DRN-4614420

The complaint

Mr K complains that he was mis-sold a mortgage by a mortgage adviser for which Scottish Friendly Assurance Society Limited is responsible.

What happened

In 2007 Mr K took out an interest only mortgage with a lender I'll call Lender A. He received advice from a mortgage broker – the individual broker firm no longer exists, but it was a member of a network for which Scottish Friendly is now responsible. As such Scottish Friendly has accepted responsibility for this complaint. For ease I'll refer to the firm which gave Mr K advice as Scottish Friendly.

Although the mortgage advice was given in 2007, which is more than six years before Mr K brought this complaint, another ombudsman has already decided that he made his complaint in time within the three year time limit which is also part of our rules – that he first raised his complaint no later than three years from the date he became aware, or ought reasonably to have become aware, that he had cause for complaint. I agree with that decision on our jurisdiction and so what follows is my decision on the merits of Mr K's complaint.

Mr K borrowed around £234,000 on interest only terms over a term of eight years, with a lifetime tracker interest rate (that is, a tracker rate that operated for the life of the mortgage). He was refinancing a previous mortgage and raising some further borrowing. He said at the time that he was self-employed and intended to retire at age 70 – which would have been around seven and a half years after the mortgage completed. Mr K says that his plan at the time to repay the capital was either to re-finance or repay using the proceeds of ending his self-employed business, or to sell the property and downsize, at or before the end of the term.

When the mortgage term ended in 2015, however, that proved not to be possible. The property had fallen in value in the meantime and was in negative equity, so couldn't be sold to raise enough both to repay the mortgage and to allow Mr K to downsize. And for the same reasons, coupled with his age and with changes in lender risk appetite for interest only lending in the meantime, he was unable to refinance.

Since the financial crisis – and especially since changes to mortgage regulation implemented in 2014 – interest only lending is generally less available than previously, meaning any new mortgage would likely need to be on repayment terms with higher monthly payments. For the same reasons, lenders became more cautious about lending into customers' retirement, and maximum age limits for lending became more common. That's why by 2015 it was, in practice, very difficult for Mr K to find a standard mortgage. A lifetime mortgage was unlikely to have been available to him either because the loan to value required would be too high – the maximum loan to value for lifetime mortgages is generally significantly lower than standard mortgages because of the impact of rolled-up interest on the balance over time. The financial crisis also hit Mr K's business and income.

The effect of all this was that Mr K was unable to repay his mortgage at the end of the term, either by re-financing or by sale of his property. After discussions with the lender didn't result in an agreed way forward, Mr K complained to us. By this time he had placed the property on the market, though without success. Lender A offered to extend the mortgage term to December 2020 to allow Mr K more time to market and sell the property. It later confirmed that it wouldn't take further action before October 2021, in light of guidance from the regulator related to the impact of the coronavirus pandemic. Another ombudsman said that the lender had acted fairly and reasonably.

Mr K also complained about Scottish Friendly. He said he had been badly advised and the mortgage was mis-sold. In particular, he said that around the time of the mortgage advice in 2007 the global financial crisis had already started. He said the mortgage adviser ought to have understood the impact the crisis would likely have on the value of Mr K's property and his ability to re-finance, coupled with his age at the end of the term, and ought to have warned him about this. The combination of those factors meant that in reality he would have no way of repaying the capital, which the adviser ought to have known at the time of the advice.

Our investigator didn't recommend that the complaint be upheld, so Mr K asked for it to be reviewed by an ombudsman. I issued a provisional decision to allow both parties a further chance for comment and to provide any further evidence or arguments before I make my final decision.

