

## **The complaint**

Mr N complains about the actions of Southern Pacific Mortgage Limited in respect of his mortgage with it after he became bankrupt. He says it:

- Unfairly tried to pursue him for the outstanding debt.
- Incorrectly applied a second default to the mortgage account in 2019.
- Failed in its duties whilst selling a repossessed property as it was undersold.
- Unfairly applied fees and charges to the account throughout the term of the mortgage.

## **What happened**

In 2007, Mr N took out an interest only mortgage with Southern Pacific Mortgage Limited (SPML). The mortgage was for £391,000 (excluding additional fees to be added to the loan) with a term of 15 years.

The mortgage has fallen into arrears several times over the term and in March 2019 Mr N decided to surrender the property. Before SPML could proceed with repossession and marketing the property, it needed Mr N to sign and return a Surrender of Property (SOP) form.

SPML sent the SOP form on several occasions to Mr N. As SPML didn't receive the signed form and because the arrears had continued to increase, it started legal proceedings in November 2019. Mr N returned the SOP form in December 2019, so SPML cancelled legal proceedings and took possession of the property on 20 December 2019.

The property sold for £305,000 in July 2020 leaving Mr N with a shortfall of £137,547.28. However, in August 2020 SPML wrote off the remaining shortfall debt.

Mr N says he was declared bankrupt on 19 December 2008, at which point SPML registered a default for his mortgage account. When the property was repossessed in December 2019, Mr N says SPML applied a second default to the mortgage account which he says it shouldn't have done.

Mr N says SPML pursued him for the mortgage debt after he had been made bankrupt. He says it shouldn't have done this as it is contrary to the Insolvency Act 1986. Therefore, he wants SPML to remove all history of the mortgage from his credit file and return all the money he was wrongly charged following his bankruptcy.

Mr N is also unhappy that SPML tried to pursue him for the shortfall debt by making him sign a SOP form. He says he returned the form with parts redacted to ensure he wasn't responsible for the debt. Mr N also thinks that SPML undersold his property, failing in its duties whilst selling a repossessed property.

Over the duration of the mortgage Mr N has had several different fees and charges applied to his account. Mr N says he would like the fees and charges refunded to him as he feels they were excessive and unfairly applied to the account.

SPML didn't think our service could consider all of Mr N's complaint as some of it had been raised too late. Our Investigator agreed and explained to Mr N we could consider all of his complaint points with the exception of the fees and charges being applied over the duration of the mortgage. For this complaint point the Investigator only thought we could consider fees and charges applied to the account since July 2013. Mr N disagreed.

An Ombudsman looked at the complaint and issued a decision setting out our jurisdiction on 2 August 2021. They agreed with the Investigator that our service could only consider a complaint about fees and charges applied to the account from July 2013, as under the rules which the Financial Ombudsman Service operates under (specifically DISP 2.8.2 which deals with whether a complaint has been made in time), any complaint about fees and charges prior to July 2013 had been raised too late. The Ombudsman decided that all other complaint points were raised in time.

Our Investigator considered the merits of the complaint and felt SPML hadn't treated Mr N fairly. They reviewed the fees and charges applied to Mr N's account since July 2013 and felt SPML had incorrectly charged an arrears management fee in August 2018 – they said this should be refunded to Mr N. They didn't think SPML had acted unreasonably by making Mr N sign a SOP form, or that it had undersold his property. They also thought SPML had correctly recorded a default on the mortgage account.

Mr N disagreed and asked for an Ombudsman's decision. He disagreed that SPML had applied the default to his account correctly and didn't think the Investigator had taken into account the guidance released by the Information Commissioner's Office on when a default should be registered.

