DRN-4445056

The complaint

The estate of Mrs G complain that Phoenix Group Management Services Limited mis-sold an equity release mortgage.

What happened

In 2000, Mr and Mrs G took out an equity release mortgage with Northern Rock for £57,000. In 2003, they took a further advance of £25,000. Both the mortgage and further advance were recommended by third party mortgage brokers.

The mortgages have subsequently been sold to Phoenix.

Mr and Mrs G have both passed away. This complaint is brought by the executors of Mrs G's estate. They complain:

- Mr and Mrs G had no need for the money raised by the initial mortgage or the further advance. Their income comfortably exceeded their expenditure and the funds raised remained in cash on deposit.

- Mr and Mrs G were in good health at the time and it ought to have been clear that the mortgage and further advance were not needed.

- It would have been obvious at the time that rather than provide Mrs G with adequate funds on the death of Mr G, the opposite outcome would be inevitable. Mrs G had to repay over £300,000 for initial borrowing of £82,000 which served no purpose and that caused her and her family financial difficulty.

- There was no proper analysis of Mr and Mrs G's needs and priorities.

- There were no reviews conducted when lifetime mortgages became regulated to make sure Mr and Mrs G had been advised properly.

- Mr and Mrs G were financially naïve and had never received financial advice before. In view of their age and vulnerability they should have been asked if they needed family members to become involved or at least be made aware of the action they were taking. If they had been consulted, serious concerns would have been raised about the suitability of this product.

- The interest rate was excessive and the rolled up interest meant that borrowing was paid from the sale of the property substantially reducing the inheritance for the beneficiaries.

- A previous complaint was made in 2018, but that was not dealt with properly.

- The mortgage and further advance were mis-sold in breach of the Mortgage & Home Finance: Conduct of Business Sourcebook (MCOB) 8.5A.

- The product was unsuitable given Mr and Mrs G's age mental agility, lack of financial experience, circumstances, needs, family structure and cost and use of the funds. There is little evidence either loan was taken out with informed consent.

- There is no evidence that an adequate review was carried out and so there is no defence that the product was mis-sold.
- The box on the application form to indicate the attachment of a recommendation form was left blank.
- A document dated 5 June 2000 records next to "mortgage code compliance" was "n/a" indicating there was no record of the mortgage being compliant.

The investigator did not think the complaint should be upheld. The estate of Mrs G did not accept what he said:

- Vicarious Liability: Phoenix did not directly advise Mr and Mrs G and relied on others. However, they benefited from the arrangements set up by the third- party advisors. By accepting the business brought by these advisors, Phoenix took on a level of responsibility for ensuring that the advice was sound and that it was in line with their ethical standards. A plain and cursory review would reveal that this product was not suitable and was not taken out with informed consent or consultation with the beneficiaries.
- Duty of Care: The primary responsibility for advice might rest with the advisors, but as is rightly acknowledged, Phoenix has a duty of care towards its clients. The mechanisms in place for review of whether products were sold which were suitable for customers were plainly insufficient as they relied wholly on paperwork, much of which was incomplete. I specifically refer to review documents which were only partially completed with key gaps easily identifiable which should have been a red flag.
- Vulnerability: Mr and Mrs G were elderly and vulnerable when they entered into these mortgages. Inadequate steps were taken to ensure they understood the full implications. While they were represented, it is not clear that this was by their own solicitors and the terms of such advice have not been disclosed - i.e. process and procedure only or full advice. Even if the solicitors were negligent, the company should accept that the product was unsuitable per se.
- Full disclosure and informed consent: the presence of a Key Information Document, while standard, does not guarantee full comprehension. In any event these were not all complete. The fact that no family member was ever consulted is a glaring omission in a decision on lending with such huge potential consequences to future beneficiaries.
- Comparative cases: If the position is that Phoenix relied totally on third party advice with no independent checks or review, there must be many cases which have resulted in a similarly prejudicial situation. We simply cannot accept that fairness is simply a tick-box exercise and the points relating to breaches of the Code have not been addressed. We are aware that similar cases of mis-sold equity release mortgages have been reviewed and found to be deserving of sanction due to the nature of the product and high threshold for compliance.
- Oversight of Advisors: Phoenix's reliance on third-party advisers warrants an examination of the training and oversight these advisors received. Were they well-informed about Phoenix's products and their implications? The absence of completed paperwork is suggestive that insufficient regard was had to the nature and effect of the product in the particular circumstances it was sold. Some of the answers have been left

blank and others completed incorrectly, tending to suggest a lack of oversight and training.

