DRN-3085833

Financial Ombudsman Service

The complaint

The executor of the estate of the late Mr D has complained that a lifetime mortgage that Mr D took out with Aviva Life & Pensions UK Limited was mis-sold.

The complaint has been dealt with throughout by Mr P who is a mortgage adviser acting on behalf of the executor, Mr D1. Mr D1 was one of Mr D's sons.

What happened

I will keep my summary of what happened fairly brief. Mr P has given us some detailed information about Mr D's personal circumstances, which I have read in full. However our decisions are published so it's important that I don't include any information that might identify Mr D.

Mr D met an adviser from Aviva in October 2008 and, after discussing his wishes and needs, Aviva issued a suitability report in November 2008, summarising what had been discussed. Aviva recommended an equity release mortgage of £53,300.

The property was valued at less than Mr D had said it was worth, and so the maximum loan amount was reduced to £45,100 which Mr D accepted.

One of Aviva's requirements was that Mr D needed to have independent legal advice before it would agree to complete the mortgage. Mr D was given advice by an independent firm of solicitors, and I understand the mortgage completed shortly thereafter in January 2009. In common with this type of loan, no repayments are due; instead interest rolls up into the debt, which is repayable either when the borrower dies or goes into long-term care.

Mr D died in April 2020 and Mr D1 raised a complaint with Aviva a few days later that the mortgage had been mis-sold.

Mr D1 detailed his father's personal circumstances and said he'd been his carer since 2006. He said his father was vulnerable, and lacked the capacity to make such an important decision. He said his father didn't need a lifetime mortgage as he received a generous occupational pension, and had savings, and said that all the things listed as the reason for the mortgage would be classed as short-term spending.

Aviva didn't uphold the complaint, and so it was brought to the Financial Ombudsman Service.

An investigator looked at what had happened but didn't think the complaint should be upheld. She was satisfied Aviva's sales process had been followed and that Mr D had received independent legal advice.

Mr D1 didn't agree with the investigator's findings. Because the matter is unresolved, it falls to me to issue a decision.

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.

Under our rules, we can consider a complaint from a consumer. Mr D was a consumer, and so met the definition of an "eligible complainant" set out in our rules. For the purposes of this complaint, the 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, Mr D1 (supported by Mr P) is bringing the complaint on the estate's behalf, and as Executor is authorised by law to do so.

But I must explain that, although Mr D1 is representing the estate, it is Mr D who was Aviva's customer. Mr D1's role is to bring Mr D's complaint on the estate's behalf, in the same way that other consumers might instruct a relative, solicitor or accountant to represent them in a complaint. But this does not entitle Mr D1 (or Mr P on his behalf) to air his own grievances about Aviva, because he is not its customer; his role is limited to putting forward the estate's complaint.

Mr D hadn't complained about the mortgage previously, and it seems that it was only when Mr D1 looked at Mr D's financial affairs after Mr D's health deteriorated and he sadly died that a complaint was raised with Aviva. So in this final decision I have looked at the sale of the mortgage. Without a specific complaint from Mr D about it, I have considered generally whether Aviva did anything wrong when the mortgage was taken out.

The Financial Conduct Authority and the Equity Release Council (formerly the Safe Home Income Plan – or SHIP) are aware that there is potential, years down the line, for adult children to find out their parents had taken out an equity release mortgage without consulting them first. These scenarios – and the fact that equity release mortgages are sold to elderly customers – is why this type of mortgage is (and always has been) subject to a robust and rigorous sales process, with the need for borrowers to have advice from a financial adviser, as well as from an independent solicitor.

Mr D was given independent legal advice from a solicitor of his choice – a solicitor that he'd used a few weeks earlier to prepare his will.

The documents from 2008 show that Mr D went through a very detailed questionnaire with Aviva's adviser. Mr D didn't want to have a family member present – which was his right. There is no suggestion in the documentation that Mr D was suffering from any cognitive impairment which prevented him from understanding what he was doing. Whilst Mr D1 has told us all about Mr D's recent personal history nothing he said there would have been a reason Mr D shouldn't have been allowed to make his own decisions about his own property.

