



<b><u>Decision Ref:</u></b>	2021-0099
<b><u>Sector:</u></b>	Banking
<b><u>Product / Service:</u></b>	Repayment Mortgage
<b><u>Conduct(s) complained of:</u></b>	Failure to process instructions in a timely manner
<b><u>Outcome:</u></b>	Rejected

**LEGALLY BINDING DECISION  
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

The Complainant entered into a mortgage loan agreement with the Provider in **March 2007**. The loan was secured on a residential investment property. The Complainant was declared bankrupt in **December 2011** in the UK. On being discharged from bankruptcy, the Complainant understood the Provider's loan would be discharged. The Complainant subsequently noticed that the Provider was reporting details in respect of the loan to the Irish Credit Bureau (**ICB**) which were incorrect and did not reflect his exit from bankruptcy. The Complainant requested that his ICB profile be updated. The Provider maintains the position that it has always correctly reported information regarding loan to the ICB.

**The Complainant's Case**

The Complainant explains that he filed for personal bankruptcy in the UK in **December 2011** and was discharged from bankruptcy in **December 2012**. The Complainant states that the Provider "... have failed to update and refuse to correct information pertaining to same on my ICB credit report [and] [t]he UK insolvency would have sent correspondence to the bank." Because of this, the Complainant has been unable to open a bank account or obtain credit approval. The Complainant advises the Provider is taking the position that he is still the mortgage holder and the outstanding liability under the mortgage loan remains in his name until the mortgaged property is repossessed or surrendered. The Complainant also explains he returned the keys to the mortgaged property in **2011**. However, the Provider claims not to have received them.

The Complainant states that he wants “... to have my information on my ICB credit report reflect the discharge of bankruptcy in 2012 along with the mortgage account held with [the Provider].” The Complainant’s remarks that another financial services provider was also involved and this entity corrected the Complainant’s details following a request but the Provider is refusing to do so.

The Complainant made a formal complaint to the Provider on **15 June 2017**. The Complainant also states that the Provider has ignored his repeated requests for a senior manager to handle his complaint and “... I’m finding it impossible to get any satisfaction from them. It actually scares me how inept they appear to be in dealing with my requests.”

The Complainant explains the circumstances giving rise to this complaint “... has placed an untold amount of stress on both me and my family along with the embarrassment of being refuse[d] a simple bank account and also credit facilities.” In addition to the rectification of his ICB record, the Complainant is seeking compensation for the Provider’s conduct.

### **The Provider’s Case**

At the time of its formal response dated **16 August 2018**, the Provider advises the outstanding loan balance is €211,500 plus arrears of €46,836. As the Complainant has made no payments on the account since **2011**, the account has progressed through the collections process.

The Provider states that it makes regular returns to the ICB and the Complainant’s profile would be updated on an on-going basis to reflect the status of the account. The Provider advises the ICB reporting system is an automated process and is completed by its IT department on a monthly basis. The Provider explains that, generally speaking, where a significant event occurs in relation to an account such as a missed payment or a loan restructure, this is reported to the ICB in accordance with the ICB’s standard reporting codes. However, there is no reporting code or profile to reflect a bankruptcy. In the absence of a specific reporting code, the Provider has no process or procedure to request the ICB to amend its records.

The Provider advises that the only way to record a bankruptcy on the ICB system against an account is for a borrower to contact the ICB and ask for a *Personal Declaration* to be added to the account noting the discharge from bankruptcy. The Provider refers to section 7 of the ICB’s Fair Processing Notice in this regard.

The Provider states the loan the subject of this complaint has been in arrears since **2011** and would have been initially reported to the ICB at that stage. It states that the Complainant’s account is currently showing 9 (recurring) and will continue to be reported to the ICB until the mortgaged property is repossessed or surrendered to the Provider.

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While the Complainant's ICB profile does not reflect the fact he was discharged from bankruptcy during **2012**, the Provider states that it is satisfied the Complainant's profile in relation to the loan account is otherwise correct, and accurately reflects the arrears position in relation to the account.

