

## **The complaint**

This complaint is about an equity release lifetime mortgage taken out by Mr R in 2004, with a lender I'll call N. N stopped trading in 2008 and following a succession of transfers between lenders, responsibility for the operation of the mortgage currently vests with Phoenix Group Management Services Limited (Phoenix).

Mr R died in 2016; his estate has complained about the steps Phoenix is taking to recover the outstanding mortgage debt.

## **What happened**

The broad circumstances of this complaint are known to both parties. I'm also aware that the investigator issued a comprehensive response to the complaint, which has been shared with all parties, and so I don't need to repeat the details here.

Our decisions are published, and it's important that I don't include any information that might result in the estate of Mr R being identified. Instead I'll provide a brief summary and then focus on giving the reasons for my decision. 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.

The mortgage was in Mr R's sole name, secured on a property which he lived in with Mrs R. Sadly, Mr R died in 2016, and since 2019, Phoenix has been seeking repayment of the mortgage debt. In 2022, the estate complained about the action Phoenix was taking to recover the debt by way of the sale of the mortgaged property, Mrs R's home.

The complaints have been made by Mrs R in her capacity as executor of Mr R's estate; she in turn has authorised a relative, whom I'll refer to as Mr R2, to present the complaint to us. We have dealt predominantly with Mr R2, so where I refer to things Mr R2 has said or done, it can be taken to mean what the estate of Mr R has said or done.

Our investigator didn't think Phoenix's actions were unreasonable in the circumstances. Mr R2 has asked for the complaint to be reviewed by an ombudsman.

## **What I've decided – and why**

I'll start with some general observations. 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.

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. But in doing so, we have to work within the rules of the ombudsman service, and the remit those rules give us.

Under our rules, we can consider a complaint from a consumer. Mr R was a consumer, so he met the definition of an “eligible complainant” set out in our rules. That eligibility now vests in his estate.

Our rules say that a complaint may be brought on behalf of an eligible complainant by a person authorised by the eligible complainant or authorised by law. In this respect, Mrs R, represented by Mr R2, is bringing the complaint on behalf of the estate of Mr R, in her capacity as executor.

But I must explain that, although Mrs R represents the estate, and in turn Mr R2 represents Mrs R, the complainant here remains the estate of Mr R. Mrs R’s and Mr R2’s role is to bring the complaint on the estate’s behalf, in the same way that other consumers might instruct a solicitor or accountant to represent them in a complaint. But this does not entitle Mrs R or Mr R2 to consider it their complaint or to air their own grievances about Phoenix, because they are not its customer. This is the estate of Mr R’s complaint, and their role is limited to putting it forward for the estate.

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

Having done so, these are my conclusions, and the reasons for them.

The starting point here is the mortgage contract. The parties to the contract were originally Mr R and N, now they are the estate of Mr R and Phoenix. Mr R2 challenged whether it was permissible for a mortgage to be transferred from one lender to another without the borrower’s consent.

Our investigator confirmed that the right to do this is contained in the mortgage terms and conditions; that’s actually a standard provision to be found in most mortgage contracts. The investigator also allayed Mr R2’s fears about possible increases in the interest charged on the mortgage by explaining that the interest rate is fixed for the life of the mortgage.

Getting back to the main thrust of the complaint, Phoenix was, and remains, reasonably entitled to expect the outstanding debt to be repaid once Mr R died. That’s when the mortgage fell due for repayment under the terms and conditions underpinning the mortgage contract. I’m aware that the mortgaged property is Mrs R’s home, but close to eight years have now passed since Mr R died, the mortgage has yet to be repaid, and that is the context in which I’ve considered what is fair and reasonable.

When Mr R took the mortgage out in 2004, Mrs R signed a document headed “Agreement and Undertaking”. The effect of this was not to sign away her rights of occupation of the mortgaged property; Mrs R was still allowed to live there. Rather, what Mrs R did by signing the document was to agree that N’s legal charge has priority over her rights under s.70(1)(g) of the Law of Property Act 1925, which deals with overriding interests.

Mrs R would have needed to have had her own independent legal advice when she signed the Agreement and Undertaking agreeing to the legal charge having priority. Mr R2 has cast doubt over whether Mrs R’s interests were protected at the time of signing. However, as I said earlier, this is the estate of Mr R’s complaint and not Mrs R’s. Mrs R is not eligible to complain in her own right, to this service at least, about the circumstances in which she came to sign the Agreement and Undertaking.

This service has no power to determine Mrs R’s property rights, only a court can do that. But in her capacity as executor of Mr R’s estate, Mrs R’s role is to administer the estate and pay off the estate’s debts. As she hasn’t done that in a reasonable time, Phoenix is entitled under

the terms and conditions of the mortgage to take possession, in accordance with the court order granted in its favour in May 2019. Given the amount of time Phoenix has already allowed for Mr R to fulfil her obligations as executor, it's hard for me to conclude that it has been anything other than fair to the estate of Mr R, which is the sole test I must apply.

That begs the question of what happens next. Barring a minor error when a letter was sent by mistake, Phoenix has had its recovery action on hold whilst the case has been with us, which is close to two years. I think it is also important to explain here that lenders will generally agree to put recovery action on hold whilst we look at a complaint, but they don't have to and we can't force them to.

If the Financial Ombudsman Service had that power it would undermine our impartiality between the parties to a complaint. It would also create the potential for consumers to use our service to bring complaints with the intention of having any legal action put on hold, thereby obstructing businesses that were trying to take action through the courts to recover money legitimately owed by the consumers.

I do not wish to alarm Mrs R, but I would not want her to be under any misunderstanding that we would tell Phoenix that it must delay recovery action afresh in the event of any new complaint being raised on behalf of the estate of Mr R about the mortgage. It is a matter for a court to decide whether it is appropriate to adjourn or suspend any legal action, not this service.

### **My final decision**

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 discussion of the merits of it.

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mr R to accept or reject my decision before 27 February 2024.

Jeff Parrington

**Ombudsman**