

## **The complaint**

The estate of Mrs H complains that Aviva Life and Pensions UK Limited lent irresponsibly when selling her an equity release mortgage.

## **What happened**

Mrs H's estate is represented in this complaint by the executor, Mr P. So, when I refer to the assertions of the estate, I'll say "Mr P" for simplicity.

In 2004 Mrs H borrowed approximately £50,000 from Aviva as an equity release mortgage. Under the terms of the mortgage contract no payments were to be made until Mrs H's death. Instead, interest would be rolled-up and paid, along with the capital borrowed, by the estate.

The application, signed by Mrs H on 5 September 2003 says that she was 69 and widowed. And, that the property to be mortgaged was her bungalow – a 45 year old freehold building constructed of stone and tile, with an approximate value of £160,000. It says Mrs H wanted to borrow the maximum amount available based on the actual value of her property and that she wanted the money for various (itemised) home improvements/repairs as well as travel plans. According to the fact find document from the time of the sale, Mrs H indicated that she was in good health.

Sadly, in 2022, Mrs H died. The amount owed by the estate on her mortgage with Aviva was approximately £230,000.

Mr P has complained about a number of aspects of the sale and Aviva's decision to lend to Mrs H. He says:

- Mrs H took the mortgage while suffering with severe mental health problems.
- Most of the funds borrowed (£45,000) were unused and were still in Mrs H's bank account on her death 18 years later. So, the mortgage was not required.
- As the full mortgage was not required, Aviva should recalculate the interest due.
- Mrs H was never required to provide evidence that her home required the repairs listed on the application form.
- Aviva's valuation of Mrs H's property should have identified that the listed repairs to the property were unnecessary.
- The beneficiaries of the estate were unable to assist her because they were unaware of the mortgage until 2022.
- The beneficiaries feel that Aviva should have contacted Mrs H after regulatory changes in October 2004 to make the mortgage easier to understand.
- Aviva made no efforts to invite or encourage Mrs H to renegotiate the agreement on more favorable terms.
- Aviva should have allowed a grace period between the death of Mrs H and the repayment of the mortgage during which interest would not continue to accrue.

Mr P complained to Aviva. In its final response letter dated 12 October 2023, Aviva addressed many of Mr P's concerns and concluded that its recommendation to Mrs H was

suitable for her requirements and needs at the time. Aviva said Mrs H had valid reasons for releasing equity and it discussed alternatives with her. And it said the risks were explained to Mrs H and she accepted them - she had ample time to consider the mortgage and her own solicitor explained the terms of the agreement to her before she signed it.

Dissatisfied with Aviva's response, Mr P asked us to consider the complaint. Our investigator didn't uphold Mr P's complaint. She said she was satisfied Mrs H consented to the mortgage because she signed the application form, provided identification documents and a cheque for the application fee. Our investigator said it was for Mrs H to decide how to spend the money from the mortgage and it was acceptable that she kept some for emergency use. She also saw that Mrs H had indicated she'd spoken to her family about the mortgage, though that was not a requirement. Our investigator hadn't seen evidence that Mrs H was unable to make an informed decision without help.

Mr P didn't agree, commenting further on the aspects of the complaint mentioned above. He's also obtained and provided medical evidence to illustrate the extent of Mrs H's mental health condition at the time of the mortgage sale.

### **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.

To decide this complaint, I've thought about all the aspects Mr P has mentioned – but in particular, whether Aviva's sale of the mortgage to Mrs H was in line with the regulatory and industry standards of the time; and whether Aviva ought to have known Mrs H's health condition meant she wasn't capable of making a financial decision of this nature without the help of friends or family.

#### Mrs H's health

It appears that of particular concern to Mr P is Mrs H's health condition at the time of the mortgage sale. So, I'll address that first. For that to be a deciding factor in upholding this complaint, I'd need to be persuaded by the evidence available that it's more likely than not that Aviva knew, at the time of the mortgage sale, that Mrs H did not have the mental capacity to make such a financial decision. That doesn't mean, I need to be satisfied that Mrs H was suffering with her mental health at the time of the sale – I need to be satisfied that any mental health issues were likely to have been apparent to Aviva. I understand Mr P's concern in that regard, but it's my role to decide if Aviva did anything wrong, specifically in this instance, whether it ought to have acted differently in the circumstances.