In the case of bankruptcy, the Provider explains, a customer's liability will not be removed until the property is sold. Until such time, missed payments will continue to be reported in accordance with ICB reporting criteria.

The Provider points out that the ICB holds information about borrowers and their loans for five years after an event is first recorded. It argues that discharge from bankruptcy is not a *clean slate* in the context of an ICB profile. The Provider cites a passage from the Irish Insolvency Service website: *'Returning to solvency should not be confused with a return to credit worthiness, which is determined by each financial institution using their own criteria.'*

The Provider remarks that the ICB operates at an account rather than an individual level. This means an ICB profile reflects the performance/credit rating of a given account and not that of a specific individual. The Provider argues that until the mortgaged property is sold, it is required to continue to report to the ICB and the ICB profile will continue to reflect any arrears on the account.

Following receipt of communication from the Complainant on **15 June 2016** regarding his ICB profile, the Provider issued a response on **26 July 2016** stating that the Provider would continue to report the loan to the ICB until such time as the property was in its possession and had been sold.

The Provider states, in respect of the loans held with the financial service provider referred to by the Complainant in his submissions, that it is not the Provider's position to comment on the action taken by this entity as it is not in possession of the Complainant's file held by that entity. The Provider also notes the ICB reporting of that entity was not specific to bankruptcy, it was reported that the account was written off and then completed. These are both standard ICB reporting codes.

The Provider explains it received confirmation from the Official Receiver on **31 January 2014**, that the mortgaged property was of no value to the bankruptcy estate and that it would not have any interest in the property, and, as such, had no objections to the Provider seeking possession and/or disposing of the property. The Provider advises that even if the property had been taken into possession immediately following this confirmation, the ICB profile for the account would only have begun reporting as repossessed in **2014**. The Provider states that it has been agreed to backdate the ICB reporting to S (Surrender of Goods) to that date as soon as the voluntary surrender form is received. It states that the ICB will continue to report as an S until the property is sold and the residual debt written off. At that stage, it would report as W.

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The Provider submits that it cannot take a property into possession without either a voluntary surrender or a court order. The Provider advises that its records indicate that during a telephone call with the Official Receiver in **March 2014**, the Official Receiver confirmed that they would forward the Voluntary Surrender form to the Complainant for completion. The Official Receiver confirmed to the Provider on **14 April 2014** that the voluntary surrender form had been forwarded to the Complainant. The completed documentation was returned to the Provider on **24 May 2018** but the Provider states that it could not be accepted as it had not been completed correctly. The Provider advises that legal proceedings issued in an effort to take possession of the property. The case was listed for hearing on **24 July 2018** but was adjourned and at the time of the Provider's Formal Response to this Office, was currently awaiting a new hearing date. I note that these proceedings were subsequently struck out in **March 2019**.

It is stated that while the Provider has a record of the Complainant's correspondence stating he was returning the keys to the mortgaged property dated **19 December 2011**, it has no record of the keys being received. It states that notwithstanding this, the return of keys would not suffice in respect of surrendering property. Voluntary surrender forms must be completed and returned to the Provider before the process can commence.

The Provider states that a Final Response letter issued to the Complainant on **17 October 2017** in respect of the issues raised by the Complainant on **5 October 2017**. The Complainant's request to have his complaint dealt with by senior personnel was noted and senior management was made aware of the matters raised by the Complainant.

The Complainant made a further complaint regarding the ICB issue on **19 and 20 October 2017**. The matter was further reviewed and referred to management in the relevant area. A Final Response letter issued to the Complainant on **25 October 2017**.

A further communication was received from the Complainant on **4 April 2018** in relation to the ICB issue and was further reviewed by management. A Final Response letter issued on **16 July 2018**.

### **The Complaints for Adjudication**

The complaints are that the Provider:

1. Wrongfully and/or unreasonably refused to correct the Complainant's ICB record to reflect the fact the mortgage loan account had been written off and completed; and
2. Ignored the Complainant's repeated requests to have his complaint handled by a senior manager.

