

The complaint

Mr C complains about a fixed sum loan agreement he took out with Sky UK Limited.

What happened

In mid December 2022, Mr C took out a fixed sum loan agreement with Sky to get a brand new mobile telephone device. A few days later, Sky's chosen courier delivered a package to Mr C's home address.

Mr C says the device was a Christmas present for his daughter and after the delivery, he gift wrapped the package ready for her to open on Christmas Day. Mr C also says he didn't check the contents of the package from Sky, before he wrapped it.

When the package was opened, Mr C says he noticed that the device wasn't in its box. Instead, he says the box contained the charging equipment only. Mr C says he contacted Sky on the same day as the package was opened to complain and report what had happened. Mr C also provided Sky with photographs of the packaging.

In their final response to Mr C's complaint, Sky said they hadn't found evidence to suggest the device wasn't in the package delivered by the courier. Sky also told Mr C he was responsible for the repayments owed under the fixed sum loan agreement. Mr C didn't accept Sky's response and brought his complaint to us.

One of our investigators looked into Mr C's complaint and found that Sky had treated Mr C unfairly. He concluded that Mr C had contacted Sky within a reasonable timescale of receiving the package and had found an alternative device for his daughter to use. The investigator also thought the photographs provided by Mr C show damage to the packaging and signs of tampering.

Sky hadn't shown us any evidence to support their side of the dispute. So overall, the investigator was persuaded by what Mr C had said. He found that Sky should remove Mr C from the fixed sum loan agreement, refund any repayments made by Mr C and to add interest to any refund because Mr C wasn't able to use those funds. The investigator also said Sky should remove any adverse information from Mr C's credit file.

Mr C accepted the investigator's findings. But, Sky didn't respond despite several prompts from the investigator. Because Sky haven't accepted or provided further evidence to the investigator, his conclusions remain unchanged. So, Mr C's case has now been passed to me to make a final decision.

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.

The agreement

The fixed sum loan agreement Mr C took out with Sky is a regulated financial product.

Because of this, we are able to consider complaints about it.

Sky provided Mr C with a fixed sum loan to finance the purchase of an electronic device. It was also the supplier of the device, so it was responsible for its delivery. As well as the fixed sum loan to cover the cost, Mr C had an additional contract with Sky for the supply and use of the device, as well as associated services.

I've seen that the terms of Mr C's fixed sum loan linked the other contract for the supply of the device. Given this, and as it appears that both contracts were sold as one package, in my view the contracts were intrinsically linked. The credit agreement actually sets out that it is a requirement for Mr C to also enter into a contract for the supply of equipment. So, I'll consider both contracts together in determining whether Sky has treated Mr C fairly.

Mr C's fixed sum loan has terms which seek to stop him setting off a claim under one contract against the other. This might apply in a situation where Mr C seeks to make a claim about the failure to supply the goods to him under the linked contract for goods and services.

I've thought about what the Consumer Rights Act 2015 (CRA) says about contract terms, and I'm also aware that it is for a court to decide if a term is unfair. But, I'm required to take into account relevant law when deciding what is fair and reasonable.

Having carefully considered this, I don't think it would be fair to exclude Mr C's right to set off a claim under one contract against the other. I think we can consider Mr C's claim that Sky breached its contract with him by not supplying the goods. In any case, there is a regulated credit agreement, under which Mr C is being charged for the goods. So, I can consider whether Sky is acting fairly by asking Mr C to pay where there is a dispute about delivery.

As a result, I'm able to decide whether I think, on balance, that the device was delivered to Mr C's address.

When the evidence is incomplete, inconclusive, or contradictory as it is in this case, I make my decision on the balance of probabilities. That is, what I think is most likely to have happened given the available evidence and the wider circumstances.

The delivery of the package

Both Mr C and Sky agree that a package was delivered to Mr C's address a few days after the fixed sum loan agreement was taken out. This dispute is over the contents of the package. I think images of the package being handed to Mr C, the delivery notes, device activation and usage records, contact notes and call recordings would all prove useful evidence.

However, Sky haven't provided us with their notes about the ordering or the delivery of the device to Mr C. Neither have they provided their records to support their handling of the complaint, despite being asked by the investigator.

On the other hand, Mr C has provided us with photographs from the day the package was opened and a copy of the fixed sum loan agreement. Mr C has also sent us a copy of Sky's response to his complaint, a description of what he says happened and copies of his bank statements.

Mr C says that when he took delivery of the package, he wrapped it as a gift for his daughter and didn't inspect the device first. I accept it may have been reasonable for Mr C to have checked the condition of the device, before wrapping it as a gift. Afterall, the device may have been the incorrect specification or may have been damaged.

But, the package was to be opened a few days after the delivery. So, I'm not persuaded this means Mr C should have contacted Sky sooner than he did. Or, that it was unreasonable for Mr C to have inspected the device when the package was opened by his daughter.

