply any more interest or charges, or apply an early repayment charge if the mortgage is repaid.

I accept that Mrs B has been caused distress because of the growing debt secured against her home over a number of years. But I'm not intending to make an award for that. I say that because Mrs B has had the benefit of the interest on the savings she did not use because she took the equity release mortgage– and that is likely to be more than I would have awarded to reflect any distress she has suffered as a result of this matter.

Aviva did not accept my provisional findings. It made a number of points, including:

- The sale was in 2003. Sales practices and documentation would not necessarily have been as detailed as today's standards. The documentation in its opinion was "compliant" for a 2003 sale.
- In 2007, Mr and Mrs B sold their house. They had the option to repay the mortgage at that time – and this is documented in a phone call with Aviva. But Mr and Mrs B chose not to repay the mortgage. If they were unhappy with it, they could have repaid the mortgage at that point or raised a complaint. There was enough equity from the sale to repay the mortgage.
- The fact find stated the level of savings and that Mr and Mrs B did not want to use them. This shows that there was a discussion around this point. Just because there is no information about penalties to withdraw etc. does not mean those discussions took place.
- Ultimately, it is the consumers decision – if they do not want to use the savings they should not be made to do so. It is reasonable to assume if a potential borrower did have sufficient savings to cover their immediate needs, it would have been "obvious" to them to consider using those funds. They clearly didn't and approached Aviva instead.
- The statement regarding them wanting to keep as much equity as possible is a "standard paragraph" and would typically be used where a customer is borrowing no more than they require for immediate use subject to minimum levels of borrowing.
- Alternative ways of raising the funds were discussed. But Mr and Mrs B did not want to take those options. A traditional loan may not have been available and even if it was it would have reduced Mr and Mrs B's net disposable income.
- It was "guidance" that borrowers only release funds they planned to use over the following five years.
- I'd made an assumption that the reasoning for the gifts to Mr and Mrs B's children was not an immediate need. That is very subjective. Whether something is "immediate" is a matter of opinion. Mr and Mrs B gave the reasons for the mortgage and that was consistent throughout the file.

- Mr and Mrs B were aware of the minimum loan value and were able to borrow for what they needed and to gift e any excess. There is no reason why Aviva would question this. It takes a customers word for the reasons for borrowing and has not reason to question that.
- Independent legal advice is part of the process for taking an equity release mortgage. The solicitor had a duty of care to make sure Mr and Mrs B understood the mortgage, the implications of it and that they had capacity to enter into the contract. Nothing was raised by the solicitor.
- The redress I have proposed is not possible. If the loan is deemed unsuitable, Mrs B would need to repay the loan plus interest at the Bank of England base rate plus one percent.
- The proposal to write off all of the interest and ERC would mean that Aviva would be providing a £15,000 interest and “penalty” free loan for an unspecified amount of time. Equity released mortgages are intended to be repaid on death. With my proposed redress there would be not incentive for Mrs B to repay the mortgage early – giving her a financial advantage.

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.

Thank you for both sides patience while I considered the responses to my provisional decision. Having done so I see no reason to depart from the outcome I reached in my provisional decision.

My provisional decision acknowledged what the sales standards were in 2003. I noted that Aviva said that it was applying the sales standards set out in the Mortgage Code – even though this was not technically a Mortgage Code mortgage, because it was regulated by the Consumer Credit Act 1974. Loans regulated under that Act were excluded from the Mortgage Code. I am not applying current sales standards to the sale of this mortgage.

Aviva said the sale was “compliant”. But it is not clear what rules or laws it considered the sale complied with. As I've explained, the paperwork said the sale was made using the Mortgage Code standards – but this was not a Mortgage Code mortgage. I don't think this really makes any difference because if I apply either the Mortgage Code standard for an advised sale or the underlying duty to give advice with reasonable care and skill, it does not change the outcome of the complaint.

I accept that Mr and Mrs B could have repaid the mortgage when they sold their property. The fact they did not I consider reflects their lack of financial sophistication and their reliance on the original advice they received from Aviva.

I agree that it is for consumers to make decisions about what to do. But the purpose of advice is so that businesses can recommend the right thing for them after considering their circumstances. The cost of taking an equity release mortgage rather than using savings was significantly poor value for money. I don't consider that Aviva has shown that it adequately took that into account in giving advice of provided a sufficient warning about the potential cost to Mr and Mrs B.

I don't consider that whether the statement about keeping as much equity as possible was a “standard paragraph” is relevant. There was a reasonable expectation that Aviva would take

that into account in its advice.

I don't consider the evidence we have supports that an adequate discussion about using alternative funds – whether existing savings, alternative borrowing or a mixture – took place. While we don't know for certain that Mr and Mrs B could have qualified for a loan, equally we do not have any evidence that they would not have done so.

I don't think whether there is an "immediate" need for something is subjective. There is a difference between gifting money where there is no intended purpose (as in this case) and having a specific purpose in mind for the money, which may or may not be an immediate need.

Aviva was giving Mr and Mrs B mortgage advice. The solicitor was not. It was not their role to make sure the advice given was fair. Bearing in mind the mortgage had been recommended as suitable for them, there would be no reason for them to have any concerns when the solicitor made sure they understood the contract they were entering into.

I can't see any reason why the redress I proposed is not possible. Aviva have not put forward any real reasons why it can't be put in place.

The proposal to write off all of the interest and ERC would mean that Aviva would be providing a £15,000 interest and "penalty" free loan for an unspecified amount of time. That reflects that the mortgage was mis-sold.

I accept that if Mr and Mrs B had not taken the mortgage they would have used the funds from their savings and/or borrowed money elsewhere. But as I explained, that is why I have not made an award for distress and inconvenience and bearing in mind the difficulty of obtain any real evidence of what they could have done due to the passage of time.

I've considered what Aviva said in response to my provisional decision. But it has not persuaded me to change the decision I reached in my provisional decision,

My final decision

Aviva Life Services UK Limited should take whatever steps necessary to make sure all of the interest, charges and fees that have been applied to Mrs B's mortgage since inception are written off and to ensure that no more interest, charges, fees or anything else is applied to the mortgage balance. The early repayment charge should be waived if Mrs B decides to repay the principal balance.

Aviva will be entitled to repayment of the principal balance when the property is sold.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 7 July 2023.

Ken Rose
Ombudsman