My provisional decision

I said:

> "As a regulated mortgage adviser, Scottish Friendly was independent of the lender and was acting for Mr K. Under the rules of mortgage regulation as they were at the time, its obligation was to understand Mr K's needs and circumstances and recommend the most suitable mortgage for him – or, if there was no suitable mortgage available, recommend that he not proceed. In dealing with a complaint about mortgage advice, therefore, it's necessary to understand both the borrower's needs and circumstances at the time of the recommendation and the reasons for the resulting recommendation.
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> We've previously found that this complaint was brought in time and is therefore one that we can consider. But nevertheless, the advice was given in 2007 – some sixteen years ago – and as a result there is limited information available. Clearly Scottish Friendly recommended that Mr K take this mortgage with lender A. We have a copy of the mortgage offer which confirms as much. However, the record of the actual advice that he was given does not survive and so I can't see the reasons for the recommendation Mr K was given at the time – or a note of what discussion there was about how Mr K would repay it.
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> Mr K says that the plan was that he would either refinance or sell the property and downsize, and the mortgage was recommended on that basis. In the absence of documentary evidence from the time of the discussions between Mr K and Scottish Friendly and the advice it gave – which, as I say, doesn't survive – I accept Mr K's recollection that the mortgage was recommended on the basis that the repayment strategy was sale and / or re-finance, and that this was the basis on which he took out his interest only mortgage.
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> However, I also note that the mortgage offer issued by lender A says that the repayment strategy was an investment. I'll say more about this discrepancy below.
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> The mortgage offer says that Mr K's property was valued at £275,000 at the time of

the advice, and he borrowed £233,750 – a loan to value of 85%. So clearly the property wasn't in negative equity at the time. And if property prices had risen, rather than fallen, during the mortgage term Mr K would have had more equity by the end of the term.

To make sale of the property feasible on its own to repay the mortgage while also leaving sufficient equity to fund downsizing, a substantial increase in property values would have been necessary – though it seems Mr K had also anticipated having access to additional funds at this point, for example from winding up his self-employed business, to supplement any increased equity. He also told us, in the complaint about lender A, that he had intended, at the time of taking out the mortgage, to substantially improve the property to increase its value (and so the equity available on repayment) during the term.

However because of problems in the housing market, by the end of the term the value of Mr K's property hadn't risen. And, he says, his business and wider finances had also been adversely impacted by the financial crisis in the meantime so the additional funds he expected to have available didn't materialise.

Relying on the sale of the property, in the expectation of increasing house prices or home improvements, is no longer an acceptable repayment strategy for an interest only mortgage.

But that wasn't the case in 2007. It's true to say that one of the reasons it's no longer acceptable is a recognition, following the financial crisis, that sale of the property isn't always a reliable vehicle for repayment and so the rules were changed in April 2014. But in considering this complaint, I must take into account the rules of mortgage regulation as they were at the time – not as, with hindsight, they perhaps might have been, and not as they are now. At the time, there was no prohibition on relying on the sale of the property. And even now there is no specific prohibition on relying on a plausible expectation of being able to refinance.

At the time of the advice, house prices had been increasing for some years. Mr K says that the mortgage adviser ought to have foreseen the financial crisis, or ought to have understood that on some indicators it was already underway, and should have taken this into account. He says that the adviser ought to have understood that the coming crisis would prevent him carrying out the repayment strategy as planned. That's because the crisis would lead to a reduction in house prices as well as impact his self-employed business and income. In turn this would impact his ability to repay by sale of the property and downsizing supplemented by other capital. And the reduced property value, together with his age, would also impact his ability to refinance.

I'm afraid I don't agree. I think that's largely an argument from hindsight – that because we now know what happened, it ought to have been predicted or predictable at the time. I don't know exactly when the advice was given, but it appears to have been around August or September 2007. I say that because the mortgage offer is dated 23 October 2007 and it generally takes a few weeks for an application to proceed to offer stage even if everything runs smoothly. There's also evidence on the complaint file about lender A that the application was submitted on or around 10 September 2007, so it's likely the advice was given shortly before that.