## **Decision**

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on 2 October 2020, outlining my preliminary determination in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

Following the issue of my Preliminary Decision, the parties made the following submissions:

1. E-mail from the Complainant to this Office dated 29 October 2020.
2. Letter from the Provider to this Office dated 12 November 2020.
3. E-mail, together with attachments, from the Complainant to this Office dated 30 November 2020.
4. Letter from the Provider to this Office dated 14 December 2020.

Copies of the above submissions were exchanged between the parties.

Having considered these additional submissions and all submissions and evidence furnished by both parties to this Office, I set out below my final determination.

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The Complainant has, in his post Preliminary Decision submission, detailed that:

*“[The Complainant] note[s] from going through [his] file some new information has come to light. The Provider sent a number of correspondences with sensitive information to the investment property address.*

*[The Complainant] would like to request the Provider to provide a list of each correspondence that have been sent to the investment property along with an explanation.*

*[The Complainant] would also request they check if this is in contravention with GDPR/data protection rules and the Providers own rules”.*

The Complainant stated in his second post Preliminary Decision submission dated **30 November 2020** that:

*“The issue of [the Provider] sending correspondence to an address where [the Complainant] ha[d] not given them permission to do so is a new issue [...]*”

The above complaint has not been investigated by this office, nor does it appear that the Provider has been given the opportunity to address this new complaint element prior to it being raised as a post Preliminary Decision submission.

As this element of complaint has not been addressed previously, nor has an investigation by this office been undertaken as part of the Complainant’s original complaint, it cannot form part of the adjudication of the current complaint.

It remains open to the Complainant to raise a complaint concerning the above conduct as a separate matter with the Provider, if he so wishes. Furthermore, it should be noted that some of the issues the Complainant is now raising may be more appropriate to the Data Protection Commissioner.

Having clarified that the new complaint conduct raised by the Complainant in his post Preliminary Decision submission, cannot form a part of the current adjudication due to the timing of it being raised in the adjudication process, I will now deal with the present complaint at hand.

The Complainant signed an *Acceptance of Loan Offer* on **30 March 2007**. At paragraph 1 of this document, the Complainant agreed “... to mortgage the property to [the Provider] as security for the mortgage loan.” The property in question was an investment property.

A *Mortgage and Charge* charging the investment property in favour of the Provider in respect of the present and future advances to the Complainant was executed on **4 May 2007**.

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The Complainant wrote to the Provider by letter dated **1 December 2011** stating:

*"I am no longer in a position to make repayments to the mortgage account.*

...

*Please find keys enclosed. ..."*

This letter bears the Provider's date stamp of **19 December 2011**.

By way of a UK Bankruptcy Order presented on **13 December 2011**, the Complainant was declared bankrupt.

The Official Receiver wrote to the Provider on **18 January 2012** advising it of the Complainant's bankruptcy and requested certain information and documentation. While there was a small exchange of correspondence in the intervening period, the Official Receiver appears to have repeated its request for information on **18 July 2012**.

The Provider responded to this request on **18 September 2012** providing and also requesting information in respect of the Complainant. This letter also indicated the Provider was not receiving any payments in respect of the mortgage obligations, and legal action to recover and sell the mortgaged property was being considered. To this end, the Provider requested that the Official Receiver confirm that it had no interest in the property and that the Provider could continue with this course of action.

The Official Receiver wrote to the Provider on **31 January 2014** referring to a letter from the Provider of **14 January 2014**, stating:

*"I can confirm that as the property is of no value to the bankruptcy estate that the Official Receiver would not have any interest in the property and as such no objections to you seeking possession and/or disposing of the property as you see fit."*

### **Timeline**

The Provider has prepared a timeline of events in respect of this complaint. In particular, I note the following. On **29 June 2012**, the Provider wrote to both the Complainant and the Official Receiver advising of the arrears on the loan account and requested that the situation be addressed or alternatively, vacant possession of the mortgaged property be given to the Provider. On **22 July 2013**, the Provider wrote to the Complainant calling for the delivery of vacant possession of the mortgaged property. On **22 January 2014**, an occupancy check was ordered in respect of the property. On **30 January 2014**, the Provider wrote to the Official Receiver stating that it wished to take the property in possession and enclosed a voluntary surrender form for completion.

