DRN-3882581

The complaint

The estates of Mrs D and Mr D complain about investment advice provided to the late Mrs D and Mr D in 2004 by Sesame Limited. They complain that the advice to take out a lifetime mortgage to put in an investment bond was unsuitable because instead of mitigating any tax liability, it eroded the value of the estates.

What happened

In August 2019 the estates of Mrs D and Mr D complained to Sesame about advice the late Mr and Mrs D received in 2004. In short they said:

- Mr and Mrs D were advised to borrow money in 2004 on their home to invest in a Scottish Widows bond. This was supposed to be inheritance tax planning, but in fact it eroded the value of the estates.

- They complained that a number of other options were not discussed, including change to ownership of the properties, potentially exempt transfers or taking whole of life plans.

- They complained that no account was made for the possible increase in estate value during subsequent years, and that the advice caused financial loss to the estates rather than any mitigation of Inheritance Tax (IHT).

Sesame didn't initially uphold the complaint, and so the estates of Mrs D and Mr D referred their complaint to this service. One of our investigators looked into the complaint. He said:

- The evidence he had seen showed that the late Mr and Mrs D were looking to mitigate IHT as well as looking for some additional income to support their lifestyle.

- The evidence suggested that the late Mr and Mrs D were not looking to invest their existing liquid assets, or encash them for additional capital, and instead were looking on releasing money from their property as they had previously done so in the past. He concluded that the late Mr and Mrs D were looking to maximise their income without increasing their outgoings, and the equity release product they were recommended did this.

- The information around the product itself was clear as to the costs and impact on the value of their home. He therefore didn't agree that the advice was unsuitable.

- The way in which the adviser recommended the late Mr and Mrs D mitigate IHT.

  He acknowledged that there may have been other products on the market, but he said that he was tasked with establishing whether it was fair and reasonable for the adviser to have recommended what he did, and not whether it was not the most suitable or the best product on the market.

- The alternatives to a Discounted Gift Trust (DGT) were discussed with the late Mr and Mrs D. He said there was evidence the adviser had discussed taking out life policies, but these weren't appropriate in view of Mr and Mrs D's health. He also said that the use of gifts, or potentially exempt transfers (PETs) was also discussed – but the late Mr and Mrs D had been reluctant to make full use of PETs as a result of concerns over the impact on their income.

- The DGT was recommended because it allowed the late Mr and Mrs D to retain the benefit of the income from the investment, while at the same time placing the capital outside of their estate.

- The investment itself was suitable for the late Mr and Mrs D based on their objectives and attitude to risk.

The estates of Mrs D and Mr D didn't agree with the investigator's conclusions. They said that the investigator hadn't fully considered the impact of the late Mr and Mrs D borrowing money against the property in order to mitigate tax, where the rolling up of interest had essentially wiped out any possible IHT benefit and eroded the value of the estate.

They said that by the time of the second death, there was little or no equity left in the property. They queried how the compounding interest affected the IHT planning which the adviser was recommending, and said that the total cost to redeem the mortgage in December 2017 meant that the whole estate was essentially jeopardised in order to deliver the income or capital drawdown the late Mr and Mrs D were looking for at the time – when the purpose of the advice was ostensibly to protect the estate, not erode it.

As agreement couldn't be reached, the case was passed to me to decide.

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'd like to thank the representative of the estates of Mrs D and Mr D for the comprehensive submissions during the investigation, and the response to the investigator's assessment. I understand why the advice provided in 2004 continues to cause concern, and I acknowledge the representative's misgivings over the advice to release equity from the property in this way. There's no doubt that, over the long term, this was an expensive form of borrowing.

As the investigator has said, the passage of time has meant that not all the information has been accessible – and I don't think that's unreasonable.

But I'm also satisfied that the information available is sufficient for me to be able to make a decision on this case on the balance of probabilities.

In terms of the equity release product, I'm persuaded it was fair and reasonable for the adviser to have concluded it was suitable for the late Mr and Mrs D based on their objectives and overall financial circumstances.

