

The complaint

Mrs J complains that New Wave Capital Limited trading as Capital on Tap (Capital on Tap) treated her unfairly when they recorded adverse credit information on her personal credit file.

What happened

There's little dispute between the parties about the core events in this case. As I understand them – in summary they are as follows:

- Mrs J is the director of a company which I'll refer to as P. However, she's brought this complaint in her personal capacity for reasons that are explained below.
- In June 2021, on behalf of P, Mrs J applied to Capital on Tap for a business credit card.
- Capital on Tap approved the application, and on behalf of P, on 22 June 2021, Mrs J signed a credit card agreement (the Agreement) on the basis of which Capital on Tap provided P with £10,000 credit on its credit card account (the Account).
- As additional security for debts accrued on the Account, on the same date Mrs J granted Capital on Tap a personal guarantee (the Guarantee). It is in that capacity ie as guarantor, that Mrs J has brought her complaint to this service.
- According to Mrs J, after the Account was up and running and in use, ill health and personal issues meant she was unable to work. And as a result, repayments towards the Account were not made and arrears began to accrue.
- In December 2021, Mrs J contacted Capital on Tap and explained her financial circumstances. She was asked to send in copies of her bank statements so that a payment plan could be worked out with Capital on Tap. According to Mrs J, she did so on 14 December 2021.
- But shortly afterwards, on 17 December 2021, Capital on Tap wrote to Mrs J regarding the arrears. They told her she was now in breach of the Agreement. Capital on Tap's letter added:

"Please note: this account includes a Personal Guarantee. If the business cannot pay, it is the responsibility of the Guarantor (named on this letter) to make the payments."
- In January 2022 Mrs J contacted Capital on Tap again to further explain her circumstances. In particular, that she was finding it difficult to meet the required repayments on the Account. Although in an attempt to help, Capital on Tap put in

place certain payment arrangements, they were for limited duration and weren't always adhered to by Mrs J.

- Throughout 2022, correspondence about the arrears on the Account continued to be sent addressed to Mrs J. And Capital on Tap continued requesting that such arrears be cleared. Among others, the correspondence included a letter dated 20 May 2022. It too was addressed to Mrs J and referred to:

“Credit Card Agreement between [Mrs J] and New Wave Capital Limited t/a Capital on Tap dated 22/6/2021 ('Agreement')”. And it went on to say:

“This is a Notice of Sums in Arrears issued in compliance with Section 86C of the Consumer Credit Act 1974 because you are behind in contractual payments under your Agreement”.

- The letter asked Mrs J to contact Capital on Tap to discuss: *“the state of your account”*. And it included the same standard paragraph referred to in the December 2021 letter noted above.

- On 21 November 2022 a Notice of Arrears email was sent to Mrs J. The email said:

“Your Capital on Tap account is in breach of contract and immediate attention is required. Despite our best efforts to make contact. you have failed to maintain your payments to Capital on Tap in line with your contractual obligations or set up an arrangement to clear the arrears.

Your account remains in arrears by £2.086.71.

It is important to remember that this account holds a Personal Guarantee - if the business cannot pay, the guarantor is required to make payments. If you do not pay or make an arrangement, we may report the late payments on your personal credit file.

A Notice of Default is due to be issued. If the default amount is not satisfied, the default will be listed against your credit file. In addition, your details may be passed to a debt collection agency or a solicitor to obtain any outstanding sums owed to Capital on Tap along with any fees and charges incurred for enlisting their services.”

- On 25 November 2022 Capital on Tap issued a default notice under Section 87(1) of the Consumer Credit Act 1974. It was addressed to Mrs J followed by P's full name. The subject matter of the letter confirmed P's full name followed by “t/a” and then Mrs J's full name. The Default Notice referred to the: *“Credit Card Agreement between [P] and Capital on Tap dated 22/6/2021”*. And it went on to explain that the notice had been served because:

“you are in breach of clause 3 of the agreement which provides that each month you will pay the minimum payment by the due date ...”

- On 19 May 2023 Capital on Tap wrote to Mrs J once more. Referring, as the letter did to the:

“Credit Card Agreement between [Mrs J] and New Wave Capital Limited dated 22/06/2021”, the letter continued:

“On 25/11/2022 we sent you a default notice under Section 87(1) of the Consumer Credit Act 1974 because you have failed to keep to the terms of the Agreement. We asked you to pay £2086.71 by 14/12/2022 but you have not done so.

