DRN-5015439

The complaint

Mrs H's complaint arises out of a lifetime mortgage with Aviva Equity Release UK Limited. Mrs H wanted to move the mortgage onto a new property and paid administration and valuation fees of £592. Aviva later declined the application after being advised by solicitors that part of the equity in the property was subject to a trust, which was outside Aviva's lending criteria.

Mrs H says that Aviva should have said at the outset that it would not have been possible to transfer the mortgage onto a new property, before the fees were paid. Mrs H wants the fees to be refunded.

Mrs H is represented in the complaint by a third party, but for clarity I will refer to Mrs H throughout.

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 Mrs H 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 2006 Mrs H took out an equity release lifetime mortgage with Aviva (then known as Norwich Union), jointly with her husband, Mr H. The mortgage terms and conditions state that the mortgage can be moved to another property, provided Aviva is satisfied it is a suitable property. If the new property was at a higher loan-to-value ratio (LTV) than the existing property, an early repayment charge (ERC) might be payable on transfer of the mortgage.

I am sorry to note that Mr H passed away in 2015. Aviva was informed of Mr H's death, and I see that at that time there was an enquiry about redeeming the mortgage from a firm of solicitors. However, the mortgage remained in place, with Mrs H as the sole borrower.

In 2023 Mrs H wanted to move to another property and contacted Aviva about this. Administration and valuation fees totalling £592 were paid, and Aviva was satisfied that the property Mrs H wanted to buy was suitable.

In common with this type of mortgage, Mrs H had her own solicitors acting on her sale and purchase. Aviva instructed its own solicitors (KX) to act for it in relation to redemption of the mortgage on Mrs H's existing home, and transferring it to the new property.

During its enquiries, KX learned that, after Mr H had passed away in 2015, his 50% beneficial interest in the property had been transferred into a trust. KX noted that this was

outside Aviva's requirements for the legal title to be considered suitable, as it meant that a third party had a beneficial interest in the property. Aviva required Mrs H to hold the full legal and beneficial interest in the property.

Aviva said that, as a concession, it was prepared to allow the trust to remain in place on the existing property, but couldn't allow it to continue on the new property. Mrs H was able to repay the Aviva mortgage and buy her new property, but complained that Aviva hadn't treated her fairly. She argued that the only requirements Aviva had set out for transferring the mortgage were in relation to the suitability of the property. Mrs H thought Aviva should refund the fees she'd paid.

Aviva didn't uphold the complaint, explaining that the creation of a trust, other than tenants in common, was a risk to Aviva's security. Dissatisfied with Aviva's response, Mrs H brought her complaint to our service. An Investigator looked at what had happened, but didn't think the complaint should be upheld. He explained that it wasn't until the legal work began on the transfer of the mortgage that Aviva first became aware of the existence of the trust. Because this was after the fees were incurred, he didn't think Aviva was required to reimburse the fees.

Mrs H disagreed and asked for an Ombudsman to review the complaint. Further points have been made, which I summarise below:

- The fact Aviva didn't discover the existence of the trust until 8 years after it came into effect highlights the lack of robustness in Aviva's processes. Aviva made assumptions instead of obtaining factual information, and changed the mortgage into Mrs H's sole name, even though *"half the debt remained the liability of the trust"*.

- There was never any warning from Aviva that if, when writing a Will, creating a lifetime interest trust would cause significant problems preventing a change of property.

- The trust was registered on the property title at H M Land Registry so Aviva should have been aware of it.

- The whole situation could have been avoided if Aviva had asked the right questions when Mr H had passed away.

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. This means that I don't think Aviva has done anything wrong. These are my reasons.

I agree that the information provided in 2006 about moving the mortgage onto another property focuses on the suitability of the property. However, it is not just a question of the bricks and mortar needing to meet Aviva's criteria. There are also legal requirements to be fulfilled so that Aviva's security is not impaired or affected by any third party rights.

I note that when Mr H passed away in 2015 Aviva was informed of this. However, Aviva wasn't provided either with a copy of Mr H's Will, nor with any information relating to the creation of a trust that would affect the property. There was therefore nothing that would, or

could, have placed Aviva on notice that the beneficial interest in the property was not owned 100% by Mrs H.

Aviva would have had no reason to look at entries on the Land Registry once its mortgage was registered. If it wasn't told about the creation of a trust triggered by Mr H's death, I don't see how it could otherwise have been aware of it.

Aviva was also under no obligation to provide legal advice at the time Mr and Mrs H took out this mortgage in 2006 or at any time thereafter about the implications of making a Will that created a trust. Aviva isn't authorised by the Solicitors' Regulation Authority to provide legal advice about Wills or trusts.

Although criticism has been levelled at Aviva for transferring the mortgage account into Mrs H's sole name, this is standard practice across the mortgage and banking industry after one party to a joint account has died. Aviva therefore did nothing wrong in this respect.

Aviva's default position is that a sole borrower must hold the full legal and beneficial interest in a property. The solicitors instructed by Mrs H on her sale and purchase were provided with instructions on what was required by Aviva in relation to ensuring that the legal title would be suitable security. One of Aviva's requirements was as follows:

> *"Trusts are not permitted save for the standard tenants in common situation where there are two Customers and they will be co-owners of the property.* ***Note, where the property currently mortgaged was in joint names but the Property being ported to is in the sole name, the co-owner's interest must have vested fully in the Customer so that they will have the full legal and beneficial interest in the Property."***

The solicitors were required to provide an Undertaking – which is a legally-binding promise – as follows:

> *"we confirm that where the Customer's property with the existing mortgage on it was in joint names but the co-owner has died, their beneficial interest in the existing property is now vested absolutely in the Customer and not to any trust or third party"*.

Because of the existence of the trust, Mrs H's solicitors were unable to meet Aviva's requirements or provide that Undertaking. I'm satisfied that it was only when Mrs H's solicitors confirmed to KX about the existence of the trust that Aviva first became aware of it.

Aviva was only prepared to go ahead with transferring the mortgage if the trust was extinguished, with Mrs H holding 100% of the legal and beneficial interest in the property. This is, in my opinion, perfectly reasonable. If another party has a 50% equitable interest in the property, there may be insufficient equity to redeem the equity release loan out of the borrower's equity share. Aviva is therefore entitled to protect its interests by requiring the borrower to hold the entire legal and beneficial interest. It would be unreasonable for Aviva to be expected to risk its security for the benefit of third party interests.

I can understand how disappointed Mrs H must have been that she wasn't able to transfer the mortgage. But overall I'm not persuaded Aviva is at fault here. This means that there is no basis on which it would be fair or reasonable to order Aviva to reimburse the £592 fees paid by Mrs H.

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 Mrs H to accept or reject my decision before 9 December 2024.

Jan O'Leary
Ombudsman