

complaint

Mr E complains that Amigo Loans Ltd allowed him to become a guarantor of someone else's loan when he lacked the mental capacity to agree to do so.

background

Mr E is represented in this complaint by Mrs A. Mr E's work colleague (now his ex-colleague) had a personal loan with Amigo Loans. He persuaded Mr E to guarantee the loan. He then defaulted on the loan, and so Amigo Loans required Mr E to repay it. Mrs A complains on Mr E's behalf that Amigo Loans should not have allowed him to act as a guarantor because he did not understand what he was doing. While there is no dispute that Mr E has learning difficulties, Amigo Loans denies that he lacked the mental capacity to decide to guarantee a loan, or that he didn't understand what he was doing. It also says that it had no information at the time to suggest otherwise.

Our adjudicator upheld this complaint. He said that there was medical evidence to show that Mr E lacked capacity. He listened to a recording of the phone call in which Mr E agreed to be a guarantor, and he thought that there had been some clues that should have led Amigo Loans to suspect that Mr E might not have understood the call. But more importantly, in the adjudicator's opinion, Amigo Loans should have cancelled the guarantee once it learned about Mr E's condition. He recommended that Amigo Loans cancel the guarantee and remove all information about it from Mr E's credit file.

Amigo Loans did not agree with the adjudicator's assessment. It said that the medical evidence did not go so far as to say that Mr E lacked capacity. The report only said he had moderate learning difficulties. Amigo Loans said there was nothing in the phone call which should have made it suspect otherwise. It wouldn't discriminate against someone by refusing to let them act as a guarantor just because they had learning difficulties. It argued that just because he may have made an unwise decision didn't mean he lacked capacity either. The fact that Mr E didn't have a power of attorney implied that he was capable of managing his own finances. It was not fair to make Amigo Loans take responsibility for what Mr E's former colleague, a third party, had done. That should be a matter between them, in court. It wouldn't cancel the guarantee just because of new information which had come to light since. But it would be sympathetic and positive with Mr E now that it knew about his problems, and it would offer him extra support.

The adjudicator passed this complaint to me for an ombudsman's decision.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. I emphasize that I am not deciding the question of whether or not Mr E actually lacks mental capacity. Only a court can do that. I am instead deciding what I think is a fair and reasonable answer to this complaint, taking into account the evidence and the law. In particular, I've had regard to sections one and two of the Mental Capacity Act 2005.

Rather than trying to decide whether Mr E has or lacks capacity, I think it is reasonable to approach this complaint by deciding whether he is a vulnerable consumer. If he is vulnerable, then I should consider whether Amigo Loans did enough to take his vulnerability

into account and to ensure that he understood what being a guarantor meant. And finally I should consider what Amigo Loans should do now that it knows about his condition.

In deciding these questions, I have had regard to the Financial Conduct Authority's paper on *Consumer Vulnerability*, dated February 2015. This identifies as vulnerable people who have a learning disability. The FCA adopted the Department of Health's definition of a learning disability as "a significantly reduced ability to understand new or complex information ... [or] a reduced ability to cope independently which starts before adulthood with lasting effects on development." The FCA says that "Consumers with low levels of financial literacy, with mental health issues and learning disabilities are particularly at risk." This is a broader category of people than those without mental capacity.

Mr E's doctor wrote a letter in July 2016 which said:

"his capacity regarding new learning and formulating decision making is very limited ... based on my assessment of [him] and my knowledge of his history and the medical records in front of me he does not have the capacity to make an informed choice regarding the decision of being a loan guarantor."

The letter also says that Mr E was first diagnosed when he was a child.

Amigo Loans argues that this letter is unconvincing, because it does not say what Mr E's current diagnosis is and lacks detail. It also argues that the phone call contradicts the doctor's evidence, as in the call Mr E gave detailed information. (I will return to the phone call shortly.)

I don't agree that the letter is unconvincing. While I appreciate that it is short and it does lack detail, the doctor expressly says that it is based on Mr E's medical records. Those records would include his current diagnosis, and are likely to be very extensive, given that Mr E has been under the care of doctors since early childhood. I accept what the doctor says.

