DRN-4222697

The complaint

This complaint is about an equity release mortgage that Mrs B holds with more 2 life Ltd (M2L). Mrs B is represented by a court-appointed deputy who complains that the mortgage should not have been agreed, as Mrs B lacked capacity.

What happened

The details of this complaint are well known to both parties so I won't repeat them again in detail here. Instead I'll give a brief summary (in my own words and rounding the figures involved) and then focus on giving the reasons for my decision.

The mortgage began in November 2015, with a facility of just over £296,000 and an initial drawdown of around £148,000. A second drawdown followed in 2017, increasing the drawn funds to £200,000. A third drawdown was requested in 2018 but not agreed.

In 2019, the Court of Protection appointed a deputy to manage Mrs B's affairs. In 2022, the deputy raised a complaint with M2L that it should not have lent the money to Mrs B. M2L rejected the complaint and it was referred to this service. Our investigator wasn't persuaded M2L had done anything wrong. Mrs B's deputy has asked for the complaint to be reviewed by an ombudsman.

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.

If I don't comment on any specific point it's not because I've failed to consider it but because I don't think I need to comment on it in order to reach what I think is the right outcome in the wider context. My remit is to take an overview and decide what's fair "in the round".

We're not the regulator of financial businesses, and we don't "police" their internal processes or how they operate generally. That's the job of the Financial Conduct Authority. We deal with individual disputes between businesses and their customers. In doing that, we don't replicate the work of the courts. We're impartial, and we don't take either side's instructions on how we investigate a complaint, or when we have enough information on file to decide it.

If the available evidence is incomplete and/or contradictory, we reach our findings on what we consider is most likely to have happened, on the balance of probabilities. That's broadly the same test that the courts use in civil cases.

In this decision I have to look at the provision of the mortgage (in terms of regulatory requirements and what was regarded as good industry practice *at the relevant time)* and considered generally whether M2L did anything wrong when the mortgage was taken out and the drawdown permitted. In doing that, I can give no regard to the regulatory standards as they are *today*, or to any hindsight that the intervening years might have brought.

I've considered all of this very carefully; it's for us to assess the reliability of evidence and decide how much weight should be attached to it. When doing that, we don't just consider individual documents in isolation. We consider everything together to form a broader opinion on the whole picture.

Our investigator's conclusion was that M2L had followed its standard procedures correctly. That's fine as far as it goes, but the true test – and what the outcome turns on – is whether M2L had (or should reasonably have had) any reason to suspect all might be well, such that it needed go *beyond* its normal procedures and make further enquiries that might have resulted in it deciding it should not lend.

As part of the evidence to support her case, Mrs B's deputy has provided copies of two assessments of Mrs B's capacity, conducted in August 2015 and December 2018 respectively. Both assessments concluded that she was unable to make decisions about her circumstances and affairs. The 2018 report post-dates the two transactions I'm looking at here, so is not relevant to my decision.

The August 2015 report, however, predates the first drawdown, by about three months, so is relevant. However, M2L didn't know it existed at the time. Bearing in mind the approach I set out above, I have to decide whether there were reasonable grounds for M2L to have made enquiries that might have resulted in the August 2015 capacity report coming to light.

M2L was only one of three separate parties involved in Mrs B taking out the mortgage in November 2015. The other two were:

- a third party intermediary I'll refer to as "K" that advised Mrs B to take out the mortgage and recommended it as being suitable for her needs and circumstances; and
- a firm of solicitors I'll refer to as "A" that certified that having met Mrs B face to face, it had fully explained the nature of the transaction and that she had confirmed her desire to go ahead with it.

It wasn't M2L's role to replicate the work of K or A; provided the application met M2L's lending criteria – which I'm satisfied it did – M2L wasn't required to make its own judgement on whether the mortgage was suitable and whether Mrs B knew what she was doing in applying for it. In both cases, those assessments had already made by the parties required to make them. M2L would therefore have had no reason to insist on further enquiries or investigations that may, or may not, have resulted in the August 2015 capacity report coming to light.

As far the 2017 drawdown is concerned, it's important to remember that this did not involve a new underwriting decision by M2L on whether and how much it was willing to lend. The lending decision already made in 2015 was that M2L was willing to lend Mrs B a little under £300,000. All M2L was being asked in 2017 was for some more of the money it had already agreed to lend to be released.

I'm aware that in this instance, Mrs B's daughter initiated the first contact with M2L. She called M2L to say Mrs B wanted to draw some more money; M2L did the right thing by saying it could not agree to release funds on the say-so of Mrs B's daughter. Instead, it posted out an application form, which Mrs B then signed and returned. Satisfied that the signature was Mrs B's, M2L released the second drawdown.

There's nothing untoward in that; it's quite common for an elderly person to have a relative or friend assist them informally in the organisation of their affairs, of itself, that's not

indicative of a lack of capacity. In such informal situations, the third party assists, but only the principle party can transact; and that's exactly what happened in the case of Mrs B's 2017 drawdown.

I don't know, and won't speculate on, whether the involvement of Mrs B's daughter in this transaction (or indeed the abortive attempt at a third drawdown in 2018) was any less benign than merely helping Mrs B. The test for me, again, is whether there was any reason for M2L to suspect it might be, at least as far as the 2017 transaction is concerned.

In all the circumstances, I'm not persuaded there was. Based on the available evidence, and without the aid of hindsight, I find that M2L acted reasonably and fairly in respect of both the original advance and the later drawdown.

My final decision

I don't uphold this complaint. My final decision concludes this service's consideration of this complaint, which means I'll not be engaging in any further discussion of the merits of it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 9 August 2023.
Jeff Parrington
Ombudsman