

The complaint

Mr E complains about the actions of New Wave Capital Limited (trading as Capital on Tap).

What happened

Mr E told us:

- His limited company which I'll call 'M' took out a loan with New Wave in December 2021.
- Due to unexpected circumstances with his health, he had to make a repayment arrangement with New Wave but then was a couple of days late making his first repayment.
- New Wave immediately registered a default on his personal credit file which Mr E said was unfair as the loan had been lent to M, not him personally.
- New Wave refused to remove the default as it said Mr E had been a guarantor for M's loan, and therefore they could register the default against him personally.
- Mr E said that he hadn't signed the personal guarantee, and that the loan and related documents had been electronically signed by one of E's employees who thought they were just accepting the loan. He asked New Wave for copies of this information, but it wouldn't provide this.

New Wave told us:

- M requested a revolving credit facility (the loan) in December 2021. M provided the relevant identification documents and once it had carried out its checks, it sent Mr E – as director of M – the details so he could log into the customer portal and review and accept the agreement.
- Mr E had been given the loan agreement and a personal guarantee agreement which he ticked electronically to say he understood and accepted. As a lender, it asks that all borrowers are personally guaranteed by their directors.
- Mr E had been given the opportunity to download a review all documents before agreeing to them, and the documents highlighted that it was recommended that borrowers seek legal advice before accepting the agreement. The agreement clauses made it clear that if M couldn't repay the loan, that New Wave would seek repayment from Mr E.
- M's account went into arrears in January 2022, and it had attempted to contact M and Mr E between January and early June without success. It then provided Mr E with information he'd requested about the personal guarantee and in July, it explained to him that if M didn't meet its repayments and Mr E didn't pay them under

the guarantee, that his personal credit file would be affected.

- A repayment plan was set up for M's loan in early September, but Mr E cancelled the direct debit less than a month later. It had written to Mr E in the same month to confirm that if the required repayments weren't made as agreed, it would report this on Mr E's credit file – as it was contractually obligated to report arrears of more than 90 days.
- It contacted Mr E about M's debt in November and December and explained that if the repayments weren't met, the agreement would be terminated. When the repayments weren't met, it had terminated the agreement and sold the debt to a third-party, which was in line with the agreement terms and conditions.

Our investigator didn't recommend the complaint be upheld. He recognised that Mr E said he wasn't aware that he was giving a personal guarantee for M's loan. However, he said that New Wave had sent Mr E the electronic application form and he'd instructed an employee to complete this on M's behalf, so the responsibility for how this was complete remained with Mr E. He also said that M's repayment had been missed in January 2022, and it wasn't until June 2022 that M agreed to a new arrangement, which had subsequently been missed. So, M's account had effectively been six months in arrears at the time the default was registered on Mr E's credit file. So it was reasonable for New Wave to take this action.

Mr E didn't agree. He said that he didn't give his permission for M's employee to sign the personal guarantee. He also said that he thought the agreement was misleading, and that the personal guarantee couldn't be entered into on his behalf and that it needed his actual signature to be binding, not simply a tick box that had been hidden amongst the loan agreement. He also didn't think it was fair that New Wave had registered the default against him personally for the company debt. So he asked for an ombudsman to review his complaint and the case has been passed to me to decide.

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.

Having done so, I've decided not to uphold it. I'll explain why.

Mr E says that New Wave have treated him unfairly because it applied a default against his personal name for borrowing taken out by E. But I'm not persuaded that New Wave treated him unfairly here. I agree that the loan was in M's name, and it was therefore responsible for any debt, repayments, and the consequences of not meeting its contractual obligations. However, I've also seen that New Wave had a personal guarantee from Mr E, and that when M didn't make their repayments, the lender told Mr E it would be seeking repayments from him under the personal guarantee.

I've also seen that it made Mr E aware that if the contractual repayments weren't met that his personal credit file would be affected as a result of this personal guarantee. Both M, and then Mr E didn't meet the contractual repayments or the agreed repayment plan, so New Wave registered this against Mr E's personal credit file. I think this was reasonable.