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On **11 February 2014**, one of the Provider's agents spoke with the Insolvency Service who confirmed they were not in a position to confirm whether they would be signing the voluntary surrender form. The Provider was advised during a telephone conversation on **4 March 2014** that the Official Receiver would not be in a position to sign the form and this should be sent to the Complainant directly. The Official Receiver indicated during a telephone call on **12 March 2014** that it would send a copy of the voluntary surrender form to the Complainant on behalf of the Provider. The Official Receiver advised the Provider on **14 April 2014** that it had written to the Complainant and would revert to the Provider when it had a response. In a submission dated **23 August 2018**, the Complainant advises that he did not receive voluntary surrender forms from the Official Receiver.

There appears to have been one further contact between the Provider and the Official Receiver on **18 September 2014** regarding the bankruptcy generally and the Official Receiver's intention to apply to be released as trustee.

The next entry in the timeline is a reference to a letter received from the Complainant on **15 June 2016** requesting that the Provider correct his ICB profile. The Provider responded to this letter on **26 July 2016** explaining the position regarding the Provider's reporting to the ICB. The timeline indicates that the Provider did not issue correspondence regarding the recovery of the property until **March 2017** when it referred to its power to appoint a receiver over the mortgaged property.

### **Legal Proceedings**

A Special Summons seeking possession of the mortgaged property issued on **26 September 2017** with a return date of **24 July 2018** before the Master of the High Court. The Complainant signed a *Consent to Order for Possession* in respect of the proceedings on **17 August 2018**. The matter was listed for hearing on **11 March 2019**. However, the Provider's solicitors wrote to the Complainant on **8 March 2019** indicating that the Provider instructed that the proceedings be struck out. It appears the Provider accepted the surrender of the property at this point.

In a submission dated **8 April 2019**, the Provider explains the reason for its decision regarding the litigation as follows:

*"The Bank made a decision to strike out the proceedings based on an in depth review of the account prior to the recent Court date. This review involved, amongst other things, consideration of the recent correspondence on file from the Complainant (borrower), confirmation that the property is now vacant and legal advices received.*

*The initial correspondence received from the Official Receiver in the UK (on behalf of the borrower) was in 2012. Contact continued between the Bank and the Official Receiver until 2014. At that point the Official Receiver advised that they had no objection to the Bank seeking possession of the property.*



*A number of occupancy checks were carried out by the Bank (as recently as 2017) which indicated that the property was occupied.*

*On that basis, the Bank decided to issue proceedings seeking possession due to the fact that other parties may have held an interest in the property.”*

Further explanation of the Provider’s decision surrounding the litigation can be seen in a submission dated **15 July 2019**:

*“The Bank was not in a position to take possession of the property for a number of years due to ongoing communications with the Official Receiver. ...*

*A report from 13 July 2017 advised that the apartment was believed to be occupied. On that basis, the Bank took the prudent approach of issuing proceedings seeking possession due to the fact that other parties may have held or claimed an interest in the property. An updated report in relation to the occupancy of the property was obtained on the 09 April 2018. That report confirmed that the property was then vacant. It also noted that local enquires were made confirming the property had been vacant for the past 7 months. The fact that the property was confirmed as vacant by this report in 2018 (which in effect advised us that no other party had an interest in the property) assisted the Bank in making its decision to strike out the proceedings. ...”*

### **Complaint to the Provider**

The Complainant wrote to the Provider by email dated **15 June 2017** wishing to make a complaint in respect of his ICB profile. This email states:

*“On numerous occasions over the past year I have contacted [the Provider] with a view to having my information updated so that it is recorded accurately.*

*I was discharged from bankruptcy in 2012, at this point all debts were discharged including a buy to let mortgage with [the Provider] ... Detail and evidence of same have been provided to [the Provider] on a number of occasions since 2012.*

*According to my ICB credit report the account is currently in arrears. This is not correct, there are no arrears due.*

*There should also be a scheduled removal date applied 5 years from the date of discharge (December 2017). It currently states ‘to be determined’.*

*I request [that] my information be updated so that it is accurate.”*

Receipt of this email was acknowledged by the Provider on **15 June 2017**.

