

## The complaint

This complaint is about an equity release mortgage Ms R took out with more 2 life Ltd (referred to here as M2L) in 2023. Ms R wants to repay the mortgage, but would like M2L to waive the early repayment charge (ERC).

Ms R has been assisted in bringing her complaint by a family member acting under a Power of Attorney.

## What happened

I won't set out the full background to the complaint. This is because the history of the matter is set out in the correspondence between the parties and our service, so there is no need for me to repeat all the details here. In addition, our decisions are published, so it's important I don't include any information that might lead to Ms R being identified.

So for these reasons, I will instead concentrate on giving a brief summary of the complaint, followed by the reasons for my decision. If I don't mention something, it won't be because I've ignored it; rather, it'll be because I didn't think it was material to the outcome of the complaint.

In November 2022 Ms R spoke to her own independent financial adviser (IFA) about taking out an equity release mortgage. An enquiry was made to M2L, but at the time the length of the lease on Ms R's property was too short to meet M2L's lending criteria. Ms R took steps to extend the term of the lease and in January 2023 her IFA re-submitted the application for the equity release mortgage.

The application shows that Ms R wanted to borrow £220,400 to provide the deposit for a family member's first home. The application was approved by M2L and, after Ms R took advice from her own independent solicitor, the mortgage completed on 14 February 2023.

The mortgage offer says that an ERC is payable in the following circumstances:

*"You have to pay early repayment charges if you want to repay all or part of your lifetime mortgage during the first 10 years after the start of the mortgage for reasons other than those shown below. In the first 5 years after the start of the mortgage, the early repayment charge will be 5% of the amount repaid. Between 5 to 10 years after the start of the mortgage, the charge is 3%."*

The offer also says:

### ***"Circumstances in Which Early Repayment Charges Do Not Apply***

*Early repayment charges will not apply:*

- *After the initial 10 years of your mortgage;*
- *If the lifetime mortgage is repaid because you are moving home and intend to transfer this lifetime mortgage to your new property;*
- *If the last remaining borrower moves into long-term care;*

- *If the mortgage is repaid from the sale of your home if the last remaining borrower has died;*
- *If, after 5 years from the date of your advance, you repay your loan as a result of selling your home and move to another property which does not meet our lending criteria;*
- *If, after 5 years from the date of your advance you fully repay the loan following a move into sheltered accommodation;*
- *If the mortgage is repaid by the remaining borrower within three years of the death of or entry into long-term care of the first borrower;*
- *If you make a partial repayment in accordance with Section 14;*
- *The total debt is reduced or fully repaid using the money from an insurance company following damage to the property.”*

In January 2024 a complaint was raised with our service about the mortgage. The complaint was that Ms R had recently been diagnosed with a cognitive impairment, and had been suffering with the symptoms at the time the mortgage was taken out. She wanted to repay the mortgage but without the ERC.

The complaint was referred to M2L, which issued its final response on 8 April 2024. M2L didn't uphold the complaint. In summary, M2L noted that Ms R had been given advice by both her own IFA and solicitor before taking out the mortgage, and that neither had had any concerns about Ms R's ability to understand the implications of taking out the mortgage.

M2L noted that the IFA had contacted M2L on 4 January 2024 stating that the IFA had been made aware by Ms R's family that she had now been diagnosed with a cognitive illness, and that the IFA would no longer be able to transact with Ms R. M2L referred this to its vulnerable customers team and flagged the account accordingly.

Overall, whilst M2L sympathised with Ms R's circumstances, it explained that the ERC would apply if the mortgage was redeemed.

Dissatisfied with M2L's response, Ms R's Attorney asked our service to continue with our investigation. After considering the complaint, the Investigator didn't think the complaint should be upheld. He explained that M2L had had no contact with Ms R in relation to the mortgage application. He noted the solicitors acting for Ms R when she took out the mortgage certified that there were no concerns about her ability to understand the mortgage. He also clarified that if Ms R was to move into long-term care, then under the mortgage terms and conditions, the ERC would be waived.

Ms R's Attorney asked for an Ombudsman to review the Investigator's findings. He said (and I summarise) that the solicitor isn't qualified to diagnose a cognitive illness, but that, although he wasn't blaming M2L, he thought M2L had a moral obligation where it comes to light that a client has a mental illness that wasn't apparent at the time.

The Attorney also said that equity release companies are “*preying on and capitalising on the elderly*” and that a solicitor is not a trusted source of diagnosis for the elderly with declining mental health.

### **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.

Having done so, I've reached the same conclusion as the Investigator, for broadly the same reasons.

The crux of this complaint is that Ms R's Attorney says that at the time she was given the mortgage advice and legal advice in January 2023 she was suffering from the symptoms of a cognitive illness, which was diagnosed some time later, but which should have been apparent to the advisers Ms R saw at the time. Given this, the Attorney believes M2L should waive the ERC if the mortgage is repaid early (I am told the family intends to repay the mortgage).

M2L had no direct contact with Ms R in relation to this mortgage application, as it was submitted through Ms R's own IFA. If the IFA had had any concerns about Ms R's cognitive ability, they were under a duty not to proceed with the application.

Likewise, Ms R's solicitor was required to follow the guidance provided by the Equity Release Council in relation to considering whether Ms R was capable of understanding the nature and implications of the transaction she was about to enter into. I agree with the Attorney that a solicitor is not a medical professional, but I'm satisfied that if the solicitor had had any concerns about Ms R's cognitive ability in January 2023, they would not have been able to allow her proceed with the transaction.

I also can't ignore the fact that on 1 November 2023 – ten months after taking out the mortgage – Ms R signed a Power of Attorney. The document says at the start:

***"Restrictions – you must be at least 18 years old and be able to understand and make decisions for yourself (called 'mental capacity')."***

What this means is that if Ms R had lacked capacity, it wouldn't have been possible for her to sign the Power of Attorney; instead, if Ms R lacked the mental capacity to be able to understand or make decisions for herself in November 2023, an application would have to be made to the Court of Protection to appoint a Guardian to act for her.

It follows, therefore, that if Ms R had the mental capacity to be able to understand and make decisions for herself that allowed her to sign a Power of Attorney in November 2023, then she must have had the capacity to enter into the mortgage in January 2023, ten months earlier. Given this, the evidence is persuasive that Ms R would have had capacity to enter into the mortgage in January 2023, and is therefore bound by the terms and conditions of the mortgage, including the ERC.

I note the Attorney has said he doesn't *"blame"* M2L, but instead believes M2L owes a moral obligation to waive the ERC. I can understand his strength of feeling, but I have to decide the complaint impartially, on the basis of the evidence, rather than be swayed by emotion. Given this, in all the circumstances, I'm satisfied that if the mortgage is repaid (in full or in part) for any reason other than one of the exceptions listed above, M2L will be entitled to charge an ERC.

I appreciate this will come as a disappointment to Ms R and her Attorney, but in all the circumstances, I'm unable to find M2L has done anything wrong.

### **My final decision**

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

This final decision concludes the Financial Ombudsman Service's review of this complaint. This means that we are unable to consider the complaint any further, nor enter into any discussion about it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms R to accept or reject my decision before 12 November 2024.

Jan O'Leary  
**Ombudsman**