DRN-3392720

Financial Ombudsman Service

The complaint

Mrs F's complaint is that a lifetime mortgage sold to Mrs F and the late Mr F in 2003 by Key Retirement Solutions Limited was mis-sold. This is because Mrs F's attorney doesn't believe Mrs F and the late Mr F needed most of the money borrowed. He also doesn't believe that Mrs F had any understanding of how the mortgage worked or the effect it would have on the options she would have in the future, given the early repayment charge (ERC) applicable.

Mrs F is represented by an attorney appointed by the Office of the Public Guardian.

What happened

Mr and Mrs F contacted Key in late 2002 to discuss releasing money from their home. They were sold a lifetime mortgage of £89,100, which was the maximum they could take, based on the value of their home.

The fact find completed detailed that Mr and Mrs F were retired, both around 70 years old and were left with around £1,500 per month disposable income after basic outgoings. While their home was worth £350,000, they had some small savings endowment policies and only £3,000 of savings. In addition, they had private medical cover and pre-paid funeral plans. In relation to their priorities it was detailed:

Clients immediate priority is to arrange an appropriate equity scheme and with proceeds "boost" their ready call funds, home improvements, replace car and invest for additional, regular gt'd income. Clients want to focus on improving their current situation and want to raise max cash release Mr & Mrs [F] *are unconcerned about inheritance on the basis that their sons & daughters are financially independent. Moreover they feel that looking after themselves now, in retirement is their top priority. In view of this they want an ER scheme that provides MAX cash and are not concerned as to whether the interest rate is fixed or not. No medium-term needs identified. Long Term: want to ensure that ER scheme will have options to raise more cash (if property valued increased) and the ability to move home if req'd. Clients want to retain ownership of home.*

An illustration for the mortgage was produced by the lender and provided to Mr and Mrs F as part of the recommendation process. This detailed that their property had a value of £270,000 and they were borrowing £89,100. It went on to show how much Mr and Mrs F would owe on the mortgage at 5, 10 and 20 years. This showed that after 20 years they could owe in the region of £614,250. In addition, it gave examples of what the ERC might be, depending on how the index the ERC was linked to fluctuated. These figures varied between zero and almost £30,0000. It was documented that the interest rate that would be applied to the mortgage would be between 4.89% and 10.14% linked to the retail price index.

It was detailed that the mortgage adviser would be referring Mr and Mrs F to a financial adviser within Key for advice on investing some of the proceeds released from the mortgage. However, it has since been confirmed that the same adviser gave the subsequent investment advice Mr and Mrs F received.

Following Mr and Mrs F accepting Key's recommendation, the mortgage lender sent them an offer. As part of the voluntary code Key and the lender followed, Mr and Mrs F were required to speak to their own solicitor about the mortgage on offer. This was to ensure they understood the contract before they went ahead with the mortgage.

Following the release of the funds from the mortgage Mr and Mrs F had further discussions with the adviser at Key. The same fact find completed before the mortgage advice was used, but updated to reflect the actual value of their home being £270,000 and to reflect that they had £86,738 in deposit-based funds from the equity release. It was detailed that on death, the income from the occupational pensions would reduce by 50%, but the joint annuity would continue after the first death. It was detailed that neither Mr F nor Mrs F were concerned about income after the first death, as they felt they would be able to manage and they intended to invest some of the equity release funds for more income. It was highlighted that increasing Mr F's income would put at risk his age tax allowance.

It was detailed that Mr and Mrs F had some small savings endowments of around £2,000 which would mature between 2004 and 2009 – seven in total. They didn't want the maturity proceeds of these policies considered when looking at their financial planning as they had plans for spending the money when it was received. It was documented they wanted to invest £50,000 from the lifetime mortgage for a minimum of five years. The adviser recorded that Mr and Mrs F had decided to retain more cash than originally planned and had decided that they didn't want an annuity because they wanted to retain access to all of their money for the immediate future. He recommended a distribution bond for £36,000 and two maxi-ISAs of £7,000 each.

The 'reasons why' letter the financial adviser sent them following him presenting his recommendation confirmed that they had accepted a recommendation for a distribution bond for £36,000 and £14,000 of maxi-ISAs. It was detailed that they had a low attitude toward risk, and this meant that they were willing to accept a low risk of the loss of some of their original capital. As such, they were happy to consider investment into plans which were indirectly invested in the market, in return for the opportunity of greater growth than could be provided by deposit-based investments. The adviser pointed out that this would limit the potential for significant capital growth. It was confirmed that Mr and Mrs F were retaining £36,000 from the equity release as accessible funds for home improvements, holidays and funeral costs.