I issued a provisional decision on this complaint on 9 March 2022 where I said:

*"Firstly, I think it should be noted that I've reviewed the previous Ombudsman's decision on what our service has powers to investigate and I've seen nothing which makes me disagree with the outcome which they reached. With this in mind, my decision will only address any fees and charges applied to Mr N's account since July 2013 - and his other three complaint points.*

*I understand since the complaint has been raised with our service, Mr N has raised additional complaint points with our Investigator, and these have been referred to SPML to consider and respond to in the first instance. To be clear, I haven't considered these additional complaint points as part of this decision. If Mr N remains unhappy with SPML's response, he can (subject to our rules) refer these to our service.*

*For ease, I will address Mr N's complaint points in turn under separate headings.*

### ***Unfairly pursuing the debt and incorrectly applying a second default to the mortgage***

*SPML has said that because Mr N's mortgage was secured against the property it is exempt from any bankruptcy. Therefore, Mr N would remain liable for the debt and could continue to be pursued for it. It says a default wasn't registered on the account until it took possession in December 2019, which was correct.*

*The Insolvency Act 1986 (The Act) covers both secured and unsecured debts. The main difference between the two types of debt is that most unsecured debts will be written off as there is no asset, or security, the creditor can take possession of to recover the debt. With a mortgage the lender can take possession of the property to repay some, or all, of the debt. This doesn't mean that secured debts don't fall within The Act, it's just that the lender will*

*have an additional level of security as there is a property which it can take possession of, meaning it doesn't just write off the debt.*

*SPML's right to enforce its security in the event of discharge from bankruptcy is preserved by The Act. However, The Act also says that where a bankrupt is discharged, the discharge releases the borrower from all the bankruptcy debts. In this case, this would mean that whilst SPML was able to enforce its security over the property, Mr N didn't need to pay the monthly instalments and SPML shouldn't pursue Mr N for payment or record the fact that monthly instalments have been missed on his credit file. However, the consequences of Mr N not making payments to the mortgage (even in bankruptcy) is that SPML can decide to take possession of the property – and it's up to it when it starts that process. In this case SPML chose not to take possession of Mr N's property as it came to an arrangement with him to continue to make the monthly payments. This is not unreasonable as it allowed Mr N to retain the property and stayed SPML from taking possession of it, which it was entitled to do.*

*Whilst Mr N's didn't necessarily need to pay the monthly instalments, SPML was still entitled to report the operation of the account to credit reference agencies. But it should have done so in the appropriate manner taking into account relevant rules and guidance. That guidance includes the Information Commissioner's Office's (ICO) Principles for the Reporting of Arrears, Arrangements and Defaults at Credit Reference Agencies, which set out how a default should be recorded on a customer's credit file in the event of bankruptcy. This says the mortgage account should have shown on Mr N's credit file as defaulted at the date of his bankruptcy – and for six years after that – with the account being marked as 'partially settled' from the date Mr N was discharged from bankruptcy.*

*Whilst Mr N's credit file shows other accounts as having defaulted, SPML recording Mr N's mortgage as having missed payments and as having defaulted has unfairly impacted him. I say this because he has had adverse information recorded on his credit file for longer than he should have. I think this would have caused Mr N distress and inconvenience, so I think SPML should pay Mr N £100 to recognise this.*

*Mr N has also raised concerns about SPML trying to pursue him for the shortfall debt by making him sign a SOP form which said he would be liable for the debt. I can appreciate Mr N's concerns here, especially considering what I have explained above about Mr N's liability with regards to the debt. However, since selling the property SPML has written off the shortfall debt, explaining this was done because Mr N was made bankrupt and the shortfall would be included in the bankruptcy. This is what I would have expected SPML to do in the circumstances but I do think asking Mr N to sign the SOP form accepting liability for the debt was inappropriate and would have been distressing for Mr N, so I think SPML should pay Mr N £150 in recognition of this.*

*Mr N has also argued that SPML should not have pursued him for the debt following his bankruptcy. He therefore wants all history of the mortgage removed from his credit file and SPML to return all the money he was wrongly charged following his bankruptcy. Whilst I agree that SPML should not have recorded any adverse information, such as missed monthly instalments, on Mr N's credit file, I don't think that Mr N should fairly have all the money he's paid towards the mortgage since the bankruptcy returned to him.*

*As explained, SPML is able to enforce its security over the property if it decides to, but equally it can choose not to do this if an arrangement to pay the mortgage can be agreed – which is what happened in Mr N's case. The arrangement Mr N agreed with SPML allowed him to keep the property until he voluntarily surrendered it, and I don't think it's unreasonable that SPML accepted payments during this time. I say this because by making these payments Mr N retained the property. So, they were a condition of SPML not enforcing its security and taking possession of the property sooner. If Mr N hadn't made these payments,*

