

The complaint

Miss C is unhappy with Healthcare Finance Limited's ('HFL') response to her claim made to it under Section 75 of the Consumer Credit Act 1974 ('Section 75').

What happened

Miss C purchased cosmetic dental treatment using a fixed sum loan from HFL. However, before the treatment was concluded the supplier went out of business.

Miss C approached HFL for help after she had completed the alignment treatment. It established that Miss C had not received the dental retainers or the whitening treatment she was due as part of the package. So it made a payment to her finance account of £298 (around £150 for each missing element) to reflect the loss of these things.

Miss C was not happy with this response to her claim. And because HFL would not do anything more she referred the matter to this service.

In summary, Miss C says that not receiving the retainers has meant the whole treatment is ineffective and has caused physical damage to her teeth. She wants the loan ended, a full refund of what she paid to date and any impact on her credit score (for stopping payments while the dispute continued) cleared.

Our investigator looked into things. In summary, she considered HFL's payment was fair and reasonable for the things Miss C did not receive. She noted that Miss C could have taken steps to prevent adverse impact by sourcing retainers from elsewhere. She also noted that the supplier did not guarantee successful results.

Miss C wants the matter looked into by an ombudsman. In summary, she says:

- it is not reasonable to have expected her to source the retainers from elsewhere as the original treatment she paid for included examination and advice;
- If HFL cannot provide the medical advice or goods as part of the original bespoke treatment then they should refund her in full so she can seek a fully advised and safe treatment from an alternative professional; and
- HFL should have notified her earlier that she wouldn't be able to get the retainers at the end of the treatment – and the failure to do so demonstrates a lack of skill and care.

I issued a provisional decision on this matter. In this I said:

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Section 75

Miss C has the right to claim against HFL here in respect of breach of contract or misrepresentation by the supplier of the goods or services in question, as long as certain technical criteria are met. I believe that the criteria are satisfied here so I move on to whether there has been a breach of contract or misrepresentation by the supplier of the treatment.

While I don't have a lot of evidence to support this beyond Miss C's testimony it now appears accepted by all the parties that she did not receive the retainers in her treatment pack or the teeth whitening. So I don't propose to consider this question further.

My starting point here is that although Miss C completed the bulk of the treatment she did not get all elements of said treatment – which is a clear breach of contract. As far as I am aware there has been no attempt by the supplier to remedy this breach and it is no longer trading. I also accept that it is clear from the expert information online (including expert societies in the UK) that the retainers are an important part of maximising any benefits from said treatment.

So I am satisfied that HFL via its liability under Section 75 needs to do something here to remedy the breach. However the issue here is deciding a fair way to do this. HFL would argue that it has remedied the breach of contract and that the £298 fairly reflects what Miss C has lost. Namely a retainer and a whitening treatment.

However, Miss C has argued that she lost more here. She points out that the original treatment – while mainly an 'at home' style plan did include an initial in person appointment where she had relevant scans done on her mouth. She has suggested that rather than awarding the plain cost of 'mail in' style DIY retainers from the internet she should be receiving something more akin to what she paid for.

From the evidence I have I don't think the service Miss C paid for was particularly focused on consultation and in person appointments – it seemed to be a significantly lower cost home treatment plan for teeth alignment than those I have seen which are based on regular clinic visits and supervision. However, I have found some information that indicates a patient was able to attend an initial in person appointment with the supplier if they wanted to get scans of the mouth. Miss C says she did this. It also appears that coming out of this first visit was a bespoke treatment plan for her to carry out at home – but also (presumably) with the ability to ask questions to the supplier with her particular needs in mind.

So, overall it appears there was a guided element and level of convenience to the treatment which is not truly reflected in the offer by HFL. I am minded to agree with Miss C that in this case the cost of simply replacing the retainers for DIY mail order types is not fully remedying the breach of contract in this instance. So HFL's suggestion that around £150 is commensurate with the true cost of what Miss C has lost is not something I presently consider reasonable.

Miss C has sent in some examples of what places charge to go in and get replacement retainers fitted with scans and an orthodontist consultation. I have also done some research (which I can share with the parties) and while costs naturally vary from what I can see this is unlikely to be less than £300 but is reasonably achievable for less than £400.

It is not entirely clear the exact type of whitening treatment the supplier was offering Miss C and it appears that the cost of this can vary significantly – both more than and less than the amount of compensation Miss C has been offered.

