

complaint

Mr R has complained that Santander UK Plc didn't mark his mortgage as 'defaulted' on his credit reference file when he went bankrupt in March 2012.

background

Mr R was made bankrupt on 15 March 2012. He had a residential mortgage with Santander at the time. The property was sold in April 2014 and the mortgage was fully paid off at that time. Santander marked the mortgage as in arrears up until the mortgage was repaid, rather than defaulting it when Mr R went bankrupt.

Our investigator upheld the complaint and said Santander should have marked the account as in default when Mr R went bankrupt. Santander didn't agree and so it's been passed to me decide.

my findings

I've considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

I'm pleased to see that despite its earlier arguments to the contrary Santander has finally agreed that the property would have formed part of the bankruptcy estate. However it still doesn't agree with how the credit file should be marked. It says:

Santander's legal department has confirmed that while your Service is correct to say that the property will have formed part of the bankrupt estate of [Mr R] it does not follow the credit record should be amended. The department which deals with the integrity of credit data says "A Mortgagee will only form part of a bankruptcy/Sequestration where there is a deficit in the equity post property sale. At this juncture the debt becomes unsecured and can therefore be included as part of a bankruptcy order."

To clarify, it doesn't follow that we are necessarily wrong to record a CAIS 6 against this file. It is a matter of fact that more than 6 payments were missed on the account and Santander is not sure why it's improper or inappropriate to record this. It seems [Mr R] ended up living in the property without making any payment at all for several months whilst repossession proceedings were ongoing.

I think it's necessary to distinguish between a lender's right to enforce its security over a property, eg by exercising a power of sale, and a lender's right to require a borrower to repay the debt. The right to enforce the security in the event of discharge from bankruptcy is preserved by the Bankruptcy (Scotland) Act 1985. However, it also says that where a bankrupt is discharged, the discharge releases the borrower from all the bankruptcy debts.

The Bankruptcy (Scotland) Act covers secured as well as unsecured debts. The main difference being that most unsecured debts will be written-off as there's no asset the creditor can take into possession to recover the debt. With a mortgage (or indeed a loan secured against any asset, such as a car for example) the lender can repossess the item the loan was secured against – in this case a property – to repay some, or all, of the debt. This doesn't mean secured debts don't fall within the Bankruptcy (Scotland) Act, just that the lender has an additional level of security as there is an item it can take possession of so it

doesn't just write-off the debt. This is the difference between the right to enforce its security over a property, and the right to require a borrower to repay the debt.

Santander didn't have the power to chase Mr R for the mortgage as under the terms of his bankruptcy Santander no longer had the right to require him to repay it. But the consequence for a consumer of not making payments to any secured debt – even in bankruptcy – is that the lender may decide to take possession of the asset (in this case the property). It's moot now as the property was sold in 2014, but had it not been Santander could have considered whether it wanted to enforce its security by taking possession of – and selling – the property the mortgage is secured against if Mr R didn't make his payments.

If mortgage payments aren't made a lender can look to take possession of a property, even if the borrower has been made bankrupt. It can also contact the borrower at that time if it's required for the purpose of enforcing that security. What it can't do is contact a borrower to chase mortgage payments and record any missed payments on their credit file, as they're not required to make them once bankrupt.

Santander should also have marked the mortgage as in default at the point Mr R went bankrupt. The credit industry in collaboration with the Information Commissioner's Office drew up some broad principles and these are published in the following document http://www.scoronline.co.uk/sites/default/files/high_level_principles_document_final.pdf.

One of the circumstances it says may lead to the recording of a default is "*The account is or has been included in a bankruptcy...*" Having considered everything I see no reason to move away from that principle here and so I'm satisfied Santander should have marked the account as in default on Mr R's credit file when he went bankrupt on 15 March 2012. It should then have noted the account as "part satisfied/settled" on 15 March 2013 when he was discharged from bankruptcy, and "fully satisfied/settled" when the property was sold and the mortgage repaid on 27 April 2014.

my final decision

I uphold this complaint and order Santander UK Plc to mark the account as having defaulted as at the date of Mr R's bankruptcy order and ensure no monthly arrears markers show after this date. I make no other order or award.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 27 January 2019.

Julia Chapman
ombudsman