*or if I were to require SPML to return them to him, he would effectively have had the property for free from 2008 to 2019. I don't consider that would represent a fair and reasonable outcome in the circumstances.*

### **Sale of the Property**

*Mr N has also said that he thinks SPML undersold his property.*

*SPML had a duty to obtain the best possible price for the property. I would expect it to have balanced that against selling the property as quickly as possible – in order to keep the costs to Mr N to a minimum. Therefore, what I need to consider is whether SPML's actions were reasonable when selling the property – and having reviewed everything I think they were.*

*Following SPML taking possession of the property, I can see that it had two valuations completed on the property by two independent surveyors. These valued the property at £375,000 and £300,000, with each report commenting on the extensive work needed to the property. The auction reserve prices on the valuations were £350,000 and £250,000.*

*The monthly marketing report says that, after the property had been on the market for 118 days, there had been a number of viewings with general feedback being that the property needed a lot of work. There is also mention of a dispute with the neighbours claiming that the garages for the property were built on their land – which was a reason for an offer being withdrawn. The property had received three offers ranging between £305,000 and £332,000, but two had been withdrawn leaving only the offer at £305,000.*

*Against this background, I don't think SPML's decision to accept the offer of £305,000 was unreasonable. This amount was within the range of valuations and the decision to sell the property took into account the advice of industry professionals – which is what I would expect SPML to have considered in the circumstances.*

*It should also be noted that SPML has written off the remaining debt due to Mr N having previously been made bankrupt, so Mr N is not be responsible for the shortfall.*

### **Fees and charges**

*Our Investigator reviewed the fees and charges applied to the account and recommended that SPML refund an Arrears Management Fee of £35 charged in August 2018 – which SPML agreed to. But I won't be requiring SPML to refund any further fees and charges. I'll explain why.*

*I've reviewed the fees and charges applied to Mr N's mortgage account since July 2013. I think these have been applied in line with the terms and conditions of the account and for the most part have been applied in a fair and reasonable way.*

*Besides that, SPML has written off the shortfall which was left following the sale of the property. Therefore, any fees and charges applied unfairly to the account have been resolved as Mr N is not responsible for repaying them and has not incurred this cost. In addition, the write-off of the shortfall also far exceeds the amount of fees and charges which would have been refunded to Mr N.*

### **Conclusion**

*In conclusion, I don't think Mr N has been treated fairly by SPML in this instance, as I don't think SPML have correctly reported the mortgage on Mr N's credit file following his bankruptcy – and by doing so has caused Mr N distress and inconvenience.*

*However, I don't agree that Mr N should have all the money he's paid to the mortgage since his bankruptcy returned to him. This is because by agreeing to the payment arrangement with SPML it has allowed him to retain the property up until he decided to surrender the property in 2019. I also think SPML has acted reasonably when selling the property following it taking possession, and also with Mr N's treatment with regards to the fees and charges."*

I invited both parties to let me have any further comments and evidence they wanted to raise by 23 March 2022.

Mr N responded accepting my provisional decision.

Despite reminders and an extension to the deadline, SPML didn't respond to my provisional decision with any further comments or evidence by the agreed extended deadline.

### **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.

Given that Mr N accepted my provisional decision and SPML didn't put forward any further comments or evidence for consideration by the deadline, I see no reason to depart from the conclusions set out in my provisional decision above.

### **My final decision**

My decision is that I uphold this complaint in part and instruct Southern Pacific Mortgage Limited to:

- Mark the entry on Mr N's credit file for the mortgage as '*partially settled*' as at the date Mr N was discharged from bankruptcy.
- Remove the default applied to Mr N's credit file in 2019 and mark the account as having defaulted as at the date of Mr N's bankruptcy order on his credit file.
- Remove any missed payments reported to his credit file from the date Mr N was made bankrupt.
- Refund Mr N £35 for the Arrears Management Fee charged in August 2018.
- Pay Mr N £250 for the distress and inconvenience caused.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 27 April 2022.

Robert Woodhart

**Ombudsman**