DRN-4383627

The complaint

This complaint has been brought by Ms B on behalf of her parents, Mr and Mrs B, acting under Powers of Attorney granted by them. Ms B says that an equity release mortgage taken out by Mr and Mrs B in 2005 was mis-sold by Aviva Life & Pensions Limited.

To settle the complaint, Ms B wants all interest on the loan cancelled so that all her parents are required to pay is the £50,000 they borrowed. Alternatively, if the complaint is not upheld, Ms B wants there to be a compromise where the mortgage comes to an end as at July 2023, and the amount outstanding at July 2023 is repaid as and when the property is sold.

What happened

I do not need to 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 the details here. In addition, our decisions are published, so it's important I don't include any information that might lead to Mr and Mrs B being identified. So for these reasons, I will instead concentrate on giving 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 August 2005 Mr and Mrs B arranged to see an advisor from Aviva (then known as Norwich Union) to discuss an equity release mortgage. After considering the advice, Mr and Mrs B applied for a mortgage of £50,000 which was at a fixed rate of interest of 6.69%. In common with this type of mortgage, no monthly repayments are due; instead, the balance is paid off when the mortgage comes to an end, usually on the death of the last surviving borrower, or if the borrower(s) require long-term nursing care.

The mortgage can be repaid at any time, although an early repayment charge may be payable. Additionally, the mortgage can be transferred onto another property, subject to meeting Aviva's lending criteria at the time of applying.

In April 2023 Ms B was granted Power of Attorney for both Mr and Mrs B. In May 2023 a complaint was raised with Aviva by Ms B that the mortgage had been mis-sold. Aviva didn't uphold the complaint, so it was brought to our service.

The investigator thought the complaint had been raised out of time but Aviva consented to us considering it. After looking at the merits of the complaint, the investigator was satisfied that the mortgage hadn't been mis-sold.

Ms B disagreed with the investigator's findings and asked for an ombudsman to review the complaint.

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 will begin by explaining who is the eligible complainant in this case.

Under our rules, Mr and Mrs B are consumers, and so meet the definition of an "*eligible complainant*" set out in our rules. 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, Ms B is authorised by the Powers of Attorney granted by Mr and Mrs B to bring the complaint on their behalf.

But I must explain that, although Ms B is representing Mr and Mrs B, it is Mr and Mrs B who were Aviva's customers at the time of the events complained about, and they continue to be. Ms B's role as Attorney is to bring the complaint on behalf of Mr and Mrs B, in the same way that other consumers might instruct a solicitor or accountant to represent them in a complaint. But this does not entitle Ms B to air her own grievances about Aviva because she is not its customer; her role is limited to putting forward Mr and Mrs B's complaint.

I note from the correspondence that Ms B has expressed her own concerns about what she perceives to be Aviva's failings – and I do not doubt her strength of feeling about this. But because Ms B is not Aviva's customer, this final decision is limited to consideration of Mr and Mrs B's complaint about Aviva.

Mr and Mrs B hadn't complained about the mortgage previously. Therefore, without a specific complaint from Mr and Mrs B about it, I have considered generally whether Aviva did anything wrong when the mortgage was taken out.

Before doing so, I agree with the investigator that the complaint has probably been brought out of time – as it's more than six years since the mortgage was taken out, and more than three years since Mr and Mrs B first knew, or ought to have known they had cause to complain. I say this because they received annual statements for the mortgage and so would have been aware of the increasing debt, and would have known about this within six years of taking the mortgage out.

In this context, I must explain that although Ms B says she only found out about the mortgage less than three years before the complaint was brought, the date when Ms B first thought there was a problem is irrelevant, because, as I've explained above, she is not the eligible complainant. However, Aviva has consented to us looking at the complaint and so I am satisfied I can consider the merits of it.

This mortgage was arranged pursuant to the Mortgages and Home Finance: Conduct of Business Sourcebook (MCOB. The mortgage was also covered by the rules of what was then known as the Safe Home Income Plan (now the Equity Release Council). The Financial Conduct Authority and the Equity Release Council are (and have always been) aware that there is potential years down the line for family members to raise a complaint, sometimes in circumstances where the borrowers themselves are no longer able – for reasons of illness or infirmity, or because they have died – of giving their own explanation for why they took out the mortgage.

This – 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 such a robust and rigorous sales process, with the need for borrowers to have advice from a financial adviser, as well as separate legal advice from their own independent solicitor. (In this case, the financial adviser worked for Aviva, and sold only Aviva products. There is nothing untoward about this, as it was disclosed at the outset.)

