

The complaint

Mrs M complains about the actions of New Wave Capital Limited (trading as Capital on Tap) who are pursuing her for a debt she says is owed by her company.

What happened

Mrs M told us:

- Her limited company which I'll call 'L' took out a credit facility with New Wave in January 2020 for £1,000 which had been increased without agreement to £12,000.
- L had been unable to make their repayment in November 2022, so they'd contacted New Wave so they could make the payment a few days later. New Wave had agreed this, but not made them aware that this would result in their remaining limit being suspended.
- When New Wave had suspended L's limit, they hadn't been able to trade. New Wave had essentially closed the business and prevented them from being able to make their repayments.
- New Wave had then told her that she needed to repay L's outstanding debt as she'd given a personal guarantee for the company borrowing. However, she hadn't signed a personal guarantee that she was aware of. And if she had done so, it hadn't been clear when she'd signed the facility documentation, that was what she was agreeing to.
- Mrs M wanted New Wave to either write off the outstanding debt or remove her completely and stop chasing her for the outstanding debt. She said L was prepared to repay the debt, but not at the level New Wave required, so the debt should be returned to the company.

New Wave told us:

- Mrs M hadn't raised a complaint about its actions of pursuing her personally for L's business debt and the effect on her personal credit file prior to bringing it to this service.
- Mrs M had been given L's credit agreement and a separate personal guarantee agreement which she signed electronically to say she understood and accepted. Mrs M 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 L couldn't repay the credit facility, New Wave would seek repayment from Mrs M.
- It had told Mrs M that if she wanted it to stop chasing her for L's outstanding debt, that she needed to discuss this with the collections team. However, she hadn't done so, and therefore it had pursued her for the outstanding balance, and her personal credit file had been affected.

Our investigator didn't recommend the complaint be upheld. She thought the personal

guarantee had been clearly presented to Mrs M before she signed the agreement. She said that she hadn't seen any evidence that Mrs M was unsure what she was agreeing to and had sought advice from New Wave. She also said New Wave had to report factually accurate information on Mrs M's credit file as the agreement was in arrears. So, she didn't think New Wave had acted unfairly.

Mrs M didn't agree. She said the personal guarantee hadn't been clear enough and that she wouldn't have signed the agreement if she'd been aware. She also felt New Wave had acted unreasonably because it held the personal guarantee. So, she asked for an ombudsman to review the complaint.

I issued a provisional decision on 23 December 2023. I said the following:

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 for broadly the same reasons as our investigator.

Mrs M says that New Wave have treated her unfairly because it has sought repayment from her and put negative markers on her personal credit file for borrowing taken out by L. But I'm not persuaded that New Wave treated her unfairly here. I agree that the loan was in L'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 Mrs M, and that when L didn't make their repayments, the lender told Mrs M it would be seeking repayments from her under the personal guarantee.

The personal guarantee says that in the event that L doesn't make the required repayment that Mrs M as the guarantor would be required to make the payment 'as though they were a party to the agreement'. It also says that New Wave doesn't have to pursue L for repayment before requesting it from Mrs M. I've seen copies of the letters to Mrs M showing this is what New Wave have done here, so I don't think it has acted unfairly.

New Wave have also provided us with copies of the letters to Mrs M which say she was responsible for making the repayments if L doesn't do so, and confirming the amount of arrears that Mrs M needed to pay. I've also seen a copy of the collections notice which was sent to Mrs M saying that if L's contractual repayment wasn't met, that her personal credit file would be affected as a result of this personal guarantee. Both L, and Mrs M didn't meet the contractual repayments or the agreed repayment plan, so New Wave registered this against Mrs M's personal credit file. I think this was reasonable.

I recognise that Mrs M says that she didn't sign the personal guarantee and that if she did sign it, she wasn't aware that that's what she was doing. She feels New Wave acted unfairly by not making this clear enough. However, based on what I've seen I don't think New Wave treated Mrs M unfairly. I've seen evidence from New Wave which shows the agreement was sent electronically to Mrs M for her to access and sign it. And that Mrs M had the option to download the documents for a further review if required. However, New Wave have provided us with a copy of the electronic audit that shows Mrs M didn't do this and simply accepted the agreement shortly after it was received.

I've also looked at the agreement documents, and I acknowledge Mrs M may not remember signing the document electronically as this was completed via a 'tick box' to say that she accepted the terms of the personal guarantee. However, I've seen

there was a separate personal guarantee document aside from the credit loan agreement, which gave a clear explanation of the obligations which the person agreeing to the document would be bound by. The personal guarantee agreement also recommended they seek legal advice before agreeing to the guarantee if they were unsure of what this meant. However, I haven't seen any evidence that Mrs M made New Wave aware that she was unsure of what she was signing. So, I think it was reasonable for New Wave to rely on the agreement it received electronically from Mrs M saying that she'd read, understood, and accepted those terms.