Mr P has provided a letter from the medical practice Mrs H attended which supports, to a significant extent, what Mr P says about Mrs H's mental health condition. That said, I have found Mr P's own testimony persuasive in that regard. I've considered that testimony carefully, but I won't detail it here because our decisions are published.

Mr P's testimony paints a picture of a person who may well not have been in a sufficient mental state over a number of years, to make such a financial decision. And, to be clear, I don't doubt the truth of what he says. However, we've also asked Mr P if a power of attorney was appointed to deal with Mrs H's financial affairs. He said *"no-one in the family thought for a moment that [Mrs P] would need one or that she'd take out this sort of loan."*

I'd like to make it clear that I don't have a medical background, so I can't estimate with any certainty how Mrs H's mental health would have been viewed by others at the time of the mortgage sale. But I do find Mr P's response regarding the appointing of a power attorney at

odds with his description of Mrs H's mental health condition and her behaviour. In particular, I'm not persuaded that Aviva ought to have known about Mrs P's mental health condition, if it gave her own family no cause for concern regarding the making of financial decisions.

I've also thought about whether Mrs H's mental health condition may have led to her acting impulsively with regard to her decision to take the mortgage – some of Mrs H's behaviour outlined by Mr P suggests that was a possibility. But it's clear from the evidence available that the process spanned a number of months, including time taken to make repairs to the property to satisfy Aviva that it was of a sufficient standard before it would lend. So, I'm satisfied that the process was not set up to take advantage of any irrational impulse that may have led to Mrs H's decision. And I'm satisfied that Mrs H had time to reflect on her plans and discuss them with family – if that was what she wanted to do. Aviva wasn't expected to compel her to discuss the matter with family – documentation from the time indicates that she did and was encouraged by her family to proceed.

A significant part of the application/sales process was the requirement for Mrs H's own solicitor to explain the mortgage to her and confirm her understanding. I've seen a copy of the signed declaration from Mrs H's solicitor confirming that. I think that requirement represents a safeguard pertinent to the question of Mrs H's apparent mental capacity. Mrs H's solicitor was a party separate from Aviva, employed by Mrs H to ensure she understood what she was agreeing to – though not whether it was suitable for her needs. The solicitor's declaration is an indication that Mrs H understood the agreement and evidence that a legal professional employed by her believed that she understood it at the time of the mortgage sale. The declaration is also an indication that Mrs H's mental health condition was not apparent to someone dealing with her under those circumstances.

#### The 'need' for the mortgage

I can see that Mr P is also particularly concerned that the loan wasn't needed. He says most of the money was still in her bank account when she died. And he says the home improvements/repairs listed on the application form weren't required. Again, I understand his concern here. But there was no requirement on Aviva to ensure the stated need for the loan was genuine or to satisfy itself after the event that Mrs H spent the money as she'd indicated she would.

That said, Aviva did write to Mrs H at intervals after the mortgage sale to enquire about the state of the mortgaged property. It asked her to complete a form in 2009 called "*self-check property questionnaire*". On the form, Mrs H was asked to list works (improvements, alterations, or repairs) that were finished or planned. Mrs H listed the following:

- Double glazed porch, french door, windows, etc.
- Garage facing PVC.
- Electric re-wiring throughout.
- New gas meter.
- Stainless steel kitchen sink.

So, irrespective of Mr P's understanding that there wasn't a 'requirement for repairs' and that the items listed above may not amount to a cost of £50,000, it's clear that Mrs H wanted or believed she needed certain home improvements/repairs. It's not clear from the form whether those improvements were already completed or planned, but they still appear to have been important to Mrs H in 2009.