The mortgage was taken out 18 years ago, and so the most reliable evidence is the contemporaneous documentation compiled at the time the mortgage was discussed with Mr and Mrs B. The factfind recorded Mr and Mrs B's circumstances, wishes and needs, and this was reflected in the letter of recommendation and the mortgage illustration that was issued to them. I'm satisfied Aviva was entitled to accept what it had been told by Mr and Mrs B as being truthful and accurate.

Therefore, although Ms B is sceptical about the reasons Mr and Mrs B gave Aviva for wanting to borrow the funds, there was no reason for Aviva to question the veracity of what Mr and Mrs B told them. Mr and Mrs B gave a valid reason for wanting to borrow the money, and they had no other means of raising the funds, as they did not want to have the burden of monthly repayments on a standard mortgage. I don't know if Mr and Mrs B actually used the money they borrowed for the purpose they told Aviva they were borrowing it for. However, Aviva wasn't required to 'police' Mr and Mrs B's spending; they were free to do with the money as they wanted.

Mr and Mrs B confirmed they did not want a relative or close friend to attend the meeting with them. That's not unusual, as people are entitled to keep their financial affairs private. Aviva couldn't force Mr and Mrs B to do this, or to disclose what had been discussed to family members. That would have been a gross intrusion on Mr and Mrs B's privacy, as well as a breach of data protection legislation.

There was also discussion about Mr and Mrs B's health, and although Ms B argues that Mr B's illness means that his cognitive function was likely to be impaired, there is nothing in the documentation to suggest that Mr B did not take a full part in the discussions with Aviva. In this context, I note that Ms B refers to him as the 'Principal Borrower'. This was, however, a joint mortgage where both borrowers have equal standing and the documents show that both Mr and Mrs B were involved fully in the discussions with Aviva.

If Aviva had concerns about Mr and Mrs B's ability to understand what they were doing, I'm satisfied the adviser would not have proceeded. There would have been no benefit to Aviva in going ahead in those circumstances, because if Mr and Mrs B's solicitors thought their clients lacked the capacity to enter into the mortgage, they were under a duty to advise Aviva of this.

Before taking out the mortgage Mr and Mrs B were given advice by their own solicitors, a firm which they chose themselves. Ms B now says that the legal advice was inadequate; if that is what Mr and Mrs B believe, then they will need to raise that with the solicitors who acted for them. Aviva was entitled to rely on the certificate completed by the solicitors which confirmed Mr and Mrs B had been given independent advice about the nature and effect of the mortgage they were taking out.

Ms B is also unhappy about the interest rate on the mortgage, which she says is *"egregious"*. However, the fixed rate of interest for the lifetime of the mortgage was set out in the documentation, and so Mr and Mrs B would have been aware of this at the time they took the mortgage out.

In August 2005 base rate was 4.50%, so the contractual interest rate of 6.69% is not an excessive margin above that. It is standard industry practice for equity release mortgages to have fixed rates of interest. As the contract specified that this was a fixed rate, there was no obligation on Aviva to vary the rate to match fluctuations in the Bank of England Base Rate, as the interest rate was not linked to Base Rate movement.

It's also important to remember that equity release mortgages are generally charged at a higher rate of interest than standard residential mortgages. That's because the money is

advanced on the basis that the lender will not receive any return on those funds for many years. Equally, Mr and Mrs B knew they had the use of the money without needing to make any repayment.

I appreciate that compound interest over the years since the mortgage was taken out has increased the mortgage account balance, but I'm unable to find Aviva did anything wrong in structuring its product in this way. It is the same product structure used for most equity release mortgages, and so is standard across the industry. The very nature of this type of mortgage is that, because no repayments are made, the balance increases more than it would with a standard residential mortgage. But because the mortgage isn't repayable until the last surviving borrower has died or gone into long term care, borrowers have the security of knowing that their home is secure.

Overall, I've found nothing to persuade me there was anything untoward in the arrangement of this mortgage, or that the advice given by Aviva was unsuitable. Mr and Mrs B were able to raise the £50,000 they told Aviva they needed, without the need to make monthly repayments, and in the knowledge that their home would remain theirs. They were happy to proceed after receiving independent legal advice from their own solicitors.

In all the circumstances, I'm unable to find Aviva has done anything wrong. This means that I'm not upholding the complaint.

Ms B said that if the complaint isn't upheld she would like Aviva to allow the mortgage to be repaid at the level of the outstanding balance at July 2023, regardless of when the mortgaged property is sold. However, I'm not upholding the complaint, which means I will not be recommending any redress or settlement that is different from the terms of the mortgage contract.

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 correspondence about the merits of it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B and Mrs B to accept or reject my decision before 9 November 2023.
Jan O'Leary
Ombudsman