DRN-4260921

The complaint

Mr and Mrs E have complained that more 2 life Ltd (M2L) declined their application to port (transfer) their equity release mortgage onto a new property because its lending criteria had changed. Mr and Mrs E say that M2L is in breach of the Consumer Rights Act 2015 by changing its lending criteria without their knowledge or consent.

To settle the complaint, Mr and Mrs E want M2L to compensate them. They say the compensation should be at least £50,000, to take into account the increased interest they will incur on a new equity release mortgage with another provider.

Mr and Mrs E are represented in the complaint by their financial adviser, but for clarity I will refer to Mr and Mrs E throughout as if all submissions have been made by them.

What happened

In 2019 Mr and Mrs E, on the advice of an independent financial adviser, took out a lifetime equity release mortgage with M2L on a new build property. The mortgage is a Maximum Choice Plan and the relevant parts of the mortgage offer say:

> *"If you buy a new home you **may** be able to transfer your lifetime mortgage to your new home."* (my emphasis)
>
> *"If you move home and want to transfer this lifetime mortgage to the new property, you can do so, subject to the new property meeting our lending criteria at the time."*

In 2022 Mr and Mrs E wanted to move to another new build property. They applied to port their lifetime mortgage but the application was declined. This was because M2L's lending criteria had changed since 2019, and it would no longer allow applications on new build properties where the applicants were the first occupiers.

Mr and Mrs E complained, saying that the mortgage was originally taken out on a new build property, and so there was no change to the actual terms of the mortgage. M2L didn't uphold the complaint, so it was brought to our service.

An investigator looked at what had happened but didn't think the complaint should be upheld. Mr and Mrs E asked for an ombudsman to review the complaint.

In addition to reiterating all the points previously made, Mr and Mrs E want us to rule on whether M2L is in breach of legislation, specifically the Consumer Rights Act 2015, in changing its lending criteria. They also argue that, under the mortgage terms and conditions, a change to lending criteria is a variation of the mortgage contract that can only be done if Mr and Mrs E have been given prior notice of the change and have consented to it.

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 confirm I've read everything provided by the parties, and I note the detailed submissions made on Mr and Mrs E's behalf by their broker detailing what he claims are breaches by M2L of the mortgage terms and conditions, and of the Consumer Rights Act 2015. However, I'm afraid I don't agree that M2L has acted unfairly. These are my reasons.

I will begin by explaining what is meant by 'porting' a mortgage. A mortgage loan and a mortgage product are two different things. A loan is the underlying transaction in which money is lent; the product is the initial terms that sit on top, including the interest rate.

In this case, Mr and Mrs E had borrowed £70,000 at a fixed interest rate of 5.46%. When they decided to move they didn't want to borrow any more money, but as interest rates had risen since they took out the mortgage in 2019, they wanted to port the mortgage interest rate product.

So porting a mortgage in this context actually means porting the product. In moving properties, the borrower pays off the old mortgage from the proceeds of sale. They also, separately, apply for a new mortgage to be secured on the new property, and if the application to port is successful, the interest rate product they wanted to port will be applied to the new mortgage.

In other words, porting a mortgage doesn't mean moving the mortgage itself from one property to another; mortgages are not transferable in this way. It means ending one mortgage and taking another, but moving the interest rate product across.

Consequently, Mr and Mrs E were required to make a mortgage application to M2L in order to port the interest rate onto a new mortgage on their new property. The mortgage contract they'd agreed to in 2019 said that they could do this, provided that, at the time of the application, the new property met its lending criteria.

It's important to note here that, when they took out the mortgage in 2019, Mr and Mrs E had their own financial adviser and their own solicitors advising them. M2L didn't give them any advice. It was the financial adviser's and solicitors' roles to advise Mr and Mrs E about the mortgage, including the circumstances in which the mortgage could be ported – including the fact that this would be subject to meeting M2L's lending criteria at the time of the application.

On 2 November 2021 M2L changed its lending criteria. Amongst other things, it would no longer lend on a new build property where the applicants would be the first occupants. I'm satisfied this information was disseminated to brokers who sold M2L product and was published on M2L's website, which is accessible to the public.

I must explain here that M2L is entitled to set its own lending criteria. Decisions that M2L makes in respect of what those criteria are, its attitude to risk, whether it should lend and, if so, on what terms are clearly discretionary matters for M2L's own commercial judgement that I would not interfere with.

Mr and Mrs E argue that M2L's porting and lending criteria are contractual terms and that they can only be changed if Mr and Mrs E have been given prior notice pursuant to the mortgage terms and conditions and have agreed to the changes. They say that, by changing its lending criteria, M2L has breached the Consumer Rights Act 2015.

