

The complaint

Mr J complains that New Wave Capital Limited (trading as Capital on Tap) is seeking to recover a debt from him under a guarantee which he says he didn't agree to.

What happened

Mr J was a director of a company which I'll refer to as "M". In June 2022 M opened a revolving credit account with New Wave, with a credit limit of £10,000. Mr J had a card on the account, which he's explained was for expenses when working away from home.

Mr J left M in December 2022 and says he returned his credit card to M. As at the date of Mr J's resignation as director of M, the balance on the account was more than £9,860 in debit. Following Mr J's departure, M made repayments to the account as usual in December 2022 and January 2023, but it missed the February payment.

In March 2023 Mr J received a letter from New Wave, saying that his "personally guaranteed business account" was in arrears, and asking him for payment. The following month New Wave wrote to Mr J again, asking him to pay two monthly payments that had now been missed. When New Wave didn't receive payment, it wrote to Mr J again, ending the credit agreement and demanding payment of the full outstanding balance of just under £10,000.

Mr J says he didn't sign a guarantee, and was never given a copy of the account terms and conditions. He's told us that the first he heard about the guarantee was when he received a letter asking for payment. New Wave says Mr J signed the guarantee electronically and provided photographic and video proof of his identity.

One of our investigators considered Mr J's complaint, but didn't think it should be upheld. In summary, she was satisfied that Mr J had given a guarantee for M's borrowing – and she explained that this meant we had power to consider the complaint. But she didn't think that New Wave had acted unfairly by demanding payment under the guarantee.

Mr J didn't agree with the investigator's view, so the complaint's been passed to me.

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'm not upholding the complaint. I'll explain why.

The account holder was M, so M was responsible for repayments, and the consequences of not meeting its contractual obligations. But New Wave has provided a copy of a personal guarantee in Mr J's name.

I recognise that Mr J says that he didn't sign the guarantee. He says the person responsible for M's administration at the time the account was applied for would have had access to his driving licence and electronic signature, as those were stored on his HR file. He says he thought the ID which he sent New Wave was purely for security purposes. And he says that he himself never logged on to any app and never had any login details for the account.

I've listened to several recordings of phone calls between Mr J and New Wave. These have been provided to Mr J. During a call in early March 2023, shortly after Mr J received the first request for payment, New Wave referred to a personal guarantee on the account. Mr J said that the guarantee was given as a director of M, not personally. He said he'd left M on bad terms, and it was up to the company to deal with things.

During the same call, New Wave explained that it couldn't discuss the account with the current director, whose details Mr J provided, as he wasn't authorised on the account. It said Mr J had opened the account, and that unless someone else was added as an authorised person on the account, it could only discuss it with Mr J. While Mr J expressed dissatisfaction with the ongoing situation, he didn't challenge New Wave's assertion that he'd opened the account.

In a further call in April 2023 Mr J explained again that he'd left M in December 2022. He commented that M had been using the card without his knowledge. He said he'd given New Wave details of the current ownership of M and who could guarantee the account now. He said that M was aware of the debt, and was liable for it. Mr J acknowledged that he had a guarantee against his name, but said that he'd left the company and was trying to rectify the position.

Mr J believes the investigator took his comments out of context. He says he clearly stated during the phone calls that he was being held responsible for the debt without his knowledge, and he was trying to get information about who should be dealing with M's debt. He believes that M knew exactly what it was doing, and he's now being chased for a debt which has nothing to do with him.

But having listened to the phone calls, I'm satisfied that Mr J was aware that he'd given a guarantee for M's debts. His objection was that he was continuing to be held responsible for those debts after he left M, and that M had continued to use the account following his departure. He also considered that New Wave was pursuing him for payment without doing enough to pursue the current directors of M.

It may be that Mr J thought that someone else would step in as guarantor if he left M. But I can't fairly hold New Wave responsible for any such impression. The guarantee specified that Mr J would remain liable in respect of the guarantee until New Wave released it in writing. And it said: "*In the event that the Borrower does not make any payment in full as required by the Agreement, then we shall have the immediate right to request that the Guarantor makes any such payment and/or makes good any shortfall where the Borrower has paid less than required.*" So I'm satisfied that New Wave was entitled to request payment from Mr J as soon as M fell behind with its payments.

I recognise that Mr J says that because he didn't sign the guarantee, he can't be held responsible under it. But I'm satisfied, on balance, that he signed the guarantee electronically as part of New Wave's application process, and that in signing it he confirmed that he'd read it and agreed to be bound by it.

I need to make clear that I can't comment on whether an agreement is enforceable. Only a court can do that. But I can consider whether New Wave acted fairly regarding the personal guarantee. And based on what I've seen, I don't think it has treated Mr J unfairly here.

However, if I'm wrong about that and Mr J didn't, in fact, 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.

The rules 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 J 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 Mr J was a director of at the time. This means he wouldn't meet the criteria for a consumer.

As I've explained, based on the evidence provided, I'm satisfied that Mr J did give New Wave a personal guarantee for M's borrowing, and he is therefore a "guarantor" under our rules. However, if - as Mr J 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 realise that Mr J will be disappointed with my decision. But based on the evidence provided, I don't think New Wave has treated him unfairly in his capacity as a guarantor. And Mr J wasn't a guarantor, I wouldn't have power to make an award to him because he wouldn't meet the definition of an eligible complainant under our rules.

My final decision

My decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 21 March 2024.

Juliet Collins
Ombudsman