I say this for the following reasons:

- The contemporaneous notes show that Mr and Mrs D had already raised capital using a mortgage product previously, whereby the proceeds of that mortgage were invested in a bond and income taken from it. So I'm satisfied that they had the knowledge and experience to understand what was being recommended, and the implications on the liability that would be attached to their home in the long run.

- This is also supported by the documentation that was issued to them, which showed quite clearly the financial impact of the compounding nature of the interest that was being charged on such a significant sum.

- Furthermore, the presence of a solicitor further satisfies me that the late Mr and Mrs D were fully aware of the implications. The letter from the solicitor confirms that discussions had been had with them about the impact on their estates, and that they were happy to proceed. The evidence also shows quite clearly that Mr and Mrs M required additional income over and above what they were receiving at the time, and had limited options to achieve this objective.

- Some anecdotal evidence shows that the late Mr and Mrs D may have been considering the possibility of repaying the loan early, as they had done with the previous product. I can see that they had queried the early repayment charges, and had been reassured that those charges only applied in the first 5 years. Whilst I can't be definitive about the original query, as I don't have that evidence, I think it shows that the late Mr and Mrs D had not necessarily intended for the product to run as long as it eventually did. This is relevant, because much of the estates' representative's arguments are about the long term impact of the loan – but whilst this was clearly a relevant consideration for the adviser at the time, it was not the only one and was affected by a number of variables, including the late Mr and Mrs D's decisions around repayment as well as the increase in value of their home.

- The fact find in my view indicates that the late Mr and Mrs D had limited other options for raising the money they wanted to be able to invest. I agree with the investigator that this was one of two key reasons why they were interested in the equity release product – the other being the possibility of extinguishing the existing mortgage they had taken out previously.

- I'm satisfied that at the time, Mr and Mrs D wanted to raise funds in order to reduce their outgoings (by extinguishing the existing mortgage and therefore eliminating £750 repayment per month), and be able to invest the residual balance in an investment that would produce an income for them. Whilst I'm not concluding there were no other alternatives available for them to do this, I'm persuaded it was fair and reasonable for the adviser to have thought that this was a suitable recommendation for them.

- In terms of the DGT, here too I think the evidence shows that most of the alternatives put forward by the estates' representative were not accepted by the late Mr and Mrs D. Life policies were discussed but discounted, and the adviser acknowledged the late Mr and Mrs D's concerns over gifts, but recommended they make use of them anyway.

  It's clear to me that the overarching objective of not reducing their income and maintaining their lifestyle was paramount to the late Mr and Mrs D objectives at the time.

  This meant that the adviser was duty bound to ensure that his recommendations took those objectives into account and gave them the requisite priority. So I don't consider it unreasonable that the adviser gave those concerns precedence over IHT mitigation using other alternatives.

Furthermore, I can see that when the adviser was calculating the estate's liability for IHT, he took the above into account. At the time, this meant a liability for IHT of over £560,000 – so I'm satisfied that moving the residual balance of the equity release into a DGT was a suitable way for the late Mr and Mrs D to mitigate their IHT liability, while at the same time retaining some control over the income they were due to receive.

Unfortunately, it isn't now possible to know precisely what other options, if any, were discussed with the late Mr and Mrs D, or whether in subsequent years the desire to repay the equity release early was overtaken by other events. As the investigator has pointed out, there were significant withdrawals in another bond the late Mr and Mrs D had which suggests there was a greater than anticipated need for income or capital withdrawals. Had this been raised with the adviser at the time of the advice in 2004, it may have been relevant to the recommendations he made.

But from the evidence I've seen, which includes a fact find and contemporaneous evidence of the late Mr and Mrs D's objectives at the time, I'm satisfied that it was fair and reasonable for the adviser to conclude that the recommendation to release equity from the property, and with part of the proceeds set up a DGT, was suitable. I accept that this will come as a disappointment to the estates of Mrs D and Mr D, but I hope they will understand the reasons behind my decision. If they do not accept my final decision, it will not be legally binding – this means that they will be able to pursue alternative avenues against Sesame should they consider it reasonable to do so.

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 estates of Mrs D and Mr D to accept or reject my decision before 24 October 2023.

Alessandro Pulzone
Ombudsman