

The complaint

Mr B complains about how NewDay Ltd (“NewDay”) responded when he asked it to help him claim a refund for goods he ordered.

What happened

Mr B used finance provided by NewDay Ltd to buy a phone from a third party retailer, a company that I will call “A”. Mr B tells us that he never received the phone. Rather the courier who delivered the package which should have contained the phone left the package halfway in and halfway out of his letterbox. Then Mr B’s relative opened the package only to find it did not contain the phone. Mr B’s initial position was either:

- The phone was never in the package in the first place,
- or it was never delivered to his address by the courier,
- or the package did contain the phone, but it was removed from the package by persons unknown who then put the package back into his letterbox where his relative found it.

Either way Mr B considers this to be a breach of contract. He also considers he is therefore entitled to a full refund. Due to the type of credit Mr B used to purchase the phone he indicates that he is entitled to bring a like claim for breach of contract against NewDay as he could against A.

Mr B complained to NewDay.

NewDay declined to uphold the part of Mr B’s complaint about breach of contract, on the basis that it did not accept there had been any breach of contract. Rather, its stance is that the courier delivered the package containing the phone to Mr B’s address. Therefore, there were no grounds for it to uphold this part of Mr B’s complaint. But it also said it had at first incorrectly told Mr B he could try to get his money back via a process known as chargeback. However, Mr B did not have a right to a chargeback. It offered Mr B £50 compensation for this mistake, which Mr B accepted to settle that part of his complaint.

Dissatisfied Mr B complained to our service.

One of our investigators investigated Mr B’s complaint. Our investigator did not recommend that Mr B’s complaint be upheld.

NewDay accepted our investigator’s recommendation, Mr B did not. I’ve summarised Mr B’s reasons for rejecting our investigator’s recommendation. NewDay responded to Mr B’s objections, and I’ve summarised its responses too below:

Mr B indicated:

- That the package might originally have contained the phone but because the package had been left where and how it was, an unknown third party could have tampered with the package removed the phone from it and left the remainder in the letterbox. Any number of people had access to the letterbox as it serves more than one address.
- Alternatively, the courier provided a photo of the package in Mr B’s letterbox. Mr B does not believe this shows the package was actually delivered to his address. What

is more likely is that it was delivered to another address, as many of the neighbours' letterboxes look the same as his. And then an unknown third party removed the phone from the package. After this the package without the phone was placed in his letterbox.

- The relative who opened the package would not have noticed if the package had been tampered with prior to opening it as he has a disability, and that disability means would not have noticed if the package had been opened. Moreover, the photo taken by the courier only shows one side of the package. Therefore, it is not possible to discount that the package was tampered with before his relative opened it.
- The box for the phone was missing a seal strip and the manufacturer has told him its phones are not dispatched like this.
- A provided poor customer service. It did not investigate his complaint properly it was merely interested in making him pay for a phone he does not have.
- A *“has a reputation of doing this type of thing regularly and you as a regulatory body are allowing them to get away with it.”*

NewDay responded:

- On balance if a third party did tamper with the parcel, they were far more likely to have taken the whole thing. Rather than open the package, remove the phone, repackage everything and put it back into the letterbox.
- The photo as far as it is aware shows Mr B's front door that precludes the possibility that the courier left the package at a neighbouring address.
- NewDay has already sent detailed information about A's quality assurance and dispatch procedures which include packaging.

Mr B asked that an ombudsman take a fresh look at his complaint.

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.

First, I'm very aware that I've summarised this complaint in far less detail than the parties and I've done so using my own words. I'm not going to respond to every single point made by all the parties involved. No discourtesy is intended by this. Instead, I've focussed on what I think are the key issues here.

Our rules allow me to do this. This simply reflects the informal nature of our service as a free alternative to the courts. If there's something I've not mentioned, it isn't because I've ignored it. Rather, I'm satisfied I don't need to comment on every individual argument to be able to reach what I think is the right outcome.

I'm only dealing with the part of Mr B's complaint about breach of contract in this decision as the part of his complaint about chargeback was settled between the parties before Mr B complained to us.

In considering what is fair and reasonable, I need to have regard to the relevant law and regulations, regulators' rules, guidance and standards, codes of practice and (where appropriate) what I consider to have been good industry practice at the relevant time. Here relevant law includes but is not limited to section 75 of the Consumer Credit Act 1974 and the Consumer Rights Act 2015.