The adviser explained that he had recommended the distribution bond because it would meet their requirements for potential growth and the ability to provide an income. The bond was to be set up with a monthly income of 'natural' income so that the capital value of the bond was not eroded. The adviser had said that as Mr and Mrs F didn't need the income at that time, he had recommended it start in month thirteen, so that the bond could benefit from a year's growth before an income was taken. That said, the income could be suspended if Mr and Mrs F didn't need it at that point. It was confirmed the distribution fund was consistent with Mr and Mrs F's low attitude toward risk and it had outperformed its sector over the last five years.

In relation to the maxi-ISAs, the adviser explained that they would provide the potential for long term capital growth and additional income if required. He recommended they be invested equally in two Gilt funds, as they were in line with Mr and Mrs F's low attitude toward risk. It was highlighted that Mr and Mrs F were aware that the ISAs were linked to stocks and shares and there was a risk of them losing some or all of their capital.

The attorney raised a complaint in January 2021 with the mortgage lender about the advice Mr and Mrs F received. He explained that he believed the mortgage had been mis-sold because:

- Mr and Mrs F had sufficient retirement income to have no need for the mortgage. Its advance has been detrimental to the estate and to Mrs F's long-term care options;
- of the £86,000 they still have £36,000 in an investment bond. There is also £39,000 in deposit accounts. While the original advance may have been spent, the deposit-based funds shows that they didn't need it due to the amount of savings they built up over the term;
- between 2003 and 2020 they donated around £50,000 to charity. Prior to the mortgage, they were donating around £1,000 per year and this had quadrupled by 2010. The attorney believes this was because they had so much cash available;
- borrowing such a large amount simply encouraged wasteful spending and poor investment;
- in 2017 Mr and Mrs F were unable to port the mortgage to a retirement property by the lender because it wasn't suitable security. As they couldn't afford to buy the property if they had to pay an ERC on repaying the mortgage, they were unable to move. This is despite it being something they told the adviser they wanted to be able to do when the mortgage was taken out; and
- Mrs F didn't understand how the mortgage worked.

The attorney considered more conventional borrowing should have been arranged for most of the things that he deemed had been necessary expenditure and paid for from Mr and Mrs F's disposable income.

The lender forwarded the complaint to Key and it responded. It didn't uphold it as it considered that Mr and Mrs F had received funds that they wanted and understood what they were doing. In addition, Key considered that the complaint had been made too late, as it was more than six years from the time of the sale complained about, and more than three years since Mr and Mrs F should have known they had cause for complaint.

The attorney didn't agree and made further comment to Key following its rejection of the complaint. He said that Mr and Mrs F may have wanted some money at the time in 2003, but questioned whether they actually need it. He considered they didn't. He said he could prove that more than £50,000 went to charity and the rest, including the 'dreadful distribution bond', was still retained. He said that Key claimed Mr and Mrs F wanted the money for holidays and a car. The amount needed for that would be the lower limit of £25,000.

The attorney suggested that Mr and Mrs F were encouraged by the salesman to take the maximum to increase the commission. The only reason they donated so much money to charity over the ensuing years was due to having no use for the money. He highlighted that there was no mention of charitable donations in the reason for requesting Equity Release before it happened. The bottom line was that Mr and Mrs F's income was sufficient to do everything they wanted to do without the destruction of their estate. He said that giving to charity is one thing, donating your entire estate to the lender's shareholders for zero return was another.

As Key didn't change its opinion, the attorney asked this service to consider the complaint. When we asked Key for its file, it repeated that it thought the complaint was time-barred and so it fell outside our remit.

One of our investigators considered Key's objection to us considering the complaint. He accepted that more than six years had elapsed between the event complained about and the complaint being made. However, he didn't agree about the shorter timescale. He explained that knowing the bare facts about a mortgage via documentation, wouldn't be enough to start the three-year 'clock' when the complaint was about suitability. He was satisfied that the complaint was one we could consider.

Key confirmed, in light of the investigator's comments, that it consented to us considering the complaint. The investigator went on to do so, but he didn't recommend that the complaint be upheld.

The attorney didn't agree with the investigator's opinion. He focussed on the inability of Mr and Mrs F to move home in 2017 despite this having been a specific requirement from the mortgage at the time of the sale. He considered Key would have known that the mortgage recommended might have significant financial penalties for repaying the mortgage if the lender wouldn't agree to the mortgage being transferred to the new property.