Please therefore treat this as our letter ending the Agreement. This means that you must now immediately pay to us the balance under the Agreement of £8781.00.

If you do not make payment of £8781.00 (including any rebate you are entitled to) by 5pm on 05/06/2023 then we will have no option but to:

*(a) report your default to credit reference agencies
(b) instruct third parties to try and recover monies from you; and
(c) consider taking legal action against you”*

- In the same month, May 2023 the Account was referred to a debt collection agency. Before that, however, in February, March and April 2023 Capital on Tap said they recorded adverse credit information on Mrs J’s personal credit file.
- Mrs J didn’t think that was fair and complained to Capital on Tap. She wanted the adverse credit entries deleted from her personal credit file. This, she said was on the basis that she made her financial circumstances known to Capital on Tap throughout. But contrary to what she expected which was to receive help from Capital on Tap, they instead placed adverse credit information on her credit file.
- Capital on Tap didn’t think that in their dealings with Mrs J, they did anything wrong.
- They said – in summary:
 - It’s acknowledged Mrs J faced repayment difficulties and throughout 2022 they put in place three repayment arrangements to try and help her through those difficulties.
 - But on two occasions the payment arrangements weren’t adhered to and fell into arrears which led to them being terminated.
 - In various items of correspondence, Mrs J was made aware of the consequence of missing repayments both in respect of her personal credit file and that of P’s.
 - In particular, on 21 November 2022, a final warning was issued warning Mrs J’s that her personally guaranteed account was in breach of contract and at risk of default.
 - Mrs J signed the Agreement on behalf of P and agreed to all the terms and conditions. These included her liability under the Guarantee and furthermore,

she was aware of the implications in terms of the reporting of adverse information on her credit file.

- Mrs J didn't agree with Capital on Tap's response to her complaint. And as it remained unresolved, it was referred to this service to look into.
- Our investigator upheld the complaint for the reasons I summarise. She said having regard to the Agreement she was satisfied that:
 - The credit card debt that accrued on the Account belonged to P. It was P therefore that was primarily liable for it.
 - Mrs J in her personal capacity wasn't a party to the Agreement. Her own personal liability was derived from the Guarantee.
 - Having regard to that document, it made clear Mrs J became personally liable for P's debt "on demand". Whereas, in the circumstances of this case Capital on Tap served no formal demand on Mrs J personally.
 - In light of that omission, Capital on Tap acted unfairly when they placed adverse entries on Mrs J's personal credit file.
 - Capital on Tap should therefore:
 - a) Remove the adverse credit entries from Mrs J's credit file; and
 - b) Pay her £300 compensation for the distress and inconvenience caused to her.
- Mrs J agreed with the investigator's recommendations. But Capital on Tap, on the other hand did not. So, the case has been passed to me to review.
- In response to the investigator's conclusions and recommendation, Capital on Tap largely maintained their position. But added – in summary that:
 - Mrs J signed the Guarantee accepting the terms of the Agreement. In particular she agreed to become personally liable if P should fail to make payments towards the Account. Pages 15 – 17 of the Guarantee is relevant to this case and supports the action that Capital on Tap took against Mrs J.
 - Contrary to the investigator's conclusion, Mrs J was provided with a formal demand to make payments under the Guarantee. That's because the trading name of P is actually Mrs J's own name. And P's business address was also Mrs J's home address.
 - Capital on Tap sent correspondence to Mrs J addressed to her personally. The correspondence clearly set out the amounts and dates of missed repayments, the deadline within which to make them and the consequences of failing to do so.

- So, the investigator was wrong to conclude that Mrs J wasn't served with a formal demand, which in turn meant it was unfair for Capital on Tap to place adverse markers against her personal credit file.
- The adverse credit information recorded against Mrs J in February, March and April 2023 was due to the Account being 90+ calendar days late. The reports reflect the fact that "P" failed to maintain its contractual repayments under the Agreement, and Mrs J did not fulfil her obligation to pay any sum owed where her business – P, did not.

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.

Where the evidence is incomplete or inconclusive (as indeed some of it is here) I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances.

I'll come to the substance of my conclusions in Mrs J's case in a moment. But first, I'll state an obvious but in the circumstances of this case a necessary point.

As a limited company, legally P is separate and distinct from Mrs J. As the director of P, Mrs J is an employee and officer of the company. Mrs J and P cannot be treated as one and the same regardless of whether P's trading name is Mrs J's. That important legal principle has informed my approach to this case, the substance of which I now turn.