The Complainant wrote to the Provider in respect of the above email on **12 September 2017** and advised the Provider that:

*"I have discussed this matter with the ICB and they agree with what has been outlined above.*

*The ICB have instructed me to contact [the Provider] to correct the information. The ICB cannot change the report unless instructed to by the lender.*

*Please escalate this matter to a higher level ...*

*I recently tried to open a bank account and the bank refused my application due to the information on the ICB report. ..."*

It appears two telephone conversations took place between the Complainant and the Provider on **18 September 2017** and **19 September 2017**. However, recordings of these calls have not been furnished in evidence.

The Complainant wrote to the Provider again on **1 October 2017** expressing his dissatisfaction and frustration as to how the matter was being handled by the Provider, and the impact the Provider's ICB reporting was having on him emotionally and financially. The Complainant also made "... one more request for this complaint to be escalated to a Senior Manager."

The Provider wrote to the Complainant on **4 October 2017**, referring to his correspondence of **15 June 2017** and **12 September 2017**, advising:

*"I have fully investigated your complaint and I would like to take this opportunity to outline the situation to you.*

*On 13<sup>th</sup> December 2011 you entered into Bankruptcy agreement with The Insolvency Service based in the United Kingdom. The Mortgaged property at ... has not been surrendered to the Bank and therefore the Bank still maintains the right to repossess the property via legal proceedings.*

*Kindly note this condition is outlined in the Secured Creditors and Finance Agreements 2014 Section 40.105 Secured Creditors – General:*

*'The concept of a creditor holding security, being a secured creditor, is an important one in insolvency as a secured creditor retains rights against the property of the insolvent which are not available to an unsecured creditor.*

*In particular, the secured creditor retains rights to take possession of, and sell, such property of the insolvent against which his/her debt is secured, with his/her responsibility to the insolvent estate being limited to a requirement to pay over any surplus funds to the liquidator/trustee for the benefit of the estate following the sale of the secured asset.'*

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*In relation to your scheduled removal date, please note this is still listed as 'to be determined' as this property has not been surrendered to the Bank. Kindly note as the property has not been surrendered; the Bank still maintains its right to repossess the property via legal proceedings.*

*Please be advised you are still the Mortgage holder and the outstanding liability remains, therefore the ICB credit report is correct.*

*I note you confirmed on the 13<sup>th</sup> of July 2017 that you returned the keys to the Bank in 2011 and the Voluntary Surrender form in 2012, I wish to confirm that we have no record of receiving same, if you can provide additional information as to where the keys and Voluntary form were submitted, I would be happy to investigate same further for you."*

The *Secured Creditors and Finance Agreements* referred to in the Provider's letter is a subsection in Chapter 40 of a *Technical Manual* for the UK Insolvency Service and is available on the UK Insolvency Service website. This manual is not legally binding and contains guidance on the personal insolvency process.

The Complainant responded to this letter on **5 October 2017**. In the Complainant's letter, it is stated:

*"... I was discharged from all liabilities on the 13<sup>th</sup> of December 2012. The loan from [the Provider] was included as one of these liabilities.*

*Therefore any dealings in relation to the property or the loan following this point are nothing to do with me. I have been fully discharged from the liability.*

*... As I was discharged from bankruptcy I no longer have a liability or mortgage, and no liability in my name should remain. (I also no longer own the asset). Therefore the ICB credit report is not correct.*

*...*

*In my previous correspondence I requested this complaint to be dealt with by a senior manager, please confirm this has been acted on. ..."*

The Complainant also enclosed a letter from another financial services provider agreeing to amend his ICB profile.

