

complaint

Mr Q complains that MKDP LLP ("MKDP") is acting unfairly in pursuing him for a debt taken out by a third party company.

background

A business loan was taken out by a company ("B") in 2010 with a lender ("F"). Mr Q was a director of B. B went into liquidation in 2012. F then sold the loan to MKDP. MKDP is pursuing Mr Q for payment of the loan because he gave F three personal guarantees for B's current and future debts in 2004, 2005 and 2008. But, Mr Q said that when the loan was taken out in 2010, the personal guarantees were cancelled. He said that there were previously three directors of B, but in 2010 as he was the only director, he had signed a new guarantee which cancelled the previous guarantees. F said that the three previous guarantees covered a total borrowing of £36,000, and covered B's loan in 2010. Mr Q complains that a copy of the 2010 loan agreement is not available and that there are no documents available to prove that the guarantees were cancelled, and that he does not have personal liability to repay the 2010 loan.

The adjudicator did not recommend that the complaint should be upheld. She was satisfied that Mr Q was personally liable for the loan debt that remained when B went into liquidation. She could not see that MKDP had done anything wrong in asking Mr Q to pay it.

Mr Q disagreed and responded to say, in summary, that he had signed a form at the same time as the loan was taken out in 2010, which had cancelled the three previous guarantees. So, he was not personally liable for the loan.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

Where the evidence is incomplete, inconclusive, or contradictory (as 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 light of the available evidence and the wider circumstances.

I note that when Mr Q first discussed this case with this service, he said that he believed that the loan had been cancelled when B went into liquidation. When the adjudicator issued her initial opinion which referred to Mr Q's 2008 guarantee, Mr Q said that when the third guarantee was signed in 2008, there were three directors in the company. But when B took out the loan in 2010 he was the only director and the bank told him that the 2008 guarantee would not apply. Mr Q said that he had signed a guarantee or another document in 2010 which cancelled the previous guarantees.

I note that the adjudicator spoke to F. It explained that a new guarantee would not have been signed in 2010 when the loan was taken out. And F would not have asked Mr Q to sign a new guarantee as the three previous ones sufficiently covered the debt. It also said that if it had asked Mr Q to sign a new guarantee in 2010, there would have been a charge to draw up the new guarantee and Mr Q would simply have been replacing the three previous ones for a new guarantee and would be in exactly the same position as now, being personally liable for the company debt. It also said that F retained the personal guarantees even if a debt had been repaid as it covered future borrowings.

So when B borrowed more money in 2010, the personal guarantees were applicable. It did not matter that the company had three directors previously and then only Mr Q in 2010, as the guarantees were not joint and several. They were personal guarantees.

I note that neither Mr Q nor F nor MKDP can produce a copy of the document which Mr Q said cancelled his previous guarantees, or a copy of the 2010 loan agreement. But it is clear from the loan account statement and B's bank account statement that there was a loan in July 2010, and that B made the loan repayments until February 2012.

Having carefully considered the circumstances of this complaint, on balance, and in the absence of any compelling evidence to the contrary, I cannot safely conclude that the personal guarantees given to F were cancelled in 2010. As the guarantees covered all future debts, I agree with the adjudicator that MKDP has not acted inappropriately in pursuing Mr Q for repayment of the loan.

I note that Mr Q says that he is in financial difficulties and would be unable to repay the loan. I would urge him to contact MKDP to discuss this. I would remind MKDP of its duty to treat cases of financial difficulty positively and sympathetically.

my final decision

My decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr Q to accept or reject my decision before 16 February 2015.

Roslyn Rawson
ombudsman