The doctor also filled in a "Debt and Mental Health Evidence Form." It's true that in this form the doctor described Mr E as having "moderate learning difficulties." But the doctor also said he had "poor" concentration and memory, and "very poor understanding and comprehension." The doctor said Mr E had an "inability to make rational and reasoned decisions," and that "face to face communication with an advocate is advised." He has annual reviews of his mental health.

Mr E's mother has told us that her son "can't understand things if he is only told once how things work and would need extra help or time spent trying to explain things that others would easily comprehend." While this is not medical evidence, it is her summary of many years of experience of Mr E, and I take it into account.

I have listened to the call recording. The call handler explained Mr E's obligations under the guarantee in a way which would have been clear to a person without learning difficulties. Mr E did not indicate that he did not understand – indeed, he told the call handler that he did understand her. I have considered the argument that this must mean that he really did understand what he was doing. I think it's a reasonable point made by Amigo Loans. But in my opinion the medical evidence (and the mother's evidence too) carries more weight. I think it's more likely that Mr E's responses on the phone call are a sign that, after years of coping with his learning difficulties, he has learned to try to conceal them from strangers. It's easy for him to say that he understands, and to affect a confident tone of voice. But in view

of what I've read about him I think, on the balance of probabilities, that he was faking, and that he didn't understand. And while the call handler's explanations were clear, that doesn't mean that they were clear to him.

In view of all of this evidence, I think it is now clear that Mr E is a vulnerable consumer, whether or not he has mental capacity.

I've read Mrs A's submissions in which she explains why she thinks Amigo Loans should have realised from the call that Mr E had learning difficulties. But I'm afraid I don't agree. My impression of the call is that there was nothing so obviously out of the ordinary that the call handler should have considered the possibility that she might be talking to a vulnerable consumer.

In the call Mr E described his (now former) colleague as a really good friend. So I don't think it was suspicious that he was asking to guarantee a colleague's loan.

Mrs A has argued that Amigo Loans did not assess Mr E's income and expenditure properly. But the call handler went through this carefully with Mr E (even after he said he had done it himself the day before), and I think it was done correctly. I accept that it might not have been accurate, but Amigo Loans could not have known that with the information it had at the time. In particular, I think Amigo Loans is entitled to use whichever credit reference agency it wishes.

It follows that I do not accept that Amigo Loans was wrong to accept Mr E as a guarantor of his former friend's loan, based on what it knew at the time.

Nevertheless, a vulnerable person has still become the guarantor of a loan, without understanding what it meant for him. So I now have to decide what should be done about Mr E's complaint with that in mind.

I don't think it would be right for me to leap to proposing the cancellation of the guarantee as a first resort. A fair starting point would be exactly what Amigo Loans has suggested, namely to collect the debt in a positive and sympathetic manner, while making allowances for Mr E's learning difficulties. To that I would add that Amigo Loans should also follow the FCA's guidance on vulnerable consumers and the guidelines in paragraphs 241 to 252 of the *Lending Code*. I think that would involve Amigo Loans arranging a reasonable and affordable repayment plan with Mr E. So I have considered whether that would be a fair resolution to this complaint, instead of our adjudicator's recommendation.

That alternative solution would significantly alleviate the financial pressure on Mr E. But it would still not address the fundamental problem at the heart of this complaint: that Mr E took on an onerous financial responsibility he did not understand. I won't speculate about whether he would have taken it on if it had been explained to him in such a way that he could have understood it, because there is no way to know the answer to that. But I think it would be fair to put him back in the position he would have been in if he had never been a guarantor. In coming to this conclusion, I have taken into account that the present state of affairs is in no way Amigo Loans's fault, as it is not responsible for the actions of the borrower. But I don't think it is right to hold someone to an agreement – a contract – which they entered without understanding it. And Amigo Loans will still be able to pursue the borrower for the full debt.

my final decision

So my decision is that I uphold this complaint. I order Amigo Loans Ltd to:

- Stop pursuing Mr E for the debt, and
- Rework Mr E's credit file as if the agreement was never taken out in his name.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr E to accept or reject my decision before 9 December 2016. Mrs A may answer on his behalf.

Richard Wood
ombudsman