I recognise that Mrs M will be unhappy about this, and that she'll be disappointed with my decision. But based on everything I've seen I don't think New Wave has treated Mrs M unfairly by pursuing her personally for L's debt or recording negative markers on her personal credit file in her capacity as a guarantor for L's credit facility.

I invited Mrs M and New Wave to give me any more evidence and information they wanted me to consider before issuing my final decision. New Wave didn't respond to say whether or not it accepted the decision. Mrs M didn't accept. She said in summary that New Wave hadn't acted fairly in line with the consumer duty, and even if this didn't apply, the lender hadn't behaved in a reasonable manner. Mrs M also reiterated that L was taking out the facility with New Wave and the personal guarantee wasn't obvious. The lender should have ensured that she was sufficiently aware of what she was signing so she could make an informed decision. She didn't think the lender had made the personal guarantee obvious and felt the tick box was likely to be missed.

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 remain of the opinion for the reasons already given, that I don't uphold this complaint.

I recognise Mrs M's strength of feeling about this complaint, and I acknowledge the comments that she's provided, particularly about the impact on her as a result of the personal guarantee. However, as I explained in my provisional decision, I've seen that the personal guarantee was a separately headed document. This was titled "*Personal Guarantee and Indemnity by Directors of Corporate Borrowers or Partners of LLPs*", so I'm not persuaded that the document was ambiguous. The personal guarantee agreement also appears to have been separated from the loan agreement by the tariff of charges, so I can't fairly say that the terms or wording of the guarantee were blended into the main agreement.

I also acknowledge Mrs M's comments about making an informed choice, but the personal guarantee does say to seek legal advice, and "*This document is a Guarantee. Sign it only if you want to be legally bound by its terms*". So, when Mrs M ticked to say that she had read the agreement and accepted its terms, I think it was reasonable for New Wave to rely on this. I think it's also worth noting that on New Wave's website the FAQ's explain what a personal guarantee is and that all its customers have to provide a personal guarantee to receive a credit facility through the lender. So, I think New Wave does make it clear that this is part of its lending criteria – rather than it being hidden until a customer makes an application.

Mrs M has also cited different laws and regulations which she believes New Wave hasn't met, she's also commented on previous court enforceability decisions. Firstly, I need to make clear that I can't comment on whether an agreement is enforceable, only a court can do that. I also need to make clear that some of the regulations she's referred to, such as the

consumer duty don't apply here because the lending that the personal guarantee was given in relation to, is unregulated. Mrs M isn't complaining as a consumer here, she's complaining in her capacity as L's director, so she doesn't have level of protection through regulations that a consumer would have.

So, I have considered Mrs M's complaint on the basis of what's fair and reasonable. And in the absence of regulations covering this type of activity, I've also considered what best practice would be in this area. Our service would usually consider the Standards of Lending Practice drawn up by the Lending Standards Board as a good guide to best practice in the industry, even if a lender hasn't actually signed up to that code. The part of the standards which are relevant here are:

(8) Firms should inform the customer if any security, for example, a guarantee/ debenture/ indemnity, is required to support the borrowing or other liabilities and the reason why. The level of security required by the Firm should be appropriate to the amount borrowed.

(13) If an individual or a business agrees to be a guarantor or to provide an indemnity, the Firm should make the individual/business aware of their obligations under the agreement and that they have the option to seek legal advice, should they wish to do so.

So, looking at the evidence provided, I think New Wave did inform Mrs M about the personal guarantee when it sent her the agreement and related documents. Furthermore, it's also explained within the FAQ's on New Wave's website what a personal guarantee is, and that a personal guarantee is always required from directors for a business to secure borrowing. And, as I mentioned in my provisional decision, the personal guarantee document says, "*We strongly recommended that you take independent legal advice before agreeing to be bound by this guarantee and also read the Agreement which this guarantee relates to.*" Therefore, I'm satisfied that New Wave did meet the standard expected.

I'm sorry to disappoint Mrs M as I recognise that she has found herself in a difficult position and I appreciate she feels strongly about the complaint. But based on what I've seen, I don't think New Wave has treated Mrs M unfairly in her capacity as a guarantor.

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 Mrs M to accept or reject my decision before 14 February 2024.

Jenny Lomax
Ombudsman