

complaint

Mr S complains Kensington Mortgage Company Limited continued to send information to the credit reference agencies about the secured loan he had held with it despite the loan being included in his bankruptcy and the bankruptcy being discharged. He wants compensation.

background

In my provisional decision, I set out why I intended to uphold the complaint. Both parties responded; Mr S accepted my view but Kensington didn't.

When Mr S complained to Kensington, it said it had received nothing to show the debt was included in the bankruptcy and so would continue to report the information. It also said it didn't know Mr S was bankrupt until he emailed and told them so in 2016.

In the adjudicator's view, Kensington hadn't acted fairly. She said she thought the credit records should be amended so that the account was marked as settled on the date of discharge of the bankruptcy. But she didn't think that Mr S should receive compensation for the damage to his credit score as – although the record was incorrect – given Mr S's bankruptcy she didn't think the incorrect information made his credit file worse. Kensington agreed to amend Mr S's credit file but said it would only amend the file to say the account was settled on the date it was told about the discharge in 2016.

Mr S disagreed with the adjudicator. He agreed his credit score would be damaged by his bankruptcy but says the suggestion of an ongoing default on an account would have made his credit score even worse.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. In my provisional decision I said:

"It might assist if I explained a little about the effect of a bankruptcy on a secured loan. The loan itself continues and any part of it which is secured over a property also continues, despite the bankruptcy and any discharge from bankruptcy. But any part of the debt which is unsecured, because there isn't enough equity in the property to clear the loan in full, will be dealt with by the trustee in bankruptcy if the loan was entered into before the start of the bankruptcy. It isn't always clear if there will be a shortfall until the property is sold.

Mr S was declared bankrupt in August 2010 and he was discharged in August 2011. He entered into the loan with Kensington before he was declared bankrupt. Creditors are normally regarded as knowing of the bankruptcy order from when it's advertised in the London Gazette. In Mr S' case, I'm told by the Official Receiver that this didn't happen as Mr S applied for a stay of the bankruptcy.

The trustee in bankruptcy confirmed that Kensington submitted a claim in Mr S' bankruptcy estate and was sent two reports about the progress of the bankruptcy. He also confirmed that Kensington wasn't a supporting creditor for Mr S' bankruptcy petition. The trustee wasn't able to confirm exactly when Kensington submitted its proof of debt, but the Official Receiver confirmed Kensington's solicitor was aware of the bankruptcy on 8 November 2010 as it sent a letter about the bankruptcy on that date.

Based on the evidence available to me, I think Kensington was aware of the bankruptcy at the very latest by November 2010. As no advertisement in the London Gazette was made, and it appears that Kensington didn't take part in the bankruptcy petition hearing, I don't think it would be fair or reasonable for me to say that it knew earlier about Mr S' bankruptcy at an earlier date.

Discharge from bankruptcy doesn't affect the assets held in the bankruptcy estate; it also doesn't mean the debts should be treated as settled as of the date of discharge. As Kensington was a secured creditor, it may've been possible for Mr S to pay the monthly payments without breaching insolvency laws to ensure creditors of the same class are treated equally if he was also paying the first charge-holder. But as the first charge-holder took possession proceedings and sold the property, it's unlikely in this case Mr S would've been able to make the required payments to Kensington after his bankruptcy.

The property was sold in February 2011, and Kensington released its security over it in September 2011. This means the extent of its unsecured debt crystallised in February 2011. I don't know why it took several months to release its security.

I think Kensington should've stopped reporting the failure of Mr S to pay the secured loan from September 2011 onwards as that's the earliest date I can be sure Kensington knew Mr S couldn't make any monthly payments as its secured debt converted into an unsecured upon the sale of the property and the release of the security. It's fair and reasonable for it to require time to consider the effects of the bankruptcy upon its debt, and to take advice from its solicitors. But it wasn't accurate or fair to report an ongoing default once Kensington knew its debt was unsecured and was covered by the bankruptcy. Mr S was no longer responsible for the debt once it became unsecured.