Overall I think that Miss C should get something that more closely reflects the value of what she lost as a result of the breach, particularly in respect of the retainers. This is not a science but as a broad award for what has occurred here I think that £550 in total is fair. I note that HFL says it has already applied £298 to Miss C's account so I think it should pay another £252 which it can apply to the loan to reduce the balance further. If Miss C prefers she can also have the £550 or part of it as a cash payment instead – but I don't think it fair to award additional out of pocket interest here as Miss C has apparently withheld loan repayments for an extended period as a result of the dispute.

I know that Miss C was hoping for a full refund. She feels that the lack of retainer has rendered the treatment she did have 'worthless'. She has also indicated that she has suffered from long term physical harm as a result of not getting the retainers on time.

However while I acknowledge Miss C feels the treatment she received is without merit the issue concerns a complex procedure which I am not an expert on. Currently it is unclear to what extent any benefit gained from the treatment has been lost through the supplier's breach of contract. There are a lot of variables here and it is worth noting that the success of the treatment is specified in the contract as being variable in any event. Without further persuasive expert evidence of some kind about Miss C's case it is difficult for me to agree that it is fair for her to receive a full refund here.

Additionally, while I agree with Miss C that she shouldn't have been expected to simply find and order retainers online I do think that she could have reasonably done more to mitigate any potential damage to her teeth by going to see an orthodontist for guidance and replacement retainers. I know Miss C indicates that HFL should have offered to pay for this at the time but I think Miss C could have fairly done this and continued to dispute the matter. I also note that Miss C was able to wear the aligners for several months while she was without the retainers – which would have given her reasonable time to arrange something.

I think it important to note that even if there were more persuasive expert evidence that the supplier had caused Miss C detriment; I would then need to consider whether it right for this service to make a final determination in light of the complexity of the potential issues at play and our inability to compel other expert evidence or cross examine witnesses.

Furthermore, it is important to note that this service is unable to make awards for loss of amenity. I am of course very sorry to hear about the ongoing impact Miss C has explained in respect of her physical appearance as a result of this situation – but it is unlikely this service would be able to make an award to compensate for this in any event.

Miss C has also mentioned possibly going to court to recover costs – however, she should also be aware that choosing to accept my final decision on this matter might have an impact on any other claims she wishes to make in relation to personal injury or other losses against any party in the future. If she is concerned about the implications of accepting my decision she should seek independent legal advice.

I also note that Miss C has indicated that HFL knew that the retainers could not be supplied and should have contacted her earlier to let her know. I don't think it is clear what HFL knew. While in any event, it is not the supplier of dental treatment here so any liability is restricted to any 'like claim' against it under Section 75. Therefore, I don't think HFL had some other duties or had to take some action (beyond goodwill gestures) to notify consumers in the way that Miss C has implied.

Miss C has asked that her credit file not be affected by her decision to stop paying. I think in the circumstances here it would be fair for HFL to amend her credit file to remove any adverse information once Miss C clears the arrears (and if she does so within 6 months).

My provisional decision

I uphold this complaint and direct Healthcare Finance Limited to (depending on Miss C's preference) either:

- apply a further £252 to reduce the balance of her loan; or*
- pay Miss C £550 and add back the £298 previously deducted from the loan balance*

HFL should also remove adverse information regarding the missing repayments once Miss C gets the arrears cleared as long as this happens within 6 months of her accepting my decision.

HFL did not respond to this by the deadline set. Miss C responded and provided some additional evidence and information in order that I reconsider her request for a full refund. In summary:

- she says she was unable to mitigate the situation and pay for a consultation for retainers herself as she was in financial difficulty at the time (she provided her credit report to support this);
- she highlighted a quote from an expert society which she says shows that the retainers are essential to prevent the teeth moving again.

I then wrote to both parties explaining my thoughts on Miss C's response and how it impacted my proposal for redress. I considered that overall Miss C should receive a price reduction of 70% as a far way to settle this complaint. I have incorporated the reasoning for this in my findings here.

Miss C accepted my findings to date. However HFL then responded to say, in summary:

- information it has from when she applied for the loan shows Miss C was in a good financial position;
- it considers I have over valued the cost of whitening and aligners – it says Miss C could have purchased these for £50 and £165 respectively; and
- it does not agree with the redress proposed but it suggests in an effort to resolve matters waiving the remaining unpaid balance of the credit agreement of £631.54 and making a past correction of credit file entries.

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.

HFL has referred to other cases – however, I note that my decision is made on the particular circumstances of this case.

Despite the follow up submissions of the parties I consider the findings in my provisional decision (as copied above) in regard to the breach of contract and refund due for the failure

to provide the retainer and whitening components to be fair and reasonable. However, based on Miss C's latest submissions I consider additional redress payable. I will explain why.

