

The complaint

Mrs K complains that New Wave Capital Limited, trading as Capital on Tap, (CoT) are pursuing her unfairly under a personal guarantee.

Mr K has conducted this complaint on Mrs K's behalf.

What happened

Mr K has told us that:

- Mrs K was the director of a limited company which I'll refer to as "P".
- In March 2019, Mrs K successfully applied to CoT for a credit card which had an initial credit limit of £6,000. The card was operated by Mastercard.
- The credit terms were set out in a Running Account Credit Agreement dated 29 March 2019 (the First Agreement), attached to which was a personal guarantee (the First Guarantee) granting CoT security for P's borrowing on the credit card. Both documents were purportedly signed by Mrs K. which she denies.
- In December 2019, CoT told Mrs K they intended switching card operators from MasterCard to Visa and that she needed to sign a new updated agreement on P's behalf. The new agreement was dated 16 December 2019 (the Second Agreement) and, once more, a new personal guarantee (the Second Guarantee) was attached. Mrs K disputes signing this also.
- In 2024, because of difficult trading conditions, P began experiencing financial difficulties and payments towards the credit card were missed. So around October 2024 Mrs K contacted CoT to explain the position. CoT told her that the outstanding balance on the credit card stood at around £40,000, that she was liable under her personal guarantee and would be pursued personally for payment. Later that month CoT sent demand letters to Mrs K.
- But CoT have not said whether she is being pursued in reliance on the First or the Second Guarantee. Instead, they have maintained there is only one guarantee and that the Second Guarantee purportedly given in December 2019 is merely a continuation of the First. However, Mrs K has noted that the Second Guarantee is a much lengthier document and contains significantly more clauses when compared to the First Guarantee.
- In any event, Mrs K denies giving CoT any guarantee in the first place to secure P's borrowing. And even though she has been presented with copies of both documents nonetheless, CoT haven't been able to show she signed either of them meaning, they are neither valid nor enforceable.

CoT didn't think they'd done anything wrong. They have said - in summary that:

- In March 2019 all customers needed to complete their signing-up process. To that end, Mrs K would have been prompted to sign into her customer portal, set up the CoT account which included reviewing and signing the agreement and the personal

guarantee.

- And when CoT migrated their card operation from MasterCard to Visa, they explained to Mrs K that she would need to accept the new terms and conditions, which included electronically signing an updated agreement and guarantee.
- Mrs K's obligations under her personal guarantee were made clear to her in March and December 2019 and CoT have found no evidence that Mrs K raised any objections regarding those obligations at the relevant time.

Mrs K's complaint remained unresolved, however, so on her behalf Mr K referred it to this service to look into.

Our investigator didn't think there was anything we could ask CoT to do on this case because if a second guarantee was not given by Mrs K to CoT in December 2019, then the case would be out of our jurisdiction. But if, on the other hand it was, then it would be fair and reasonable for CoT to pursue Mrs K under that guarantee.

Mrs K didn't agree with the investigator's conclusions and Mr K has asked for an ombudsman to review her case.

Although Mr K has made further detailed submissions on Mrs K's behalf, some of them are repeated arguments. Including, for example, that there are different terms and conditions between the March and December 2019 guarantees – meaning the latter cannot be regarded as a continuation of the one purportedly given in March. But he also says this:

Even if our service cannot determine whether the guarantees are enforceable; our service should consider the fairness or otherwise of CoT's action. More specifically, in seeking unfairly to enforce terms and conditions in respect of the Second Guarantee that are substantially different and more onerous compared to the First Guarantee.

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.

I start by saying that I am not persuaded by CoT's argument that there is only one personal guarantee in this case. In other words that in the December 2019 transfer, Mrs K was merely being asked to sign an updated agreement and personal guarantee. I say that because, there was a fresh set of documents that CoT generated in December 2019 to give effect to the new arrangements. And Mr K is right, the Second Guarantee differs from the First Guarantee, not least that it is a longer document with a number of additional clauses.

I appreciate Mrs K may have concluded that if she did not sign the First and/or the Second Guarantee, this brings into play a legal technicality that would absolve her from any contractual obligation to repay P's debt. In other words, that the absence of her signature means as a matter of law, neither guarantee would be enforceable against her.

But Mrs P's submission regarding the effect of her not signing the guarantees would need to be addressed to a court rather than this service. Only a court has the power to determine whether a contract is or isn't enforceable. So, I have made no findings regarding the enforceability of the guarantees.