The investigator explained that in 2003 Key recommending a mortgage that could be moved to a new property was enough to fulfil Mr and Mrs F's requirement to be able to move in the future. As agreement couldn't be reached, it was decided the complaint would be referred to an ombudsman for consideration.

Following my review of the complaint, I asked for further information about the investment side of the complaint. Key confirmed that the same adviser arranged the mortgage and gave the advice to invest £50,000 of the advance.

The ISA provider confirmed that both of the ISAs had been closed. Two capital withdrawals had been taken from each and then the investment encashed in 2013. The total value of the withdrawals and final encashment for ISA ending in 629 was £9,930.21 and for that ending in 628 was £9,930.24.

The distribution bond provider confirmed the bond was still in force as at the end of 2021 and had a value greater than the amount originally invested. The provider also provided details of the income that had been paid out from the bond. For the period to the point the mortgage was paid off, that figure amounted to £25,958.00.

The mortgage lender confirmed that the mortgage was redeemed in November 2020. Mrs F paid £340,378.24 to do so. Had the amount of the original advance been £50,000 less, the amount to redeem the mortgage as at the same date would have been £149,368.90.

I issued a provisional decision on 10 March 2022 in which I set out my conclusions and reasons for reaching them. I partially upheld the complaint and detailed the calculation Key should complete to establish whether Mrs F had suffered a loss from the advice she and Mrs F had received. Below is an excerpt.

'*Mrs F's attorney has said that he doesn't believe that she and Mr F understood the mortgage when it was taken out. This appears to be due to the fact that they took borrowing to invest for an income that they may not have needed and the ERC that applied to the mortgage meant that Mr and Mrs F wasn't able to move home in 2017.*

There are two separate, but linked, pieces of advice in this case. These being the mortgage advice, which at the time was not regulated, and the investment advice, which was regulated and for which there were strict requirements in place regarding suitability. While it could be argued that the regulated investment advice led on from the unregulated mortgage advice, as the mortgage advance had to be made before there was money to invest, I don't consider that is the situation in this case. I say this as the adviser who sold the lifetime mortgage was the same one that gave the regulated investment advice. As such the two are so closely linked as to be inseparable. As such, I will consider the regulated advice first.

The purpose of the investments was meant to be to provide Mr and Mrs F for an additional income. In total, £50,000 of the mortgage advance was invested. In order for these products

to be considered suitable, there firstly had to be an identified need. Any recommended product then had to fulfil that need and fit with a consumer's risk profile.

In this case it is clearly documented that Mr and Mrs F wanted to invest for an additional income. However, there doesn't appear to be a need for such an income at that time of the recommendation. I say this as Mr and Mrs F were recorded as having a disposable income of £1,500 per month in 2003 as a retired couple. The financial adviser also highlighted that there was no actual need for an income to be generated at the time of the advice, or at an identifiable point in the future. I say this as he recommended that the income from the distribution bond be deferred as Mr and Mrs F didn't need an income at that point and told them that it could be delayed further.

I also note that £14,000 of the money that was available to invest for an income was not invested in products that produced an income. It was invested in equity ISAs for the purpose of capital growth, but with the understanding that this arrangement could be changed to something that could produce an income at a later date, if such a need arose.

I am satisfied that Mr and Mrs F didn't have a need for an additional income in 2003. Any products sold for a non-existent need cannot be described as suitable. In such circumstances, a regulated financial adviser should have declined to recommend any products. As the adviser was also providing the equity release advice, the lack of suitability of the investment products brings into question the need to release the fund for those investments as part of the mortgage advance. I am satisfied that, had the adviser fulfilled his regulatory obligations to Mr and Mrs F, they wouldn't have borrowed the £50,000 that was later invested.

This means that the mortgage advance would reasonably have been £39,100, rather than £89,100. I will now consider whether a lifetime mortgage of that amount was appropriate for Mr and Mrs F in 2003.

At the time of the sale of the mortgage Mr and Mrs F had a good income, but limited savings. It was documented that they wanted some capital for home improvements and a new car, along with having some more accessible funds so they could pay for things such as holidays. It was also recorded that they weren't concerned about the effect of the mortgage on their estates.

The vast majority of lifetime mortgages are applied for on the basis of releasing equity to provide funds to clear exiting borrowing, make large purchases and to enhance the borrower's lifestyle. Mr and Mrs F's reasons, other than the provision of additional income, falls within these categories.

