DRN-4292989

The complaint

This complaint's about an equity release lifetime mortgage that Mrs O took out in October 2013 with Aviva Life & Pensions UK Limited, on the advice of a third party advisor. There are various aspects to the complaint; these include the sale of the mortgage in 2003, the increase in the account balance due to the accrual of interest, and the loss of Power of Attorney documents. Mrs O is represented here by her Attorney; for simplicity's sake, I'll refer to any statements made as coming from Mrs O, even where they've been made by her representative.

What happened

By way of a provisional decision dated 26 July 2023, I set out my provisional conclusions on this complaint. The following is an extract from the provisional decision.

> "In what follows, I have summarised events in rather less detail than they've been presented, using my own words and rounding the figures involved. 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 in my view will have little or no impact on the broader outcome.
>
> Mrs O took the mortgage out in 2003. The terms of the mortgage provide that no monthly repayments are required. The intention is that the mortgage is due to be repaid if the last surviving borrower goes into full-time nursing care or after their death. It can be repaid voluntarily before either of those events have happened, but then an early repayment charge (ERC) is usually payable.
>
> Interest on the loan is rolled up into the outstanding balance and is compounded until the debt is repaid. All of this means that if the loan runs for a number of years, there can be a significant balance to be repaid.
>
> In 2021, Mrs O, who was by now widowed, put her property up for sale to pay for respite care. After a year had passed with no sale, Aviva told Mrs O it now had the right to take possession of the mortgaged property.
>
> Mrs O complained, and in October 2022 Aviva issued a final response rejecting the complaint. When it was referred to us, our investigator didn't recommend the complaint be upheld; Mrs O asked for the case to be referred to an ombudsman for review.
>
> **What I've provisionally decided – and why**

We're not the regulator of financial businesses, and we don't "police" their internal processes or how they operate generally. That's the job of the Financial Conduct Authority (FCA). We deal with individual disputes between businesses and their customers. In doing that, we don't replicate the work of the courts.

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

As far as the suitability of the mortgage at the time it was sold is concerned, that wasn't a matter for Aviva. It was the responsibility of the third party advisor that recommended Mrs O take the mortgage out. Aviva's responsibility was to ensure the proposed mortgage met its lending criteria at the time, and there's nothing in any of the evidence to suggest Aviva made a wrong lending decision.

Having no regulatory function means it's not my role to decide if a particular interest rate is fair or not. So I can only comment in general terms. It's normal for interest to roll up on a lifetime equity release mortgage, and then to attract further interest on a compounding basis.

The effect of this is demonstrated in monetary terms by a projection included in the point-of sale material. I've seen the mortgage offer Mrs O accepted and agreed to be bound by when she borrowed the money. The projection uses an assumption that the mortgage will last for 19 years, but it includes a narrative pointing out this assumption and reminding the reader of the lifetime nature of the mortgage.

The rate charged is 4.89% fixed for the duration of the mortgage, and that is set out in the offer. The use of fixed rather than variable rates has always been normal on equity release mortgages, as they enable a lender to forecast the likely growth in the debt over time as the interest rolls up.

That's important to the lender, from a risk assessment point of view when deciding how much to lend. But it also gives a degree of clarity to the borrower about how their debt will grow over time, because that forecast can be incorporated into the mortgage offer, as it was in this case. Yes, 4.89% sounds very high in the climate that has applied for much of the last fifteen years or so until rates recently stated rising again. But this rate was set in 2003, when the financial landscape was different from what it is now.

Aviva has received, and responded to, requests for redemption statements for the mortgage at regular intervals over the years since the mortgage started. So the gradual increase in the mortgage balance to its current level should not have come as a surprise.

I can't know, and won't speculate on, how closely Mrs O studied the mortgage offer, or how much of the information it contained she assimilated; before she agreed to borrow the money in 2003. In any event, responsibility for ensuring Mrs O knew and understood what she was agreeing to, lay with her advisor.

