

The complaint

Miss P complains about a claim she made to Creation Consumer Finance Ltd trading as Creation.

What happened

Miss P purchased laser eye treatment from a clinic ('the supplier') at the start of 2010 financed by a credit card (from a third party) and a loan from Creation (provided in 2009). However, Miss P said the supplier ceased trading and would not honour a lifetime guarantee. As a result she wrote to Creation in May 2022 via a consumer portal to raise a claim to it under Section 75 of the Consumer Credit Act 1974 ('Section 75') for a refund or compensation towards further treatment.

Miss P complained she had not heard anything from Creation. Eventually she referred the matter to this service in August 2022 when she did not hear back

After this service got involved Creation sent Miss P a final response letter in February 2023. However, it did not uphold the complaint. In summary, it said that in considering the Section 75 claim it had regard to the Limitation Act 1980 ('the LA') and the time limits for bringing an action for misrepresentation. It noted that the sale of the treatment took place more than six years before Miss P raised her Section 75 claim. As a result (and with the LA in mind) it said it would not investigate her Section 75 claim further.

Our investigator looked at how Creation had handled the claim. In brief she concluded that Creation took too long to give Miss P a claim outcome but it didn't act unfairly in not upholding it because there was no clear breach of contract or misrepresentation by the supplier.

Miss P disagreed. In summary, she believes the supplier promised to correct her eyesight for the better if needed / do anything to better her eyesight.

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.

I won't comment on everything said by the parties – only those matters I consider to be central to this dispute. This is not intended to be a discourtesy to either side but reflects my role resolving disputes informally.

One important thing to note here is that we don't appear to have been able to obtain a copy of the finance agreement. Creation says this is because of its age. This can have implications not only on our jurisdiction but also on the criteria for a valid Section 75 claim. However, I have proceeded here on the basis that Creation has not disputed that Miss P took out a regulated consumer credit agreement with it to fund the treatment – nor that she was the customer who contracted with the clinic for the purposes of Section 75.

Section 75

In certain circumstances Section 75 allows Miss P to claim against Creation for breach of contract or misrepresentation in respect of the agreement she has with the supplier here.

There are certain criteria for a valid Section 75 claim – and I have limited information which makes it difficult to determine if this is met. However, based on what I know (and considering that it doesn't make a difference to the outcome in respect of the claim here in any event) I am satisfied that Miss P has a claim against Creation.

Creation has raised limitation periods set out in law as being a reason why it is not responsible for a potential claim for breach of contract. Essentially it is saying that as Miss P had the treatment in 2010 she would be 'timed out' of taking the supplier to court – hence this would mean that it would not fairly be responsible for any 'like claim' against the supplier. I have thought about this – I think that Creation might be mistaken here as limitation periods can be from the date on which the cause of action accrued – which isn't always the date the service was originally performed. However, because I am making a finding that there is no breach or misrepresentation by the supplier here in any event I don't consider it necessary to discuss limitation periods in detail as it doesn't make a difference to the outcome.

I consider the central issue to be whether or not there has been a breach of contract by the original supplier no longer being around to honour the guarantee. However, this is not a straightforward question to answer. I have seen the guarantee and it is not an unequivocal promise to re-treat. I don't think as Miss P says that the supplier promised to do whatever it took to better her sight. There are several conditions listed in the terms acknowledging situations where follow up treatment is not possible (where risks outweigh the benefits), and setting out particular requirements regarding eye maintenance and aftercare in order to remain eligible. Furthermore, there are many exclusions to the guarantee including where certain eye diseases or degenerative conditions (including common age related conditions) develop.

This is a complex medical area which I don't have expertise in so I am relying on the information I have in order to decide what is fair and reasonable. I note, in light of the requirements of the guarantee there are many different variables here which could mean that Miss P is not eligible for follow up treatment. I also note that:

- she had the treatment a long time ago (2010) – so the chance of developing a condition associated with an exclusion or age related degeneration appears more likely;
- information she has got from other practitioners suggests she needs different treatment now due to age and that laser is no longer a recommended course of action; and
- there is also a lack of information here showing what outcome the consumer was promised and what she initially ended up with – along with questions around whether she followed the required aftercare to maintain the guarantee.

As I have said, I am not an expert in analysing Miss P's current eye health and the implications of the passage of time on the eligibility for further treatment. This muddies the question as to whether or not Miss P would be eligible for further treatment under the terms of the guarantee. I note there isn't any compelling (such as expert) evidence to show that she would be eligible for further treatment under the terms of the guarantee at no cost to her.

I am not able to compel witnesses or experts for cross examination – so in my role resolving disputes informally I have to go on the information I do have. Based on this I am unable to fairly conclude that there is an outstanding breach of contract that Creation should remedy in light of its liability under Section 75. For completeness – although not a focus of Miss P's claim I don't consider there to be persuasive evidence of a misrepresentation here either as there isn't compelling evidence that Miss P didn't get what she was promised (in light of the various variables and exclusions outlined in the paperwork and impacting medical treatments of this kind).

Although Miss P has not specifically said that the original treatment was carried out poorly (in fact she indicates she had good results) for completeness I have considered the fact that Miss P has had deterioration in her eyesight does not necessarily mean there was a breach of contract in respect of the original treatment. And based on the limited information I have (and noting my lack of expertise) I am unable to fairly conclude that it was performed without reasonable care and skill in any event.

I know Miss P has pointed to her credit card claim and online information to support her case here. But while I note this I look at each case on the individual circumstances – it doesn't persuade me that there is a breach of contract or misrepresentation here.

However, I have considered the customer service Creation provided – I note Miss P raised a claim with it and then didn't hear back substantively for several months. She wrote chasers and follow ups and felt that Creation had been quite rude in not responding. Creation did finally respond more fully after this service got involved but it was some months later. While Miss P has not focused on this since the investigator's view I think it is fair and reasonable for Creation to pay her something to reflect the distress and inconvenience she has suffered. I have informed both Creation and Miss P about my proposal – and not heard back from either with any objections. So I see no reason not to make this award.

Putting things right

I have considered the delays here and the distress caused to Miss P and inconvenience in having to chase Creation over several months. Keeping in mind the nature of our awards (as set out on our website) I think £150 is a fair and reasonable amount to award here. However, for the reasons already given I don't think Creation needs to pay anything to Miss P for follow up eye treatment.

My final decision

I partially uphold this complaint and direct Creation Consumer Finance Ltd trading as Creation to pay Miss P £150 compensation.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss P to accept or reject my decision before 30 August 2023.

Mark Lancod
Ombudsman