Miss C has sent in information about her financial position from February 2021 to show that if she was expected to rely on her own funds in order to pay for a consultation with an orthodontist to get retainers fitted this would not have been possible. I also note Miss C has drawn my attention to a particular quote by an expert society which indicates that retainers are '*essential in almost all cases*' to prevent the teeth moving again. Miss C has asked me to consider again a full refund in light of her recent submissions.

Miss C has brought to light her financial position in February 2021 when she raised her claim for a refund with HFL as being a reason that mitigation was not a realistic option for her. HFL has said the information it has from the initial application indicates her financial position was good. However, financial position can change over time – and HFL has been provided with Miss C's credit report from the period in question which shows what appears to be a weak financial position including a low score, high credit use and cash withdrawals from a credit card. Overall I find this evidence compelling and accept that (in light of the new information) mitigation was likely more difficult than I initially anticipated when drafting my provisional decision.

However, I do note this factor does not appear to have been mentioned before and Miss C has previously focused on not getting replacement retainers herself due to her lack of experience/lack of confidence in ordering retainers online. And the focus of her approach to HFL appears to have been a request for a full refund. With this in mind I still have some questions about a reasonable attempt to facilitate mitigation initially. For example I don't see where Miss C explained her particular financial situation to HFL in order that it could tailor its response (such as prioritising her complaint/paying compensation directly to her).

HFL has clarified that it would not disregard a customer in financial difficulty and my intention is not to indicate it would do that. HFL's initial submissions to us indicated that it has had challenges presented to response times due the Covid-19 pandemic so I think that despite its best intentions there are logistical uncertainties around how quickly it would have been able to respond at the time, and in any event there would naturally have been some delays in Miss C getting a resolution to the supplier's breach while it considered the matter and the best response.

I think it fair to conclude overall that in these particular circumstances there were likely some delays in getting a replacement retainer which cannot fairly be attributed to Miss C's lack of mitigation. However, even if I accept that Miss C was not reasonably able to mitigate the situation in February 2021 there was a point a few months down the line where she could have, once the compensation on offer/her decision to stop paying the finance enabled her to pay the £300-£400 it would have likely taken to get an orthodontic consultation and fitting. While this might not have prevented the need for any remedial work it potentially would have limited the extent of it (particularly as Miss C was wearing the final aligner in the interim).

I have considered the quote from the expert society which Miss C has highlighted. I accept it is particularly strong in indicating that not getting a retainer and any delay in getting one will likely cause reversal of the treatment. And that the benefits of the treatment can be lost without the use of retainers. I do note it still has some qualifiers such as '*in almost all cases*', nor does it specify the timeframes for teeth going back to their usual position. This takes me back to a fundamental issue here which is a lack of expert evidence about Miss C's particular case. I think using such a general statement, despite being a compelling one, I can only go so far in my capacity as ombudsman without expert opinion about Miss C and her particular case. So I am not in a position to fairly say that Miss C has had no benefit from the treatment/the aligner set she has received and is entitled to a full refund or that treatment

has to start all over again. Nor am I able to say that had she mitigated even later on (when she was reasonably in a position to) that this would have made no difference to the situation she is currently in.

So considering these observations – I don't think it is fair and reasonable for me, with the limited expert information I have to award Miss C a full refund of the treatment. However, on balance, and in light of what Miss C has said I have considered an award that would be fair and reasonable in the circumstances. I consider it fair to reflect the following in the compensation I have already proposed:

- that seeking immediate mitigation was likely challenging in light of Miss C's financial position (based on the new information she has provided); and
- it is likely (in light of the persuasive information from the expert society highlighted) Miss C has lost notable benefit from the treatment due to the supplier's failure to provide the retainers promptly in February 2021

I have thought again about the point that the supplier states overall results are variable. I think this is still relevant to the overall uncertainty about what Miss C has actually lost out on here (whether she got the retainers on time or not). But on reflection, as a starting point I think that it is fairer to assume (and in the absence of other contradictory information) that Miss C would have had at least some benefit from the aligner treatment.

This is not a scientific exercise but as ombudsman I can look at the situation and decide overall what is a fair and reasonable proposal in light of all the circumstances I have discussed above. In an attempt to come to a fair and reasonable assessment of an amount to reflect the breach of contract I have taken into account the thinking above. In summary, I think that a full refund is not fair for the reasons I have outlined. However (and with Section 75 in mind) I think that Miss C should get the £550 (a further £252 to what she has received so far from HFL) for the retainer and whitening services which the supplier failed to provide. And also some additional compensation to reflect the fact she did not get retainers on time and was not able to reasonably mitigate the situation promptly due to her financial position. I think on balance this initial delay would likely have caused notable loss of any benefit from the treatment received.