I've carefully considered the letter Mr D1 provided from Mr D's GP in September 2020. The letter is in response to Mr D1's request for information about his father's mental health in 2008. Mr D1 redacted parts of the letter, stating "*I have had to redact some of it, but this redaction does not relate to* [Mr D's] *state of mind, but other medical issues and some activities he took part in.*"

But I don't agree. Fortuitously the parts Mr D1 had redacted were still readable and they *do* relate to Mr D's state of mind.

The part Mr D wanted us to see said that in November 2008 a different doctor had seen Mr D and *"he said his depression was much worse."* Mr D1's submissions about this were:

> *"I draw your attention to the section where the Doctor confirms the following "When he was seen by* [the other doctor] *on the* [date in November 2008]*, he said his depression was MUCH worst", this is ONLY 3 days after he signed up for the lifetime mortgage, he was also taking antidepressants and sleeping pills as he was hearing his dead wife's voice on a night, and "on the occasion I saw him in November 2008", his other Doctor* […] *also states "his mood was low", So he saw 2 doctors in November 2008 and both state he was in a "low mood" and "his depression was much worse" and he was on anti-depressants and sleeping pills."*

But the redacted part of the letter said:

> *"When I saw him in September 2008 he was very well, had just got a new dog and I referred him for an* [minor operation]*."*
>
> *"There was no evidence of psychosis at the time I note he had an assessment by the community mental health team although* [date in September] *where it was decided he did not need any input from the mental health team. They commented that he was comforted by his church along with a number of social outlets including* […]*."*

The full letter doesn't show that Mr D "*saw 2 doctors in November 2008 and both state he was in a "low mood"..."* Instead it shows that Mr D saw one doctor in September 2008 at which time Mr D *"was very well"* and had just got a dog, he also saw the community mental health team in September and it was decided he didn't need any input, and he saw the other doctor in November who commented that Mr D said his depression was much worse. The doctor who wrote the letter ended by saying that Mr D *"seemed to be quite stable in mood"* when he saw him in (September) 2008, although his mood was low in November.

In any event, if the family truly felt Mr D was unable to make his own decisions then I would have expected there to have been a lasting power of attorney in place. It would also bring into question the validity of both the October 2008 and the August 2010 wills as it would be nonsensical to say Mr D didn't have the capacity to understand this lifetime mortgage, but did have the capacity to make a will a few weeks earlier, and then a replacement will two years later.

Having considered everything I'm satisfied there was no medical reason that Aviva would have been aware of that should have prevented Mr D from entering into this lifetime mortgage. The adviser noted Mr D's recent mental health concerns, so he was aware of them, but both he and Mr D's solicitor felt he was in sound mind such that he could enter into this contract (and in the case of the solicitor, that he could also make a will).

The information-gathering exercise identified various specific financial objectives, chief among them to repay two loans he'd taken out in the last year to help one of his sons. The other objectives included at the time were for a holiday, a car, repay credit card debts, put money aside as an emergency fund and £1,000 to cover the fees for taking the mortgage out. By proceeding with the application, Mr D signed to confirm the information given about his personal circumstances and spending plans to be true and accurate at the time.

Mr P (on behalf of Mr D1) said Mr D no longer drove so had no need of a car. But Mr D's bank statements from 2008 show he was paying monthly for car insurance. It may be that car insurance was for a car owned and used by someone else, so equally it might be that the car Mr D said he was going to buy was also to be owned and used by someone else. It may be Mr D intended to start driving again and so either bought – or intended to buy – a car, or it

may be that information wasn't true. We have no way of knowing now what Mr D intended, but I don't need to know that to fairly decide this case. Mr D signed the paperwork to declare the information was correct, and Aviva had no regulatory responsibility to check that Mr D spent the money on what he'd said he would.

Mr P has also said that Mr D didn't have any credit cards and I agree that the bank statements provided don't show credit card payments. But equally Mr P told us that they'd been unable to obtain copies of the bank statements for another one of Mr D's accounts, so it is quite possible that the statements for the other account (or another account Mr P and Mr D1 don't know about which may have been subsequently closed) would show credit card payments being made in the run up to this lifetime mortgage being taken out. We simply can't know, and as I've explained above we don't need to know for this complaint.