This letter is dated **30 May 2017** and states:

*"At [financial services provider] we are committed to reviewing our procedures and improving our processes on an ongoing basis. Having reviewed your complaint we can confirm that we are agreeable to amending your ICB record retrospectively.*

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*This request is currently being processed and once completed your ICB record will show 'W' for the month you were adjudicated bankrupt (December 2012) and 'C' from January 2013. 'W' represents that the account was written off and 'C' represents that the account is complete."*

In an email to the Provider dated **10 October 2017**, the Complainant indicated to the Provider that his ICB profile in respect of the loan the subject of this complaint should be *W* for the month he was discharged from bankruptcy and *C* for the following months.

This email was acknowledged by the Provider on **11 October 2017** and an update was provided on **17 October 2017**.

The Provider wrote to the Complainant on **17 October 2017** enclosing a letter from the Official Receiver dated **31 January 2014**. The Provider advised the Complainant as follows:

*"Please be advised you are still the Mortgage holder and the outstanding liability remains, therefore the ICB credit report is correct.*

*Please see also guidance from the UK Insolvency service, effectively our rights as secured creditors are not affected. If the property is not surrendered to us by the Bankrupt's the bank still maintains its right to repossess the property via legal proceedings. When the property is sold then the bankrupt is no longer liable for any unsecured debt.*

**40.105 Secured creditors – general**

*..."*

The Complainant wrote to the Provider on **19 October 2017**, stating:

*"What happened or did not happen in relation to [the Provider] taking possession of the property is totally irrelevant to my personal account in relation to my ICB record.*

*It is clear that the bank's record keeping is not fit for purpose, initially you said you had no record of being contacted by the Insolvency Service and now you included a letter from them to attempt to back up one of your points. You also state that you have no record of me surrendering the keys of the property, I would suggest you check your records again.*

*I have asked for a senior manager to look after my case. You state that a senior manager in the Collection's department is 'aware' of my case. This is hardly the same thing.*

*...*

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*I'm simply asking for my ICB record to reflect that I was discharged from Bankruptcy in 2012. ..."*

The Provider wrote to the Complainant on **25 October 2017**, acknowledging his previous correspondence and advising that it had no record of receiving the keys to the mortgaged property in **2011**. The Provider also advised the Complainant that it had exhausted all avenues and was not in a position to progress the matter any further. The Complainant submitted a complaint to this office in **October 2017**.

The Complainant wrote to the Provider on **4 April 2018** in respect of his ICB profile and requested that it be rectified pursuant to the relevant data protection legislation. The Provider issued a formal response to the Complainant on **16 July 2018**. This letter is broadly similar to the Provider's submissions outlined above.

### **European Insolvency Regulations**

The Complainant engaged in the UK bankruptcy process in **December 2011**. At that time, the UK was a member of the European Union. Accordingly, the **European Union (Personal Insolvency) Regulations 2002 (S.I. No. 334/2002)**, (the **Regulations**) were in effect and applied to the operation of the Complainant's bankruptcy in this jurisdiction. The Regulations gave effect to **Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings** which essentially aimed to provide for the proper functioning of cross-border personal insolvency proceedings.

Article 4 provides that it is the law of the State within which the insolvency proceedings commenced that govern the insolvency process. Article 4(1) states:

*"1. Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the 'State of the opening of proceedings'."*

In terms of the conduct of the insolvency proceeds, Article 4(2) states:

*"2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings their conduct and their closure. It shall determine in particular:*

*(a) ...*

*(b) the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;*

*...*

*(e) the effects of insolvency proceedings on current contracts to which the debtor is party;*

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*(f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending;*

*(g) the claims which are to be lodged against the debtor's estate and the treatment of claims arising after the opening of insolvency proceedings;*

...

*(i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off; ..."*

As it is a mortgage loan agreement that is the subject of this complaint, Article 5 is also relevant:

*1. The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immovable assets — both specific assets and collections of indefinite assets as a whole which change from time to time — belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.*

*2. The rights referred to in paragraph 1 shall in particular mean:*

*(a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;*

*(b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;*

*(c) the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;*

*(d) a right in rem to the beneficial use of assets.*

*3. The right, recorded in a public register and enforceable against third parties, under which a right in rem within the meaning of paragraph 1 may be obtained, shall be considered a right in rem.*

The Complainant maintains that the Provider wrongfully and/or unreasonably refused to correct his ICB record to reflect the fact the mortgage loan account has been discharged.