I agree with the investigator that the Agreement is the document that sets out the contractual relationship and respective obligations between P and Capital on Tap. This includes P's payment obligations and the remedies available to Capital on Tap in circumstances where P fails to meet those obligations. In this connection, the relevant clauses in the Agreement are set out below and I'll come to them shortly. But before I do so, for completeness, I'll add one further point.

I also agree with the investigator's conclusion that Mrs J's own relationship and liability in connection with Capital on Tap, are derived from the Guarantee. What that means is that it is by reference to the Guarantee that Capital on Tap is able to hold Mrs J liable for P's debts and, in turn require her to settle those debts. But before Capital on Tap is able to do so, P would need to have been in breach of its payment obligations under the Agreement.

Did P breach the Agreement?

In answer to that question, Clause 3 of the Agreement is relevant and says:

“3. Repayments

3.1 *Each month you must pay at least the minimum repayment (Minimum Payment) by the payment due date, each shown on your statement. Payments to your Account will not reduce the balance until the payment has cleared.*

3.6 ***Warning – missing payments:*** *Missing or making late or incomplete payments can have severe consequences and may make obtaining credit more difficult. If you miss,*

make late or incomplete payments we will contact you to resolve this. If you miss a payment we may:

- a) sell your debt and we or the purchaser may take legal action to recover money you owe us. This may include asking a court for an order that your property must be sold or an order that we or a purchaser can be paid from the sale proceeds of your property*
- b) take legal action to recover what you owe us which could result in any outstanding balance being secured against any property you own.*
- c) End this Agreement*
- d) Instruct a third-party debt collection agency to contact you for payment or raise court action against you to recover the money (the costs of which we may choose to pass through to you)”*

It is common ground that P did not discharge its payment obligations under the Agreement and arrears accrued as a result. It follows therefore that P was in breach of the Agreement and in the circumstances, the remedies set out in clause 3.6 of the Agreement, became available to Capital on Tap.

I am also satisfied Capital on Tap wrote multiple times to P about the breach and some of the important correspondence in that regard have already been noted above.

Although I note that the relevant items of correspondence – in particular the Notice of Arrears and Default Notice dated 21 and 25 November 2022 for example, were addressed to Mrs J, I regard the correspondence as intended for P albeit it was addressed to Mrs J as its director.

To be clear, however, I do not find that the notices were aimed at Mrs P personally. And I say that because as noted above the Notice of Arrears and Notice of Default referred to the Agreement - including the date it was entered into by the parties. As I've explained, Mrs J was not a party to the Agreement. P, as a separate legal entity was. So, in my opinion Capital on Tap cannot rely on these documents as proof of the discharge of its contractual obligations in relation to Mrs J personally.

Later Capital on Tap took steps to end the Agreement and eventually transferred P's outstanding debt to debt recovery agents as they were entitled to do under clause 3.6 (c) and (d) of the Agreement.

In relation to P, therefore I do not find that Capital on Tap's actions were wrong or unfair. Rather, I'm satisfied that those actions were fully in compliance with the terms of the Agreement. And in the event, P's breach opened the possibility for the recovery by Capital on Tap of debt owed by P from Mrs J in reliance on the Guarantee.

Was Mrs J in breach of her obligations under the Guarantee?

It is this issue that is at the heart of this case.

I agree with Capital on Tap that Mrs J signed the Guarantee. And having done so, accepted that she'd become personally liable to Capital on Tap if P should fail to make payments towards the Account.

So, ultimately, it is only by reference to the Guarantee can it be determined whether Mrs J has been in breach of her obligations towards Capital on Tap. If therefore, it was determined that Mrs J was in breach of those obligations, it would follow that Capital on Tap would then be entitled to record adverse information to this effect on Mrs J's personal credit file.

I turn therefore to the terms and conditions of the Guarantee. The following clauses are relevant to this case.