Due to the type of finance Mr B used to purchase the phone the law says if he has a claim for breach of contract against A he has a like claim against NewDay. Further, I agree with Mr B when he says in general the law also provides that if the goods are not delivered into his

physical possession and within the timescale the law prescribes then this would be a breach of contract. And further I would expect NewDay to take responsibility for such a breach of contract. It seems the parties do not dispute any of this.

That said, Mr B and NewDay disagree about almost every other key aspect 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 the light of the available evidence and the wider circumstances.

Mr B's stance is that he should not have to pay for the phone as he never received it. I can well understand why Mr B is upset about this situation given his stance. Mr B has told us about a number of alternative possibilities which he tells us demonstrate that he never received the phone. Whereas NewDay's has put forward only one possibility that is the phone was delivered to Mr B's home address in line with the contract.

I've thought about the possibility that the phone was just never in the package when despatched. That is a possible scenario and would explain why when Mr B's relative opened the package, according to him, he did not find the phone inside. NewDay has told us about A's despatch processes including the steps it takes to check for discrepancies, such as the parcel not containing the item which has been ordered and paid for or packaging being incorrect. Given that these processes seem to apply to all packages I don't think it is likely that on this individual occasion A would have diverted from this routine. I therefore find it likely that the phone was in the package when despatched.

However, once despatched the package with the phone was alone with the courier. It's possible that the courier could have removed the phone from the package on the way to Mr B's home. To get to the phone the courier would have had to tamper with the package to remove the phone. But the picture the courier took of the phone on delivery shows the package tightly packaged with no signs of tampering. I take on board that we can only see one side of the package in the photo. But if the other side of the package was loose I think in the circumstances there would have been some sign of this in the photo. On balance therefore I find it unlikely that the courier removed the phone from its packaging before delivering the package.

Mr B contends that package might not have been delivered to his address at all, as he says the photo the courier took does not demonstrate conclusively that the courier delivered the package to his door. That said, if I were to accept this scenario I would have to find that the package was misdelivered to a third party address. An unknown person then removed the phone from the packaging and the resealed it and delivered the parcel to Mr B's address with the possibility of getting caught in the act. I don't find this a likely scenario.

Ideally the courier would have delivered the package right into Mr B's hands. But it seems the agreement between the parties was that the courier could leave the package in Mr L's letterbox which I'm satisfied it did based on the information I've got. I don't think I can fairly hold NewDay responsible if other people had access to Mr B's letterbox. And as far as I can see although Mr B had hoped the package would go to another drop off point should it not be delivered to him in person that was not the agreement. So I don't find that the courier did anything wrong by leaving the package in my Mr B's letterbox.

Mr B cannot tell us whether the package looked tampered with prior to his relative opening it. That is because Mr B was not there when the package was opened. And his relative is unable to tell us whether the package was opened before he opened it. But based on the information I have on the file the package was only opened in one place. I can't completely rule out that a third party opened the package left it open and then Mr B's relative opened the package in the same place afterwards. But in the circumstances I think it more likely than not that if more than one person opened the package they'd be more physical signs of this. In any event, I don't find it likely that a third party who took the phone from the letterbox

would have taken the time to remove the phone and leave the rest of the packaging. Rather, I find it more likely that a third party would have taken the entire package.

It appears that the phone is being used. But we've no information to say who is using it. Only the manufacturer could tell us this and we have no power to compel it to do this and this is personal data it would likely refuse to give to us if we asked. The fact that the phone is being used however throws no further light on the question of whether there has been a breach of contract which NewDay ought to take responsibility for putting right.

A's customer service may have been poor. But A is not a party to this complaint, and I can't therefore look at this part of Mr B's complaint. Mr B has sent us a few negative reviews from customers of A. This does not demonstrate though that there is a systemic issue at A where it is charging its customers for phones it does not deliver. And this service is not a regulator.

For all of these reasons, it follows I have no proper basis on balance for saying that the contract has been breached. It also follows that I don't find it is fair and reasonable to ask NewDay to take any further action as I do not uphold Mr B's complaint.

My final decision

My final decision is that I do not uphold Mr B's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 20 April 2023.

Joyce Gordon
Ombudsman