I recognise that Mr E says that he didn't sign the personal guarantee and that the documents New Wave are relying on aren't enforceable. Firstly, I need to make clear that I can't comment on whether an agreement is enforceable, only a court can do that. However, what I can consider is if New Wave acted fairly with regards to the personal guarantee. And based

on what I've seen I think it did. I've seen evidence from New Wave which shows the agreement was sent electronically solely to Mr E with specific log on details for him to access and sign it.

So, if Mr E didn't agree to the guarantee, this implies that it was agreed to fraudulently. However, Mr E says fraud wasn't committed here because he gave the access details to the employee to accept the agreement - they just didn't realise what they had accepted also included a personal guarantee. So, I think it was reasonable for New Wave to rely on the agreement it received electronically accepted by Mr E, as it wouldn't have been aware that he wasn't the person who'd accessed the documents.

Mr E says that the agreement was misleading because the personal guarantee was just a tick box within the loan documents and New Wave should have required confirmation of who'd signed it. But I don't agree. I say this because before New Wave sent Mr E the documents to sign electronically, he had already provided identity documents to verify his identity – which it had needed to accept. And, as mentioned above, New Wave had only sent Mr E the documents which were password protected, so it had no reason to doubt that he hadn't accepted the documents.

I've also looked at the agreement documents, and I agree that there was a 'tick box' to say that Mr E had accepted the terms of the personal guarantee. However, this was a separate personal guarantee document aside from the loan agreement, which gave a clear explanation of the obligations which the person agreeing to the document would be bound by and requested they seek legal advice if they were unsure of what this meant.

I've also seen the email from New Wave that said the agreement and personal guarantee document could be downloaded and reviewed before they were accepted. However, New Wave have provided us with a copy of the electronic audit that shows Mr E's employee didn't do this and simply accepted the agreement shortly after it was received. So based on what I've seen, I don't think New Wave has treated Mr E unfairly here and I don't think it's fair to hold the lender responsible because Mr E delegated the signing of the agreement and personal guarantee.

However, I recognise that Mr E says because he didn't sign the guarantee, he can't be held responsible for any actions taken by New Wave against it. For the reasons I've given above, I'm satisfied that Mr E did give New Wave a personal guarantee for M's borrowing. But if I am wrong about that and in fact Mr E did not give a personal guarantee, I would then have no power to consider his complaint at all.

The Financial Ombudsman Service isn't free to consider every complaint that's brought to us. We're governed by rules set by the industry regulator, the Financial Conduct Authority (FCA). They're called the DISP rules and can be found in the FCA's handbook. They set out the complaints that we can (and can't) investigate. I have to strictly apply the rules about what we can and can't consider - I don't have discretion when it comes to our jurisdiction.

The rules also set out who is eligible to refer complaints to our service. There are various categories which a complainant can fit into, but only the guarantor and consumer categories are potentially relevant here. Under the rules, a consumer is defined as "an individual acting for purposes wholly or mainly outside that individual's trade, business, craft or profession". While Mr E was acting in a personal capacity here - in that the guarantee was provided in his own name – this was done to obtain borrowing for M.

Based on what I've seen, I think the guarantee was given for a purpose connected with the business he was a director of at the time – which means that Mr E wouldn't meet the criteria for a consumer. Furthermore, based on the evidence I've seen, I'm satisfied that Mr E did

give New Wave a personal guarantee for M's borrowing, and Mr E is therefore a "guarantor" under our rules. However, if – as Mr E says – he did not in fact give a personal guarantee, that would mean he didn't meet the definition of an eligible complainant under the DISP rules, and as a result I wouldn't be able to consider his complaint.

I recognise that Mr E will be unhappy about this, and that he'll be disappointed with my decision. But based on everything I've seen I don't think New Wave has treated Mr E unfairly in his capacity as a guarantor. And if Mr E was not a guarantor, I would then have no power to make an award to him because in that case he wouldn't meet the definition of an eligible complainant.

My final decision

My final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr E to accept or reject my decision before 29 December 2023.

Jenny Lomax
Ombudsman