“3. *In consideration of our agreeing to enter into the Agreement and permit drawdown under the Agreement, the Guarantor, being a director or member of the Borrower hereby irrevocably and unconditionally:*

(a) guarantees to the Lender punctual performance by the Borrower of all the Guarantee Obligations;

(b) undertakes with the Lender that whenever the Borrower does not pay any Guaranteed Obligation when due, the Guarantor shall immediately on demand pay that amount as if he was the principal obligor,”

I also agree with Capital on Tap that pages 15-17 of the Guarantee to which they refer are also relevant and they say:

4. *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.*

5. *The Guarantor agrees to make such payment on demand as though the Guarantor was a party to the Agreement.*

6. *The Guarantor agrees that we are not under any obligation to take any debt collection or legal action against the Borrower before requiring payment by the Guarantor.*

16. *Any demand, notice or proceedings under this Guarantee may be served:*

a) by letter, sent by first class post to, or left at, your last known address or registered office and if sent by post, it will be deemed to have been served at the time it would, in the ordinary course of post, be delivered; or

b) by email to your last known email address and it will be deemed to have been served at the time of transmission

So, the above terms and conditions make clear the circumstances in which Mrs J might become liable for P's debts under the Agreement. In other words, in the event P fails to make the required repayments to the Account. And as was noted above P did not make those payments - meaning under the Guarantee, Mrs J as guarantor would become personally liable for P's outstanding debts.

Clause 5 of the Guarantee makes clear a prerequisite of that liability is that a demand is made upon Mrs J personally to do so. Indeed clause 6 allows Capital on Tap to seek to do

so whether or not, for example , it takes legal action against P beforehand. Clause 16 sets out the form in which the demand needed to be issued.

All that being said, in fairness, Capital on Tap, does not dispute that in relation to Mrs J personally, the steps I've just described are those they needed to take in the event of P's default under the Agreement. It follows, in my opinion therefore, that for it to be said that Mrs J had been in breach of her own and separate obligations under the Guarantee, the steps referred to – such as the service of a demand would necessarily have to have been made.

In this respect, however, it is Capital on Tap's case that personally, Mrs J was provided with a formal demand to make payments under the Guarantee. And furthermore, that she was alerted to the consequence of failing to do so. More to the point, Capital on Tap's argument is that Mrs J having failed to make the payment demanded, they were within their rights to register adverse information about her on her personal credit file.

But I've looked carefully at all the correspondence to determine whether, as Capital on Tap has argued, they sent correspondence to Mrs J personally alerting her to P's default and the steps she needed to take in light of this.

I start with the 21 November 2022 Notice of Arrears which Capital on Tap has referred to in support of their position. I note that although the Notice is addressed to Mrs J, it refers to her account being in breach of contract, and in arrears by £2,086.71. I've thought about whether this could be considered a Notice of Arrears to Mrs J personally.

However, since the Account belonged to P, as is my finding above, it's difficult to conclude the notice was intended for Mrs J personally rather than for P. The notice further made clear there was a Notice of Default due to be issued. And this duly followed on 25 November 2022.

The Notice of Default referred to the "Credit Card Agreement between [P] and Capital on Tap dated 22/6/2021. And that it had been served because:

"you are in breach of clause 3 of the agreement which provides that each month you will pay the minimum payment by the due date ..."

Here too I'm not persuaded this was aimed at Mrs J personally. The Agreement was not her own – it was between P - the limited company and Capital on Tap. There was no reference to the Guarantee the document that underscore Mrs J's personal relationship with Capital on Tap. I'm therefore satisfied the Notice of Default was aimed at and intended for P rather than Mrs J. And it was served on P accordingly rather than Mrs J in her personal capacity.

The upshot therefore is that I've seen no clear or persuasive evidence of Mrs J as required under the Guarantee was served with a demand for payment, failed to do so and had a Default Notice served on her personally. The relevant Notices and correspondence that I've seen were aimed at P as they referred to the Agreement between P and Capital on Tap who were the contracting parties in the Agreement. And since there was no demand served on Mrs J personally, it is difficult to conclude she was in breach of her obligations to pay the amount which the demand would have stipulated.

It follows therefore, that in the absence of that necessary and required step under the Guarantee, I do not find Mrs J has been in breach of her obligations under the Guarantee.

Putting things right

So, I find that Capital on Tap treated Mrs J unfairly when they registered the default notices

on Mrs J's personal credit file and therefore Capital on Tap needs to put this right by deleting the entries

My final decision

My final decision is I uphold this complaint. In full and final settlement of it, I recommend that New Wave Capital Limited trading as Capital on Tap:

- Remove any default markers placed on Mrs J's personal credit file, as a result of the credit card facility that was made available under the Agreement being defaulted.
- Pay Mrs J £300 for the inconvenience this matter has caused to her.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs J to accept or reject my decision before 16 July 2024.

Asher Gordon
Ombudsman