- Fairness over formality: While the paperwork might be technically in order, the question remains if the sale was made in the spirit of fairness, considering the potential vulnerability of Mr and Mrs G. Form should not prevail over substance, and any reasonable objective consumer learning of the circumstances of this mortgage would conclude it was an unfair sale with everything stacked against the consumer. Even if it was technically compliant, the fairness of the matter ought to be brought into greater focus in this case.

- Interest Rates: It is acknowledged that the interest rates were provided upfront. However, the rates of 8.2% and 7.19% were notably high, especially given the compounding nature of the product. There is no evidence that these rates were appropriately contextualised and justified, and resulted in a disproportionate profit to the mortgagee.

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.

This complaint has been brought outside the time limits that apply in our rules. But Phoenix has consented to us dealing with the complaint.

When Mr and Mrs G took out the equity release mortgage and the further advance, they received advice from mortgage brokers. Most of the points raised in the initial complaint relate to the suitability of the mortgage and the further advance. But the lender is not responsible for the advice given. I don't consider there was any obligation for the lender to conduct its own suitability assessment based on the information presented to it.

In saying that, I agree that it would not be fair or reasonable for the lender to accept every application for an equity release application at face value – even where the borrowers have received independent mortgage advice. But I don't consider there was any information given to the lender that ought to have raised any concerns, bearing in mind that it was not reassessing the suitability of the mortgage.

When the mortgage and further advance were taken out, lifetime mortgages were not regulated. They were covered by the Mortgage Code and by the Safe Home Income Plan (SHIP), now the Equity Release Council. Looking at the requirements in place at the time and the information we have that would have been available to the lender at the time in question, I don't consider that the lender had any reason to consider that the advisers had not acted in line with the requirements at the time in question. I don't agree that the errors or omissions on the documentation highlighted by the representative would put a lender acting reasonably on notice that there might be a problem with the advice given.

Equity release mortgages subsequently were subsequently regulated by the FCA in 2004. But the MCOB rules were not retrospective. So there was no requirement for the sales in 2000 and 2003 to comply with those rules. Nor did the introduction of those rules create any requirement or expectation for lenders to review sales from that time and ensure they complied with the codes of practice that existed at the time of the sale.

It was reasonable for the lender to accept the applications at face value and to understand that Mr and Mrs G had received advice. I can't see any information in the application that would lead a lender to conclude that Mr and Mrs G were vulnerable. Their age alone would not lead a reasonable lender to conclude they were vulnerable.

The advice was given by brokers who were members of the relevant body, the Mortgage Code Compliance Board. The advisers were independent of the lender. I don't agree that there was any obligation for the lender to have oversight of the advisers to the extent suggested here.

Overall, there was no requirement for the lender to carry out a review of the advice that was given at any point. And I don't consider that it was unreasonable for the lender not to do so in the circumstances here. Both the companies that gave advice appear to be going concerns. Any complaint about the advice would be better placed to those firms.

The brokers were also responsible for making sure Mr and Mrs G understood the terms, risks and benefits of the mortgage and further advance. There was also a requirement under the SHIP code for borrowers to receive independent legal advice before taking out the mortgage. We don't have evidence that independent legal advice was given. But that is not surprising given the passage of time.

I don't consider that the interest rates charged were "notably high". The Bank of England base rate was 6% in May 2000 and 3.75% in May 2003. The lenders cost of funding would likely have involved other factors. And the margin applied is not unusual in my experience for this type of mortgage. The mortgages were recommended by third parties and the interest rate was set out clearly and prominently. I can't see the lender has acted unfairly or unreasonably.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mrs G to accept or reject my decision before 22 April 2024.

Ken Rose
Ombudsman