The first indications of problems on the financial markets had appeared by August 2007, and it was in September of that year that problems at the Northern Rock bank became known publicly known, leading to it receiving government support. But much of the wider financial crisis occurred in 2008, after the mortgage advice. I don't think it's reasonable to expect that an individual mortgage adviser, advising an individual customer about their own mortgage, could have interpreted what was known at a macro-economic level in August or September 2007, understood that disparate events at that time were in fact the early stages of a significant wider crisis not separate and individual events, realised what the consequences of that crisis would be for the UK mortgage market, for the UK housing market, the UK economy, and for Mr K specifically, and then based the advice to Mr K on those conclusions.

That would require the adviser to have predicted the future with a degree of certainty and reliability that isn't reasonable to expect. I don't think Scottish Friendly could reasonably have been expected, in 2007, to predict the situation Mr K would find himself in in 2015.

The same is true of the alternative repayment strategy, that of re-financing, and Mr K's other complaint that the mortgage was unsuitable because its term extended into his retirement. I don't think Scottish Friendly could reasonably have been expected to have predicted the later changes to the mortgage market that reduced the availability of lending to older borrowers in 2007. Nor could it – as I've said – have predicted that the property would be in negative equity and that as a result even if he could obtain a new mortgage Mr K wouldn't be able to raise sufficient finance to repay this mortgage.

While the term did extend into Mr K's retirement, as he planned it to be in 2007, I don't think that means the recommendation was unsuitable. Lending beyond retirement isn't inherently unsuitable, as long as the mortgage is affordable and otherwise appropriate for borrower's situation. Mr K's plan was to retire at 70, and the mortgage term exceeded that by only a few months. And, as Mr K has said, his plan in 2007 was that he would repay before the end of the term (and so before the age of 70) in any case. As the strategy for repayment (as opposed to re-financing) relied on funds raised from his business alongside, or instead of, sale of the property, it's sensible to have allowed some time after he retired for his business to be formally wound down or disposed of and funds realised to repay the mortgage. That this didn't prove to be possible in 2015 doesn't mean it was an unsuitable strategy based on what was known and knowable in 2007.

As I say, I don't know what specific advice was given to Mr K, because the record of advice doesn't survive, but I've accepted Mr K's recollection of the reasons for the recommendation of this mortgage and the repayment strategy adopted. However, I don't think it's reasonable to expect that the adviser ought to have predicted the financial crisis and its consequences for the mortgage market generally or for Mr K specifically. The repayment strategy adopted was a permitted one at the time, and there was no reasonable basis for me to find that Scottish Friendly ought to have been able to predict that it wouldn't work out for Mr K. As a result I don't think I can fairly find that the mortgage was mis-sold. At the time it was given, the advice to borrow over the recommended term based on the repayment strategies adopted was not unsuitable.

The mortgage offer says that the repayment strategy wasn't sale of the property, or planned re-financing – it says that Mr K would be relying on an "investment-linked policy", such as a mortgage endowment. As I say, there's limited other documentation surviving from the time. The mortgage application form is silent on repayment strategy, so I don't know whether the lender was told this, or whether this was merely standard wording in the absence of an indication of a different repayment strategy. However, I don't think it makes any difference to this complaint, since I am considering whether the mortgage was suitable based on the repayment strategy Mr K in fact adopted. I've found that it was, and I don't therefore think that it's likely the lender would have declined to lend had it understood the true repayment strategy.

It's also worth noting that the mortgage Mr K took out in 2007 wasn't a new purchase. It was a re-mortgage of an existing interest only mortgage (with, it seems, some additional borrowing). So even if this advice had never been given, Mr K would have needed to find a way of repaying his previous mortgage – and therefore his situation would not be the entire fault of Scottish Friendly even if I were to uphold this complaint. While the previous mortgage balance was lower Mr K had a need for the increased borrowing at the time he took it out and I understand used it to finance improvements to the property. Without those improvements the negative equity position might not have been any better – Mr K would have borrowed less, but his property would be worth less.