Also, Mrs O was required to have separate legal advice, from solicitors acting for her, before entering into the transaction. The solicitor (or firm of solicitors) giving that advice was required to issue a document (known as a SHIP certificate) to confirm that having met Mrs O face to face, it had fully explained the nature of the transaction and that she had confirmed her desire to go ahead with it. Mrs O's representative says that didn't happen, but I have seen a copy of the SHIP certificate, and I'm satisfied the correct process was followed and the advice was given.

> The point about the SHIP certificate wasn't covered in the investigator's assessment, so I'm addressing it now in a provisional decision, so that both parties can comment before my decision is finalised. I've asked the investigator to send Mrs O's representative a copy of the SHIP certificate, alongside but separate from, this provisional decision.
>
> On the point about documentation going missing, the available evidence doesn't point to Aviva losing it being any more likely than Aviva not receiving it in the first place. Overall, I can't be sufficiently confident that making an award of compensation against Aviva for losing documents is fair and reasonable.
>
> As far as Mrs O's current situation is concerned, Aviva has first of all done what the underlying contract between it and Mrs O requires it to do. That is, give her twelve months to try and sell the mortgaged property and repay the mortgage. It's then done what its general duty to treat consumer fairly requires of it. That is, remind Mrs O of its right to seek possession once the twelve months had passed but not immediately taking steps to enforce that right.
>
> Taking everything into account, I'm not persuaded Aviva has treated Mrs O unfairly."

Both parties were given a two-week time frame in which to make their further comments. Aviva hasn't added anything further, Mrs O, through her representative has made a number of points, which I summarise below.

- Aviva's procedures required it to only accept applications from accredited intermediaries. Research has revealed that the individuals involved in the sale of this mortgage weren't properly accredited, so Aviva was at fault in accepting the application and granting the loan.
- Aviva's subsequent takeover of the broker network that included the intermediary involved in the sale means it took on responsibility for past activities and outcomes. Aviva cannot distance itself from those when it is about to benefit from the mortgage by taking possession of Mrs O's property.
- One of the key requirements of the SHIP certificate – that borrowers be free to move lenders without financial penalty – wasn't adhered to. Mrs O thinks the solicitors who advised her took Aviva's and the intermediaries' assurances on face value.

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've considered afresh everything that both parties have said and provided. Having done so, and both parties accepting the gist of it, I won't be changing my decision. However, I'll address Mrs O's further points.

On the first point, I have to assess what Aviva did, or didn't do, by reference to the standards and business practices that applied at the time the mortgage was granted. I can't apply the more stringent requirements that were brought in by mortgage regulation in 2004, and have continued to evolve subsequently.

All that was required in 2003 for Aviva to accept Mrs O's mortgage application was for the introducing broker firm to provide its respective registration numbers with the then regulator

the Financial Services Authority, and the Mortgage Code Compliance Board. As both numbers were provided, Aviva could reasonably accept and consider the application.

Aviva may have subsequently taken over the broker network involved in the sale of the mortgage, but the broker network remains a separate and discrete business in its own right. It receives and deals with complaints about its activities and, where applicable, offers referral rights to this service to those consumers who aren't satisfied with the responses it provides.

The complaint before me here is about Aviva's lending decision, not about the sale of the mortgage by the intermediary. If Mrs O wishes to complaint about the sale of the mortgage, she is free to do so, but to the broker network rather than Aviva. If she wishes to do that, our investigator should be able to answer any questions she may have about how she can do so.

Lastly, it was for many years perfectly normal for equity release mortgages to come with an early repayment charge clause. I'm not persuaded there's any conflict between that and the completion of the SHIP certificate by the independent solicitors in Mrs O's case. If Mrs O believes there were shortcomings on the part of the solicitors – and to be clear, nothing I say here implies or should be inferred as saying there were – Mrs O would need to raise her concerns with the solicitors directly.

My final decision

My final decision is that I don't uphold this complaint.

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 Mrs O to accept or reject my decision before 11 September 2023.
Jeff Parrington
Ombudsman