However, I'm satisfied that M2L's lending criteria are not contractual terms which are subject to negotiation and agreement between Mr and Mrs E and M2L. Furthermore, the potential for porting is a feature of the mortgage, but it is not a contractual term which obliges M2L to offer a new mortgage. That is because, for any new mortgage application, M2L is required to assess the application against its criteria applicable at the time of the application.

I'm satisfied that the mortgage offer does not give any guarantee that the mortgage can be ported. It says that the mortgage *"may"* be ported, and that this is *"subject to the new property meeting our lending criteria at the time"*.

I don't have any power to determine whether or not M2L is in breach of legislation; only a court is able to do so. But I am required to take into consideration the law, regulations and good industry practice when reaching my decision.

This is a regulated mortgage and was sold in accordance with the Mortgages and Home Finance: Conduct of Business Sourcebook (MCOB). In 2019, under MCOB 9.4.83(g) the mortgage illustration which accompanied the mortgage offer had to provide:

> *"details of whether or not the lifetime mortgage is portable on moving house and a brief explanation of any conditions or restrictions that apply including whether there are any restrictions on changing the terms of the lifetime mortgage during the period in which any early repayment charges apply (a reference to another document may be made in order to provide the customer with further details of the conditions or restrictions)"*

The mortgage offer was clear that any application to port the mortgage was subject to the property meeting M2L's lending criteria at the time. Those criteria are published online and so I'm satisfied that they are available to customers (and their advisers) who might want to port their mortgage in order that they can ascertain whether or not the application would meet them. Therefore reference to lending criteria in the mortgage offer is sufficient, in my opinion, to satisfy M2L's regulatory obligation in this regard.

Mr and Mrs E argue that M2L wasn't entitled to change its lending criteria without notifying them in advance. However, I'm not persuaded that M2L was under any obligation to notify them – or indeed any other customer – individually about changes to its lending criteria that might, or might not, affect them at some point in the future. If M2L was required to do this, the logistics would be immense; staff would have to monitor every mortgage account on a daily basis, check if there'd been any changes to lending criteria specific to each customer's particular mortgage that might affect them in the future and contact each individual customer. That's simply not feasible or realistic, and not something I'd expect M2L to do.

Furthermore, as I've stated above, because lending criteria are not contractual terms, they are not covered by the provisions in the mortgage terms and conditions which relate to M2L's obligation to give 30 days' notice of any variation to the mortgage contract. In addition, there is nothing in the mortgage terms and conditions which states that M2L is under any obligation to port the mortgage onto a new property.

At the time the mortgage was taken out, M2L was covered by Principle 7 of the FCA's Treating Customers Fairly (TCF) requirements, which stated: "*A firm must pay due regard to the information needs of its clients and communicate information to them in a way that is clear, fair and not misleading*". I'm satisfied that M2L's communication was clear that any application to port was subject to lending criteria at the time.

I'm satisfied that, by notifying brokers of the changes to its lending criteria and by publishing those criteria on its website (which is accessible to the public), M2L fulfilled its obligation to notify customers of the changes it had made. I'm therefore not persuaded that there was any lack of transparency on the part of M2L in its communication that renders the mortgage contract inherently unfair. However, as I've stated above, it would be for a court to determine whether the contract terms between Mr and Mrs E and M2L are fair or not.

It's unfortunate that, before they applied to M2L for the new mortgage, Mr and Mrs E had already committed to selling their existing property and had agreed a completion date for the new purchase with their builder. I understand that Mr and Mrs E sold their property in February 2023, and would have paid an early repayment charge (ERC) to M2L on doing so.

The ERC is a contractual term, and because Mr and Mrs E's application to transfer the mortgage to their new property didn't meet M2L's criteria, under the terms of the contract, the ERC was due and payable. I can't see that this is unfair, as it's something Mr and Mrs E agreed to when they took out the mortgage.

I appreciate that when Mr and Mrs E took out the mortgage they'd intended it to be their 'forever' home, but due to unforeseen family circumstances, they needed to move to another property. I doubt in 2019 they'd thought about porting, as moving house wasn't something they were anticipating. I do have sympathy for the position Mr and Mrs E found themselves in. But I have to put to one side my feelings of empathy, and decide the case on the basis of the evidence.

Having considered the evidence, I'm satisfied that M2L hasn't done anything wrong. The mortgage offer was clear that porting was subject to meeting lending criteria at the time of the application, M2L notified brokers and published in the public domain (on its website) details of the changes to its lending criteria at the time of the changes and, having done so, was entitled to decline the application.

If Mr and Mrs E decide not to accept my decision, it won't be legally binding. This means they are free to pursue their complaint against M2L in court, where they would be able to raise their arguments about alleged breaches of the Consumer Rights Act 2015. I would, however, suggest Mr and Mrs E take legal advice from a qualified solicitor before embarking on any legal action.

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 discussion about it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs E to accept or reject my decision before 6 February 2024.

Jan O'Leary
Ombudsman