When considering Mrs H's 'need' for the mortgage, I must be mindful of the fact that she was borrowing against the equity that had accrued in her property. That was money that was

available to her – via the equity release mortgage – to use as she saw fit. She'd also listed plans to travel using that money and Aviva also accepted that as reasonable use of those funds. I'm not aware of any purpose, aside from criminal activity, that Aviva were prevented from accepting as reasonable use of the funds Mrs H borrowed – though it may not have allowed them to be used for business purposes. I accept that it may have been irresponsible of Aviva to lend if Mrs H told them she had ample money elsewhere she could access to pay for her plans. But Aviva was not obliged to ensure the funds were used for 'essential repairs' or to satisfy itself that the funds were actually spent as originally intended.

#### The interest due and a grace period

As I've said above, Mr P's concern about Mrs H's 'need' for the mortgage is understandable given that she had a significant amount of money in savings at the time of her death. He's suggested that Aviva recalculates the interest due with that in mind. Aviva has declined to do that.

I've not seen evidence that the money Mrs H had in savings at the time of her death was the same money she borrowed from Aviva. I don't think Mr P has provided Aviva with any such evidence either. While it appears likely it's the same money, other explanations are possible. But, even if Mr P provided evidence to show the money in Mrs P's account was the same money she borrowed, I wouldn't direct Aviva to recalculate the amount owed to it by the estate. I say that because I haven't seen that the mortgage was mis-sold or that Aviva lent irresponsibly. And, irrespective of how Mrs H used the money, it has been in her possession rather than Aviva's.

Mr P also says Aviva should allow the estate a grace period where no interest accumulates on the debt between the date of Mrs H's death and the date it is repaid. But the terms and conditions of the agreement entered into don't say that. So, I would expect interest to accumulate on the mortgage balance for as long as the balance remains outstanding, in line with how the terms and conditions describe how interest is added.

#### Contact after October 2004 and opportunity to renegotiate the terms

Mr P says Aviva should have contacted Mrs H after the Financial Services Authority regulated mortgage products on 31 October 2004, to make the mortgage easier to understand. However, there was no requirement on lenders to revisit sales made before regulation. So, I wouldn't expect Aviva to have done so in this case.

In any event, I'm not persuaded by the evidence available that clarification of an agreement Mrs H had already entered into would have changed anything. Mrs H was provided with illustrations at the time of the mortgage sale. I haven't seen anything to suggest illustrations presented in a different way would have made her less inclined to borrow for the things she'd listed in her application form or that those (similar) things that were important to her in 2009 would have become less important. Mrs H's only alternative at that time would have been to redeem early – incurring a charge for doing so. I haven't seen anything to persuade me she would have done that if Aviva revisited the earlier sale.

With regard to renegotiating the terms of the agreement, again, there was nothing compelling Aviva to do that. And it's not something I've seen before in relation to equity release mortgages – it isn't standard industry practice, or something required by regulation. So, I don't think Aviva were wrong not to do so here.

#### Summary

Overall, despite the persuasiveness of Mr P's testimony about Mrs H's mental health condition, the evidence available doesn't indicate it's more likely than not that it would have been apparent to Aviva at the time of the mortgage sale. And the evidence suggests she told Aviva she was in good health at that time.

Aviva wasn't obliged to ensure the mortgage loan was 'needed' for a specific purpose such as essential repairs to the home. Mrs H was free to use the money as she saw fit, within reason.

I don't think Aviva have acted unfairly regarding its approach to charging interest after Mrs H's death and I don't require it to recalculate the interest due based on Mrs H's apparent usage of the full amount of the loan.

Finally, I don't think Aviva was obliged to revisit the sale or offer new terms. Though, as mentioned above, it did contact Mrs H a number of times to check on the maintenance of the mortgaged property.

Given all that I've said above, I don't uphold this complaint.

### **My final decision**

My final decision is I don't uphold the estate of Mrs H's complaint about Aviva Life and Pensions UK Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mrs H to accept or reject my decision before 11 June 2024.

Gavin Cook  
**Ombudsman**