It is necessary to understand the position of the loan and the mortgage, and the effect the bankruptcy process had on these agreements. The Complainant entered into a loan agreement with the Provider in **March 2007**.

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The Complainant also executed a mortgage/charge in favour of the Provider in **May 2007**. These are two separate and distinct agreements. The mortgage effectively created a charge over investment property and secured the monies advanced by the Provider over this property.

Article 5(1) of the Regulations makes clear that a bankruptcy shall not affect rights *in rem*. This includes the right to dispose of the mortgaged property (Article 5(2)(a)). This is further explained in the Insolvency Service Technical Manual at section 40.105, *Secured Creditors and Finance Agreements* and cited in the Provider's correspondence with the Complainant.

An *in rem* right is effectively a right in respect of or against property rather than a right against a person. In the context of this complaint, the Provider is conferred with an *in rem* right in respect of the mortgaged property by virtue of the mortgage/charge executed by the Complainant in favour of the Provider in **May 2007**.

Accordingly, for the purposes of the Complainant's bankruptcy, the mortgage essentially falls outside of the bankruptcy process and the debt secured by the mortgage remains enforceable against the mortgaged property. For this reason, the Complainant's understanding that the loan had been discharged is not entirely correct. This is clear from the following two statements made by the Complainant. The first on **15 June 2017**:

*"I was discharged from bankruptcy in 2012, at this point all debts were discharged including a buy to let mortgage with [the Provider] ..."*

And the second on **5 October 2017**:

*"... I was discharged from all liabilities on the 13<sup>th</sup> of December 2012. The loan from [the Provider] was included as one of these liabilities. ..."*

The monies advanced by the Provider were secured by the mortgage and the bankruptcy did not discharge the mortgage or monies secured by the mortgage. Further to this, the Complainant has not produced any evidence or identified any rule of law to show that the debt secured by the mortgage was discharged as a result of his bankruptcy.

The Complainant has provided an extract from his ICB credit report. This lists certain details in respect of the loan account the subject of this complaint. In particular, I note the *Type of Finance* is recorded as *Mortgage*. This demonstrates that the Provider's reporting to the ICB was in respect of the mortgage.

In light of the fact that the mortgage was unaffected by the Complainant's bankruptcy in that the mortgage and the debt secured under the mortgage were not discharged, I accept that the Provider was entitled/obliged to report to the ICB in respect of the mortgage in the manner in which it did.

Further to this, while the Complainant has requested that the reporting be done in the name of the Official Receiver or that his bankruptcy be recorded on his ICB profile, I accept that the Provider is limited in terms of the codes that can be applied to an ICB profile and there is no code to indicate a borrower has been in bankruptcy or discharged from bankruptcy. Additionally, I do not accept that the Provider is required to or indeed can create new codes to reflect this.

The Complainant also refers to the fact that his ICB profile has been updated by another financial services provider to reflect his discharge from bankruptcy. I am not satisfied this entity's conduct in respect of its reporting to the ICB is relevant to this complaint. Furthermore, I do not accept this entity's reporting approach necessarily means the Provider has incorrectly reported to the ICB in respect of the mortgage. I would also note the Complainant has not provided any details surrounding the nature or type of borrowings with this entity or the circumstances surrounding its reporting to the ICB.

The Complainant has simply furnished a letter indicating that his ICB profile would be updated to reflect his exit from bankruptcy. The relevant part of which I have cited above.

While the Provider appears to have initially taken steps to seek possession of the mortgaged property, nothing, or very little, appears to have occurred in the period between mid-**2014** and early **2017** prior to the complaint to this Office in **October 2017**. The Provider has not provided any explanation as to why nothing occurred during this particular period. However, despite this, simply because the Provider sought possession of the mortgaged property and allowed approximately three years to pass before actively pursuing possession of the property does not necessarily impact on its obligation to report to the ICB in respect of the mortgage.