In all the circumstances, I don't think there's any basis on which I can fairly uphold this complaint. I'm very sorry to hear of the difficult situation Mr K ended up in in 2015 and afterwards when he was unable to repay the mortgage. Although he already had an interest only mortgage before this advice in 2007, there's no doubt that the impact on him of the financial crisis put him in a very difficult position. But it doesn't follow that Scottish Friendly is to blame for that."

The responses to my provisional decision

Scottish Friendly had no further comments to make. Mr K did – he explained that he didn't agree with my provisional decision. I've taken careful note of everything he said. In summary:

- It's important to note the full history, which includes the action the lender took from 2017 onwards, when Mr K was unable to repay the mortgage following the end of the term, and in particular the background to and history of his previous complaint against Lender A.

- Mr K was subsequently made aware that he needed to make a complaint against Scottish Friendly, which was responsible for the advice to take out the mortgage, and so brought this complaint.

- The mortgage was recommended to him. In giving advice, the adviser should have highlighted the risk of lending into retirement.

- I noted that the record of advice does not survive – this puts Scottish Friendly in breach of the regulatory requirement to retain records of advice.

- In the absence of the record of advice, I appeared to have given Scottish Friendly the "benefit of the doubt". Even in 2007 the risks of lending into retirement and relying on re-financing should have been clear and should have been pointed out. This includes the risk of having to find another lender at around the age of 70 if it turned out that Lender A had no further options for him (as in fact turned out to be the case).

- Mr K pointed to a record of regulatory action against a different firm of mortgage advisers which he said supported his complaint.

- The complaint is not about Lender A's decision to lend, but Scottish Friendly's recommendation to take the mortgage in light of Mr K's circumstances, with no reference to the possible problems that could create for him. Mr K says that reference to his situation before the mortgage offer is not relevant as decisions would have been different if this mortgage had not been recommended.

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 also considered again everything I said in my provisional decision, and have revisited my provisional conclusions in light of Mr K's further arguments.

I don't think the report of regulatory action he points to is directly relevant to this complaint. It's not a record of action against Scottish Friendly or Lender A, it's a record of action against an unrelated firm with a similar name to Lender A. That firm is not involved in this case in any way, and therefore any regulatory findings against it are not relevant. The firm was censured for, among other things, mortgage advice given to interest only borrowers borrowing into retirement – because it didn't consider repayment strategy or post-retirement income. Findings about another firm's failure to give appropriate advice are of limited relevance in thinking about whether Scottish Friendly did give appropriate advice to Mr K. I'll say more about the particular circumstances of this case below.

As I explained in my provisional decision, the record of the advice given at the time doesn't survive. Mr K says this is evidence of regulatory breach, so I've considered what the requirements were. At the time of the advice, in 2007, there was a regulatory rule requiring an adviser to keep records. The rules of mortgage regulation are found in the MCOB section of the Financial Conduct Authority's Handbook. At the time of the advice, MCOB 4.7.17 R said:

> (1) A firm must make and retain a record:
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> > (a) of the customer information, including that relating to the customer's needs and circumstances, that it has obtained for the purposes of MCOB 4.7 [the rules on advised mortgage sales]; and
> >
> > (b) that explains why the firm has concluded that any personal recommendation given in accordance with MCOB 4.7.2 R satisfied the suitability requirements in MCOB 4.7.4 R (1). This explanation must include, where this is the case, the reasons why a personal recommendation has been made on a basis other than that described in MCOB 4.7.13 E (1).
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> (2) The record in (1) must be retained for a minimum of three years from the date on which the personal recommendation was made.

Mr K is therefore right that Scottish Friendly was required to maintain records of the advice it gave him in 2007. However, it was only required to retain them for three years – until 2010 – and so the fact that, in 2023 when his complaint was investigated, those records were no longer available is not evidence that Scottish Friendly failed to comply with its regulatory obligations.