All things considered I think that an overall price reduction of £1,200 (£650 plus the £550 mentioned previously) is appropriate representing 70% of the overall cost of treatment. I hope the parties will see this is an attempt to balance the failure of the supplier to provide a core part of the contract (and the likely the impact of this in light of the statement from the expert society) against the issues around mitigation and a lack of expert evidence about Miss C's particular case.

In its response to my provisional decision HFL challenged the price reduction I proposed in my provisional decision for the loss of whitening and retainer (£550) service. It maintains the cost should be much less than I have estimated. However from what I have seen I am not persuaded this is the case. I don't think that HFL are taking into account my point that the loss in the circumstances here can't simply be assessed looking at cheap generic one-off DIY home-kits. Miss C contracted for an overall plan of treatment and I note that in her particular case the treatment appeared to have included some in person scans. It appears there was an ongoing continuity of support which Miss C appeared to value and would have used, yet likely lost sourcing elements separately.

HFL in its initial submissions valued the whitening at '£149' for 'a very generic do-it-yourself product' – so this appeared to be a sensible starting point. It now says that it overvalued this

and it is actually £50 – but I don't consider this very consistent or credible based on what it said previously.

HFL has also said I am not comparing like with like (such as plastic retainers vs others) - but the quotes I found for in person fitting of retainers (which were sent to HFL) I am satisfied were comparing like with like. Miss C also produced quotes in excess of this. Furthermore, in response to HFL's point about the service she was contracting for not being a 'brick and mortar' premium service - I have already said in my provisional findings I recognise that – however, in her particular case it was still a roughly £1,700 service where an important part of the contract was not fulfilled. I don't consider it necessary to repeat all my provisional reasoning on how I came to the assessment of the price reduction to reflect the loss of the retainer and whitening services. However, all things considered I stand by these findings and consider them broadly fair.

HFL has explained that Miss C only has £631.54 outstanding on her account (the previous credit of £298 in compensation has been factored in to get to this figure). In light of this I consider a pragmatic solution (so as to draw a line under the matter for the parties) is to have HFL use the award to clear the remaining loan balance, amend Miss C's credit file and repay Miss C the remainder which breaks down (based on the information I have) as follows:

- £1,200 owed to Miss C by HFL if she accepts my decision
- minus £298 compensation already credited to the loan by HFL
- minus £631.54 outstanding balance of the loan

Leaving HFL with £270.46 to refund to Miss C at this point. As detailed in my provisional findings I still don't think it is fair to award additional out of pocket interest in the circumstances.

For clarity Miss C has mentioned that a factor in my determination should be sending a message to the industry as a whole- however, my decision is made on the particular circumstances and any award is not punitive or intended as a regulatory measure. I also note that Miss C has said that HSL did not respond to the complaint within 8 weeks. However, to clarify when Miss C contacted it initially about getting her money back this was not a complaint but a *claim* under Section 75. It is once Miss C complains about the outcome of her claim that a complaint arises about the financial services HSL provided.

I would also like to take this opportunity to remind Miss C I am not making an award in respect of any injury she is claiming the treatment caused. I highlight the following from my provisional findings in respect of Miss C considering whether to accept my findings here:

Furthermore, it is important to note that this service is unable to make awards for loss of amenity. I am of course very sorry to hear about the ongoing impact Miss C has explained in respect of her physical appearance as a result of this situation – but it is unlikely this service would be able to make an award to compensate for this in any event.

Miss C has also mentioned possibly going to court to recover costs – however, she should also be aware that choosing to accept my final decision on this matter might have an impact on any other claims she wishes to make in relation to personal injury or other losses against any party in the future. If she is concerned about the implications of accepting my decision she should seek independent legal advice.

Putting things right

HFL should put things right as detailed below for the reasons given here, including the

rationale in my provisional decision (as copied above).

My final decision

I uphold this complaint and direct Healthcare Finance Limited to credit Miss C with a £1,200 price reduction using this to pay down the remainder of the loan after deducting the credit of £298 it has already paid to her loan. It should then refund Miss C the balance and amend her credit file to remove adverse information in relation to this account.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss C to accept or reject my decision before 15 February 2023.

Mark Lancod
Ombudsman