Mr P has focussed on what he believes is an omission from the fact finding process which he thinks proves the whole advice was unsuitable. But, as our investigator explained, it seems Mr P has misunderstood the information.

It is clear that Aviva recorded both Mr D's pensions at the time of the sale. The fact find notes his net monthly income to be £1,820 which was made up of his state pension and his occupational pension (the gross annual figure was given as £27,000). In addition it seems Mr P has misunderstood the outgoings part as the mention of £885 just relates to Mr D's unsecured debts, not his total outgoings. Mr D's total monthly outgoings were noted on the fact find to be £2,205 a month and the breakdown for that is broadly supported by the bank statements that have been provided for one of Mr D's bank accounts.

The information captured also indicated that Mr D had no personal savings so it's reasonable to infer from this that Mr D would have need of some form of borrowing if he was to be able to realise his stated objectives. So I've next considered whether something other than a lifetime mortgage would have been a better option.

The documentation from the time shows that other ways of raising the money were discussed. Mr P has questionned why other forms of borrowing weren't considered, saying (amongst others):

> *"Mortgage / re-mortgage his home to raise the funds he wanted, and repay this monthly from his £1400 disposable income from the* [occupational pension].
>
> *Or, if not a mortgage an unsecured or secured loan, and repay from his income.*
>
> *That way he would be paying less out per month, AND retain ownership of his home.*
>
> *What Aviva advised was he sell his home for 40% of its value, immediately losing him £60,000 and his home, and increasing his debts to £130,000 by his death, because they failed to accurately record this extra £1400 a month he received as they had a duty too under the financial ser=vices and markets act 2000 and subsequent legislation.*
>
> *So, you cannot argue the first solution would be best for him, and cheaper, and he would have kept his home."*

But Mr D *did* retain ownership of his home – he took out a lifetime mortgage, not a home reversion scheme. Mr D owned his property until he died, at which time the ownership of the property formed part of his estate. Yes, the estate may have to sell the property to settle the mortgage debt, but that's not the same as Mr D not retaining ownership. Mr D raised a mortgage against his home, just like Mr P has said should have been recommended, the only difference being that this lifetime mortgage didn't require Mr D to make any monthly

payments. It is difficult to see how Mr P believes that Mr D making monthly payments to a mortgage would result in him paying less out per month (or be cheaper for him) than this option of a lifetime mortgage. It may have meant more money being available to Mr D's beneficiaries after his death, but that is very different to it being cheaper and better for Mr D.

Mr D was clear that he didn't want to make any monthly payments and that was his right and his decision to make. It was recorded that he was *"prepared to accept the risk of eroding all of the equity within* [his] *property for the benefit of having as much capital as possible now."* And *"You are unconcerned about leaving a guaranteed inheritence as your family would rather see you enjoy your money whilst you can."*

All together, this indicates to me that an equity release was probably the only viable option for Mr D given the circumstances recorded at the time. The mortgage Aviva recommended and then provided for Mr D raised the money he'd asked for. Aviva's obligation was to provide advice to Mr D in respect of his property, needs and wants; it wasn't to consider whether that would also be the best thing for Mr D's eventual beneficiaries.

Mr D had valid reasons for wanting to borrow the money. Mr D1 has commented on Aviva's statement on the application form *"The lifetime mortgage should not be used to raise cash for the short term",* saying Mr D's reasons for wanting the lifetime mortgage were *"short term cash raising".*

I think Mr D1 has misunderstood that statement. The reference to equity release being unsuitable for short term loans relates to people borrowing money and then paying it back in the short term; not about what the person intends to spend the money on. This is shown by the rest of the statement *"If you can think of a time when you might wish to repay the loan, other than on your death or when you move into long-term care you should consider alternative types of finance. If you choose to repay the loan early you may have to pay a substantial early repayment charge."*

The reason why equity release is unsuitable for people intending to repay the money is that there are normally early repayment charges. That's not relevant here as Mr D didn't intend to – and didn't - repay the money in the short term. The fact Mr D wanted to spend some money on a car and a holiday, for example, is not at all inappropriate and is quite a common thing we see with equity release mortgages. Many equity release customers are retired so they have more time available and wish to spend that time having holidays and undertaking other general leisure activities. It wasn't Aviva's role to tell Mr D how to spend the money as it was Mr D's house and his equity to use as he wished.