As I said in my provisional decision, given the passage of time – not only is it more than fifteen years since the advice was given, but it is also more than eight years since the mortgage recommended was due to end – it's not surprising that the record of advice no longer survives. In its absence, though, I didn't give the "benefit of the doubt" to Scottish

Friendly. Rather, I accepted Mr K's recollection of the advice he was given.

I explained in my provisional decision why I wouldn't have expected a mortgage adviser to have foreseen the global financial crisis, or factored it into the advice that was given, in 2007. In his response Mr K has made no further points about that, and I don't see any reason to change my mind about that.

In his response, Mr K focussed on the suitability of recommending a mortgage that extended into his retirement. As I've said, the record of advice doesn't survive so I don't know exactly what was discussed about that. Mr K now says that his plan at the time was to retire at age 70 and repay the mortgage either from re-financing or from the proceeds of winding down his self-employed business, or alternatively from selling the property.

Mr K says his planned retirement age was around six months before the mortgage would be due to reach the end of the term. But I don't think this necessarily means that the advice to take this mortgage was unsuitable. Mr K also says that he planned to repay before the end of the term in any event. And even if he didn't do so, but continued with the mortgage until his planned retirement at the age of 70, there would be nothing to stop him repaying the mortgage early at retirement – unless he had taken a new interest rate in the meantime, there would be no early repayment charge at that point. Allowing the term to run on a few months beyond his planned retirement date would give Mr K the flexibility to either repay on retirement, or to retain the mortgage for a few more months while he made arrangements to realise the proceeds of ending his business.

I don't know if that was why the mortgage was arranged for that exact length. But even if it wasn't, for those reasons I don't consider the mere fact that the term ended a few months after his 70th birthday made it unsuitable for him. At the time of the advice, this was not intended to be a situation where a borrower would be tied in for years after retirement to a mortgage they would no longer be able to afford when no longer working. Rather, the mortgage was arranged to coincide with Mr K's retirement. It could have been repaid at that time, with a few months' additional flexibility built in if it was needed for Mr K to finalise his business affairs around his retirement, or arrange another mortgage or sell the property if the proceeds of the business weren't enough to repay. That flexibility seems to me to be a sensible arrangement when dealing with a self-employed person planning to repay an interest only mortgage with the proceeds of retirement. It therefore wasn't unsuitable because of those extra few months.

In fact, repaying as planned wasn't possible at the end of the term, because of changes in Mr K's circumstances in the meantime related to the impact of the financial crisis on him. But as I've already explained I don't think this was something the adviser ought to have foreseen.

Because it's such a large and long-term commitment, there's always a risk in taking out any mortgage – especially an interest only mortgage where the borrower has to find a lump sum to repay the capital at the end of the term. When giving advice it's not possible to remove all risks, especially those that relate to changes of circumstances which can't be foreseen. In recommending this mortgage, in my view what was required for it to be suitable was not a guarantee that the mortgage would be repaid at the end of the term come what may, but a credible plan for repaying at the time the advice was given. Based on what Mr K recalls of the reasons for the advice and his intentions at the time, I'm satisfied such a plan was in place.

The real difficulty here, it seems to me, was not the advice that Scottish Friendly gave Mr K in light of his plans as they were in 2007. The real difficulty is what happened since – because of the impact of the financial crisis on Mr K and his business, his plans and circumstances changed and he was no longer able to repay the mortgage as he'd anticipated being able to do in 2007. But that change of circumstances could not, in my view, have been foreseen at the time of the advice. Based on Mr K's needs and circumstances, and wider financial plans as they were at the time of the advice in 2007, there is nothing that persuades me that this was an unsuitable mortgage for him. Mr K had, based on what was known and knowable, a credible repayment strategy for his mortgage and it wasn't arranged to run substantially into his planned retirement. I've carefully considered everything Mr K has to say. But having done so I'm afraid I remain of the view that his complaint should not be upheld.

My final decision

For the reasons I've given in this decision and in my provisional 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 Mr K to accept or reject my decision before 18 March 2024.

Simon Pugh
Ombudsman