Additionally, I acknowledge where Mr C may have noticed that the package was unusually light in weight, given he says the goods were not inside. But I've also considered that the type of device Mr C ordered is considered lightweight. And that the packaging itself and the charging equipment could have masked how heavy Mr C could have expected the package to weigh.

Overall, I think Mr C has been consistent with what he's told us about the delivery of the package and the reasons why it wasn't opened until six days after the delivery. In all the circumstances, I'm persuaded it was reasonable for Mr C to have taken these steps and in the timeframe he has set out. So, I've gone on to consider the other evidence after the package was opened.

Mr C says he contacted Sky on the same day as when his daughter unwrapped the package. I can see where Sky sent their final response to Mr C around seven weeks later. I've said that we don't have Sky's contact records to show when Mr C raised his concerns with them. But, I think the date of Sky's final response supports Mr C's side of the dispute, in that I find it likely he raised his concerns on Christmas Day.

The photographs provided by Mr C to Sky when the package was opened show two parts to the packaging. Firstly an outer, rectangular cardboard box. And secondly the branded device box, which was packed within the cardboard box. The photographs were taken after they were opened, so the packaging will show damage of some sorts. But, there is other damage to the outer box, separate from the main opening. So, on balance I'm persuaded the outer box shows some signs of damage or tampering.

I can also see from the photograph of the device box that neither cellophane wrapping, or a security tag is present. Furthermore, Mr C has told us that he cannot remember removing any cellophane wrap or any security tags from the device box.

Looking at all the evidence, I think Mr C has taken responsible steps by providing Sky with photographs of what he found when the device box was opened. On balance, I'm persuaded that the device box didn't have a cellophane wrap, or a security tag attached when Mr C took delivery from Sky's courier. And that the outer box appears to have been damaged. So, I think this supports Mr C's view that the device was likely removed from the device box, before he took delivery of it.

However, I've thought about Mr C's actions since Sky sent him their final response, to decide if it's fair to hold him responsible for the repayment of the fixed sum loan agreement.

Mr C has told us that he bought a replacement device from a friend, to give to his daughter soon after he raised his concerns with Sky. To support what he says, Mr C has provided us with his bank account statements from December 2022 to October 2023.

Although I cannot see from those bank statements the payment Mr C mentions, I can see where Mr C has continued to make the payments to Sky which were due under the fixed sum loan agreement.

Overall, I think this shows where Mr C has been transparent with the evidence he's provided. I think it also shows the steps Mr C took, to make sure his concerns about the device had little impact on the records kept about him by credit reference agencies.

Having thought about everything, I'm persuaded by what Mr C has said. I also think Mr C has been credible and consistent with what he's told us. On balance, I'm not persuaded the device was delivered to Mr C. This means I think Sky have breached the contract they have with him. It follows that I think Sky should now offer Mr C a remedy. So, I've thought about how Sky should put things right.

The settlement to this complaint

In light of my findings that I don't think the device was delivered to Mr C, I think it's unfair for Sky to hold Mr C responsible for the payment of the fixed sum loan agreement. So, I think Sky should allow Mr C to exit the agreement at no additional cost to him.

Mr C has explained to us that he has made repayments towards the balance of the loan agreement. So, I think it's fair for Sky to now refund any repayments Mr C has made under the agreement.

I also think Mr C has been without the use of those funds. So, I think it's fair for Sky to add interest to the repayments Mr C has made. I think this should be at a rate of 8% a year simple from the dates the repayments were made, to the date of settlement of this complaint.

I acknowledge that Sky are likely to have recorded information about the fixed sum loan agreement, on the records held about Mr C with credit reference agencies. Because of my conclusions about Mr C's responsibility towards the loan, I think it's fair for Sky to remove any adverse information about the agreement from Mr C's credit file.

Putting things right

For these reasons, Sky UK Limited should:

1. Allow Mr C to exit the fixed sum loan agreement at no additional cost to him;
2. Remove any adverse information about Mr C's fixed sum loan, from the details held with credit reference agencies;
3. Refund all the repayments to Mr C that he has made under the fixed sum loan agreement; and
4. Add interest at a rate of 8% a year simple to part three of this settlement, from the dates they were paid, to the date of settlement of this complaint.

Sky must pay these amounts within 28 days of the date on which we tell them Mr C accepts my final decision. If they pay later than this, they must also pay interest on the settlement amount from the date of final decision to the date of payment at 8% a year simple.

If Sky deducts tax from any interest they pay to Mr C, they should provide Mr C with a tax deduction certificate if he asks for one, so he can reclaim the tax from the tax authorities if appropriate.

My final decision

My final decision is that I uphold this complaint and require Sky UK Limited to put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 23 October 2024.

Sam Wedderburn
Ombudsman