While this may have resulted in the ICB profile changing to *S* (Surrender of Goods) or *P* (Litigation Pending) if more prompt action had been taken, I am not satisfied in the circumstances of this complaint, that this delay constitutes conduct contrary to the ***Financial Services and Pensions Ombudsman Act 2017***. It is within Provider's discretion to choose whether, and to what extent, to enforce its rights under a mortgage agreement.

The Complainant believes the Provider ignored his requests to have his complaint handled by a senior manager. The first such request appears to have been made on **12 September 2017** when he requested that his complaint be *escalated to a higher level*. The Complainant made "... *one more request for this complaint to be escalated to a Senior Manager*" on **1 October 2017**. A similar request was made on **5 October 2017**. While the Complainant states in an email dated **19 October 2017** that "*You state that a senior manager in the Collection's department is 'aware' of my case*", it is not clear where or when this was stated by the Provider. Nonetheless, I am satisfied the Complainant was advised that senior management was aware of the complaint.

Furthermore, while this office will investigate the conduct of a provider and its agents, I do not believe that it would be appropriate for this office to direct who within the provider should deal with a customer or the seniority at which it should be dealt with.

/Cont'd...

The Complainant requested that his complaint be escalated to a *higher level* in **September 2017** and to senior management in **October 2017**. The evidence in this complaint does not demonstrate that these requests were necessarily acknowledged or responded to by the Provider. While I am not satisfied that the Provider was obliged to have senior management deal with the Complainant, it is reasonable to expect the Provider to at least respond to the Complainant.

Having considered the correspondence sent by the Complainant to the Provider, there was a distinct delay on the part of the Provider in furnishing a substantive response. The Complainant wrote to the Provider on **15 June 2017** wanting to make a complaint in respect of his ICB profile. The Complainant sent further correspondence on **12 September 2017**. The Provider did not issue a formal response to these letters until **4 October 2017**. Further to this, the Complainant made clear in **June 2017** that he was making a complaint.

However, there is no evidence that the Provider complied with section 10.9 of the **Consumer Protection Code 2012** in terms of updating the Complainant regarding the investigation of his complaint. While the Provider states in its Formal Response that it issued correspondence in compliance with section 10.9 on **22 June 2017, 12 July 2017, 11 August 2017** and **8 September 2017**, copies of these letters have not been furnished to this office.

### **The Central Credit Register**

The Provider wrote to the Complainant on **26 July 2019**, advising him that the details pertaining to the loan account had been removed from the Central Credit Register (**CCR**). The Complainant advised this office on **26 August 2019**, that details of the loan had reappeared on the CCR.

Ultimately, on **5 November 2019**, the Provider advised this Office that:

*“... The Bank has completed a further investigation of this issue and can confirm that as the mortgage account remained active it automatically reported to the CCR in August 2019. The Bank can now confirm that following an additional alteration to the account record, as of 12 September 2019, the account had been excluded from future CCR reporting. The Bank would like to convey its sincere apologies for any inconvenience caused in relation to this matter and in recognition of this service issue would like to offer the Complainant a gesture of goodwill in the sum of €250.00.”*

### **Goodwill Gesture**

Addressing the voluntary surrender/repossession process, the Provider states in its formal response dated **16 August 2018** that it *“... would like to offer the Complainant a goodwill gesture of €500.00 in consideration of any mis-understanding that may have occurred as a result of the process.”*

/Cont'd...

I consider the Provider's offer of €750 (€500+ €250) to be reasonable in the circumstances and for this reason, I do not uphold this complaint.

### **Conclusion**

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is rejected.

**The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.**



**GER DEERING  
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

20 April 2021

Pursuant to **Section 62** of the **Financial Services and Pensions Ombudsman Act 2017**, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

**(a) ensures that—**

- (i) a complainant shall not be identified by name, address or otherwise,**
  - (ii) a provider shall not be identified by name or address,**
- and**

**(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.**