The First Guarantee

There is a jurisdiction point that is relevant to this guarantee, to which the investigator has alluded. We can't look into complaints about personal guarantees that were given to financial businesses before 1 April 2019.

Our rules did subsequently change on 1 April 2019 to give us wider powers to consider more complaints from guarantors. But this only applies to complaints about guarantees that are entered into on or after that date.

The application of the rule is not retrospective. So, I'm afraid that in the circumstances of this case, given that the First Guarantee was given to CoT in March 2019, we would not be able to consider a complaint about it. I won't therefore comment further on the First Guarantee.

The Second Guarantee

In December 2019, Mrs K was presented with the Second Agreement to which the Second Guarantee was attached. For reasons I explain later, I'm satisfied the Second Guarantee was given by her to CoT at that time – specifically on 16 December 2019. That means consideration of it would be within our jurisdiction.

My powers as derived from the Financial Services and Markets Act 2000, allow me to decide what is fair and reasonable in the circumstances of the case I'm considering. I am satisfied therefore, that I am able to consider whether in the circumstances of this case, it's fair to require Mrs K to repay P's debt under the Second Guarantee.

For completeness, I should add that I've considered whether I'd be precluded from considering this complaint as it relates to CoT, given that P's debt is currently in the hands of recovery agents to whom it was sold. But I don't think I am. I say that because Mrs K's complaint originated from the formal demands that CoT made on her personally as guarantor of P's debt. I've noted the demand letters that were served on Mrs K dated 27 August and 2 and 29 October 2024. The 29 October 2024 letter said:

"In accordance with the terms of the personal guarantee provided by you to us, if we do not receive the payment of the Balance in Full by 12/11/2024 we will require you to pay the Balance in Full or make good any shortfall after a payment is made by the Borrower."

This is at the core of Mrs K's case against CoT. She believes this action by CoT is unfair. In other words, their call on the security she purportedly gave in support of P's debt. It is this issue that I am considering.

I note that on 8 October 2024 Mrs K wrote to CoT as follows:

"I want to be quite clear what will happen if you seek to invoke the PG. In the event that you do, the following will happen:

I will challenge the enforceability of the PG: we have had advice that suggests it is highly likely that the PG is not enforceable."

Initially it seems it was no part of Mrs K's case that she did not give CoT a guarantee for P's debts. But more recently, at its core, her arguments against CoT and the reason she believes it is unfair for her to be held liable for P's debt is that she did not sign a guarantee. So, I've looked into this.

Did Mrs K sign the Second Guarantee and so gave CoT security for P's debt?

I've reviewed the Second Agreement and the Second Guarantee. Although, neither appear to have anything resembling a wet signature, this is unsurprising since it is CoT's case that Mrs K signed the documents electronically.

I've considered CoT's submission regarding the process for providing this type of signature and the evidence they've submitted to demonstrate that Mrs K did.

CoT have explained that at the time of the switch over to Visa in December 2019, Mrs K would have been presented with two boxes, which like all customers at the time she'd have needed to tick by way of acceptance of their new terms and conditions.

CoT have provided me with a screenshot of the relevant boxes Mrs K would have seen and needed to tick. The first box said:

"By ticking this box, I understand that any supplementary cards on my account will also be replaced".

Immediately below is a second box which said:

"By ticking this box I confirm I have read and accept the contract. I also understand that I am personally responsible for the agreement"

CoT said Mrs K completed this step on 16 December 2019 by ticking the box shown in the screenshot. They have also shared a screenshot of their internal records which shows that on 16 December 2019 at 21:42 the Second Agreement was signed.

I have also been shown a copy of the e-mail they sent to Mrs K after the successful completion of the switch entitled: *"How your Capital on Tap Account Works"* to which a copy of the updated Second Agreement including the Second Guarantee was attached.

When all of that is put together, on balance I'm persuaded that Mrs K did sign both the Second Agreement and Second Guarantee as fresh security for P's debt. I'm satisfied that it wasn't unfair for CoT to have determined, as they did when they wrote to Mrs K in August and October 2024 that she remained liable to them for P's debt and they could rightly pursue her for its repayment.

My final decision

Although I anticipate this will come as disappointing news to Mrs K, my final decision is I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs K to accept or reject my decision before 24 December 2025.

Asher Gordon
Ombudsman