I think that given Mr S's bankruptcy and his credit records generally, I can't say Kensington's failure to correctly report the situation to the credit reference agencies caused him financial loss. But I think it did cause him upset and caused him to have to make a complaint to get matters put right. I think it's fair and reasonable for Kensington to pay Mr S £100 compensation for this trouble and upset. I have noted much of Mr S' upset is about the alleged damage to his credit records, but I haven't found any damage has been caused by Kensington.

I can see the credit reports have changed since Ms S first complained and the date Mr S was discharged from bankruptcy is now recorded. The report available to me says the arrears stopped when Mr S was discharged, which I think it is fair and reasonable. Kensington should contact the credit reference agencies and notify them that the mortgage was partially settled in February 2011."

Mr S felt that my provisional view was fair, but Kensington disagreed. It said that it had agreed to update Mr S' credit records once it had proof the debt was covered by the bankruptcy order. Kensington said that it was entitled to continue to report the debt as outstanding until that evidence was received. It said it didn't receive any correspondence from the Official Receiver and responded to the bankruptcy petition in relation to a redeemed account which had a shortfall. Kensington said that it was Mr S' responsibility to ensure that it had a copy of the notice of discharge from bankruptcy. It didn't see why it should've stopped reporting the debt in September 2011, but had contacted the credit reference agencies and backdated the debt reports to August 2011. Kensington said it shouldn't have to pay any compensation as Mr S didn't send a notice of discharge to it.

I don't accept Kensington didn't know that its debt was covered by the bankruptcy. Its position has changed throughout the course of this complaint. It earlier said it didn't have any information about the bankruptcy, but this service's enquiries to both the Officer Receiver and the Trustee in Bankruptcy have shown Kensington submitted a proof of debt to the bankruptcy estate. It knew the shortfall claim was to be resolved within the bankruptcy. It earlier said that it didn't know about the bankruptcy until 2016, which is clearly incorrect. And as I said in my earlier decision, Kensington knew by September 2011 that its debt was wholly unsecured and there was no ongoing duty on Mr S to continue to pay the debt.

In its response to my provisional decision, Kensington for the first time blames Mr S for not sending the notice of discharge from bankruptcy. There's no evidence that it asked for a copy, or to explain why it needed to see it. Kensington accepted the debt was caught by the bankruptcy when it submitted the proof of debt, and ought've to have known in September 2011 that Mr S was free of the debt, given the sale of the property and the automatic discharge from bankruptcy. It says it has now changed the records to say that the debt was last outstanding in August 2011, but earlier told the adjudicator it wouldn't change the records except to record when in 2016 it knew of Mr S' discharge from bankruptcy.

Kensington says it didn't receive much correspondence from the Official Receiver, but I can't accept this. Kensington throughout this complaint has failed to send evidence showing what it or its solicitors knew, and this service has been forced to get the evidence from third parties. I'm not convinced Kensington has full records available to it in order to be able to confirm what it knew. As Kensington knew by September 2011 the debt fell into the bankruptcy estate and was wholly unsecured, it should've either have stopped reporting the debt from then or asked Mr S for a copy of the notice of discharge if it wasn't sure. It's unfair and unreasonable to expect consumers to know a business requires sight of the notice of discharge without telling the consumer. Kensington was aware its debt fell into the bankruptcy, as was Mr S. It's fair and reasonable to expect a legally advised business to take advice about the impact of bankruptcy upon a debt in these circumstances.

I'm content if Kensington has now changed the records to say the debt was last outstanding in August 2011, rather than September 2011. But I still think £100 compensation is fair and reasonable in all the circumstances. Kensington didn't treat Mr S fairly or reasonably in how it reported the debt to the credit reference agencies.

my final decision

My final decision is that I uphold the complaint and Kensington Mortgage Company Limited should change Mr S' credit records as outlined above and pay him £100 compensation. Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 6 March 2017.

Claire Sharp
ombudsman