Mr and Mrs F set out what they wanted the money for and there is nothing, other than the need for an income, that would have raised concerns at the time. I am satisfied the information they were given at the time of the sale made them aware of how the mortgage worked, that interest rolled up over the years and the effect it would have on their estates. I am also satisfied that they were willing to have their estates eroded in order to provide for their needs.

I have noted the attorney's comment that having access to this money resulted in 'wasteful spending' on the part of Mr and Mrs F. The attorney is entitled to his view about how Mr and Mrs F conducted their finances over the years, but I would comment that the equity in their home was theirs to do with as they wished. If that meant converting some of it to deposit-based savings they could dip into as and when they wanted in order to improve their lifestyle or give to charity, that was something they were entitled to do.

While I know that the attorney will not agree with this conclusion, I don’t consider the evidence shows that the portion of the mortgage that allowed Mr and Mrs F to achieve their spending goals was mis-sold or unsuitable for them. However, I am satisfied that the investments sold to Mr and Mrs F were mis-sold, and therefore, so was the portion of the mortgage that provided the funding for those investments.

Putting things right

When considering redress this service aims, as far as possible, to place the consumer in the same financial position they would have been in but for the inappropriate advice. In this case that would have been for Mr and Mrs F to have been taken a lifetime mortgage of £39,100, rather than £89,100.

The mortgage lender has confirmed that the mortgage was redeemed on 20 November 2020 and that Mrs F had to pay it £340,378.24 to do so. It has also calculated that if the mortgage advance had been £39,100 it would have required Mrs F to pay it £149,368.90 to redeem the mortgage. This is a difference of £191,009.34.

This is the starting point for the loss calculation, and I am satisfied that 20 November 2020 is the date the calculation should be done. While I know that Mrs F retained the distribution bond beyond that date, I consider she did so in the full knowledge of the issues around its suitability and so accepted the consequences of doing so. As such, I consider that Mrs F’s loss should be calculated as A minis E, where:

A =	*Difference in the sum needed to repay the actual mortgage and that which would have been needed to redeem the smaller advance - £191,009.34.*
B =	*The total that Mr and Mrs F received from the ISAs – £19,860.45.*
C =	*The value of the distribution bond on 20 November 2020, which Key will need to ask the product provider to calculate.*
D =	*The income paid to Mr and Mrs F up to 20 November 2020, which totals £25,958.00.*
E =	*B + C + D*

Key should then add interest at 8% simple per year on the loss calculated from 20 November 2020 to the date of settlement.*

**If Key considers it is required by HMRC to deduct income tax from any interest paid, it should provide Mrs F with evidence of the deduction, which they can use for HMRC purposes if required.*’

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.

Both parties confirmed that they had received my provisional decision. Neither party provided any further evidence or comment, other than Key asking us for assistance, as it was experiencing getting the backdated value for the distribution bond.

As neither party has disputed my conclusions, I see no reason to change them.

Putting things right

Mrs F should be placed in the financial position she would have been in had she and Mrs F taken a lifetime mortgage of £39,100, rather than £89,100.

The mortgage lender has confirmed that the mortgage was redeemed on 20 November 2020 and that Mrs F had to pay it £340,378.24 to do so. It has also calculated that if the mortgage advance had been £39,100 it would have required Mrs F to pay it £149,368.90 to redeem the mortgage. This is a difference of £191,009.34.

The calculation date should be 20 November 2020. Mrs F's loss should be calculated as A minus E, where:

A = Difference in the sum needed to repay the actual mortgage and that which would have been needed to redeem the smaller advance - £191,009.34.
B = The total that Mr and Mrs F received from the ISAs – £19,860.45.
C = The value of the distribution bond on 20 November 2020, which Key has confirmed it is attempting to obtain from the product provider.
D = The income paid to Mr and Mrs F up to 20 November 2020, which totals £25,958.00.
E = B + C + D

Key should then add interest* at 8% simple per year on the loss calculated from the calculation date to the date of settlement.

*If Key considers it is required by HMRC to deduct income tax from any interest paid, it should provide Mrs F with evidence of the deduction, which they can use for HMRC purposes if required.

Key should pay Mrs F the loss identified by the above calculation.

My final decision

My decision is that uphold this complaint in part. In full and final settlement Key Retirement Solutions Limited should complete the actions set out in 'putting things right' above.

Under the rules of the Financial Ombudsman Service, I am required to ask Mrs F to accept or reject my decision before 22 April 2022.

Derry Baxter
Ombudsman