That brings me to the interest rate. It's normal for interest to roll up on a lifetime equity release mortgage, and then to attract further interest on a compounding basis. The effect of this would have been demonstrated in monetary terms in the point-of-sale material.

The rate charged is 7.39% fixed for the duration of the mortgage, and that is set out in the offer. I can't know, and won't speculate on, how closely Mr D studied the offer, or how much of the information it contained he assimilated; but the information was set out in a manner prescribed by the Financial Conduct Authority's predecessor as regulator, the Financial Services Authority.

The use of fixed rather than variable rates has always been fairly normal on equity release mortgages, as they enable a lender to forecast the likely growth in the debt over time as the interest rolls up. That's important to the lender, from a risk assessment point of view when deciding how much to lend. But it also gives a degree of clarity to the borrower about how their debt will grow over time, because that forecast can be incorporated into the mortgage offer, as it was in this case.

Mr D1 has questioned the valuation of the property. Mr D had thought the property was worth even more, but the decision to lend wasn't based on Mr D's estimated valuation of £130,000; it was based on an actual valuation of £110,000, and Aviva didn't provide that lower figure; it was provided by the professional who valued the property on Aviva's instruction. Aviva's duty to Mr D in 2008 was to appoint a suitably qualified surveyor to carry out the valuation.

Provided it did that, and I am satisfied it did, Aviva was entitled to rely on the surveyor's opinion when assessing whether and on what terms to lend money to Mr D. It was the valuer who valued Mr D's home at £110,000, and Aviva legitimately relied on that figure when it made the lending decision.

In these circumstances, a lender does not have any liability for any shortcomings on the part of the valuer. I should also make clear that I'm not implying, and it should not be inferred, that there was anything wrong with the valuation. I've not – because I have no power to do so – considered whether the surveyor's opinion was accurate or not. All I can consider here is whether Aviva met its duty to Mr D in 2008. For the reasons I have set out, I am satisfied it did. Therefore it could reasonably rely on the valuation of £110,000 when deciding to lend to Mr D.

This type of mortgage provides that no repayments are made, and interest rolls up over the years. As a result, the amount the debt has increased to can sometimes come as a shock to family members. But that doesn't mean the consumers that took out the mortgage – so here that is Mr D – didn't understand the consequences of the interest roll up and weren't happy to agree to it. As I said earlier, this was Mr D's house and his equity. If he wanted to enjoy his money at a time he still could then it would be highly inappropriate for me to say that Aviva shouldn't have allowed him to do so.

I'm satisfied that paperwork explains in full how the mortgage works, all the relevant conditions that apply and the implications for Mr D of entering into this transaction. The suitability report gives some detail about Mr D's circumstances, wishes and needs. I am also satisfied that it reflects what was recorded at the time by Aviva, based on the information provided by Mr D.

Mr D1 might not agree with Mr D's decision to take out an equity release mortgage. But, being an independent person with agency to act as he wished, Mr D was entitled to make this decision – and to do this without telling his family about it. The reasons Mr D gave Aviva for wanting the money were entirely plausible. It wasn't Aviva's job to check up on Mr D or police his spending to make sure he'd used the funds as he said he was going to.

I fully appreciate it was a shock for the family to discover in 2020 that Mr D had taken out this mortgage in 2009.

Taking everything into account, I'm satisfied, from the evidence at the point of sale, that the advice and recommendation were suitable and that the mortgage wasn't mis-sold. This means that I don't think Aviva has done anything wrong.

My final 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 the estate of Mr D to accept or reject my decision before 27 January 2022.
Julia Meadows
Ombudsman