DRN-4916173

The complaint

Miss S complains about how Healthcare Finance Limited ('HFL') responded to a claim she made to it in respect of dental treatment she paid for using the fixed sum loan it provided.

What happened

While I might not comment on everything (only what I consider key) this is not meant as a discourtesy to either party – it reflects my role resolving disputes with minimum formality.

Miss S purchased orthodontic dental treatment from a remote supplier ('the supplier') using a fixed sum loan from HFL in July 2022.

Miss S says the supplier has now gone out of business, and she is unhappy because:

- Although she completed her original treatment her results are not satisfactory and she was going through the process of having a second re-treatment before it ceased operations;
- she is no longer able to receive follow up treatment which the supplier was in the process of arranging for her, nor is she going to be getting the 'Lifetime Guarantee' (abbreviated for my decision) which the supplier offered.

Miss S approached HFL for a full refund. It considered the claim under Section 75 of the Consumer Credit Act 1974 ('Section 75'). It would not offer a full refund, but said it would pay £220 to reflect the loss of aftercare benefits.

Miss S is not happy with this and brought her complaint about the claim outcome to this service. Our investigator said that HFL had made a fair offer. Miss S has asked for the matter to be looked at again by an ombudsman.

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.

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I note here that HFL had another entity respond to this complaint on its behalf. However, my references to HFL are taken to include representations made on its behalf.

I am sorry to hear Miss S is unhappy with the dental treatment she bought from the supplier. I am also sorry to hear about the impact she says it has had on her. However, it is important to note that my decision here is about the actions of HFL– and what it should fairly have done for Miss S in its position as a provider of financial services. In looking at how it handled

the claim Miss S brought to it I consider the information reasonably available to it at the time, along with the relevant protections available to Miss S. I consider Section 75 to be particularly relevant here.

Section 75 can allow Miss S in certain circumstances to hold HFL liable for a breach of contract or misrepresentation by the supplier of the financed dental treatment. There are certain technical criteria which have to be met in order for Section 75 to apply, and I am satisfied these are met here. Therefore, I move on to consider whether the supplier of the treatment has breached its contract with Miss S or misrepresented it.

Limited information

It is worth noting there are challenges presented by limited information in respect of Miss S's individual treatment plan and contract. However, I have looked to decide what is fair based on the information reasonably available to HFL when considering this Section 75 claim. This includes a blank copy of the supplier 'Consent & History' form, archived copies of the supplier FAQs, what limited information HFL was able to get from the supplier, and Miss S's testimony.

Misrepresentation

Miss S's claim to HFL appears to be about breach of contract rather than misrepresentation. But in the interest of completeness, in any event I don't consider there to be persuasive evidence available to HFL when it considered the claim that the supplier had misrepresented its service to Miss S at the outset. Even if it couldn't provide all the services it promised because it went out of business – this would not likely amount to a misrepresentation as there is no suggestion that the supplier was aware it would be going out of business when it sold Miss S the treatment.

Therefore, I have focused on breach of contract here. Which I turn to now.

Breach of contract

When considering whether there has been a breach of contract by the supplier I consider the express terms of the contract along with any terms implied by relevant law. Here I consider the Consumer Rights Act 2015 ('CRA') to be of particular relevance in considering any implied terms.

The way the treatment was provided

The CRA implies terms into consumer contracts to say that services will be provided with reasonable 'care and skill'.

While there is no specific definition of reasonable care and skill – of particular relevance will be what is considered good practice in the particular industry in question.

The difficulty here is Miss S has purchased a complex cosmetic/medical product where specific expert knowledge is necessary to understand it. I am not an expert in this area (nor is HFL) and without an expert report that explains what has gone wrong here and why or some other similarly persuasive evidence it is difficult to fairly conclude that the treatment wasn't carried out properly. I know that Miss S has said she is unhappy with the results and that she now needs to get further treatment. However, this in itself does not persuasively

show that the treatment received from the supplier was carried out without reasonable care and skill.

I also note that Miss S has said she was approved for follow up treatment because her results were not as expected/she was disappointed with them. It is not clear exactly what results Miss S achieved. However, the aftercare provision for 'touch-up' treatment appears to be part of the supplier's offering. So I don't consider this in itself can be taken as an admission that the treatment was not carried out with reasonable care and skill.

It is also important to note that even if I agreed Miss S had not achieved certain results she was expecting, a finding in respect of reasonable care and skill is not dependent on the results achieved but the manner in which the treatment was carried out. And while particular results may be indicative of how a treatment was carried out – it is common, particularly in the medical/cosmetic field for outcomes to vary for a number of reasons other than a lack of care or skill by the practitioner.

In summary, based on the evidence available to it (and noting the lack of expert evidence to support Miss S's case) I am not in a position to say that in considering the Section 75 claim presented to it HFL should fairly have concluded the treatment was carried out without reasonable care and skill.

Although the manner in which the treatment was carried out is the focus of this complaint – for completeness I also note there is no persuasive evidence to show the goods element of the treatment (the aligners themselves) breached the requirement under the CRA to be of 'satisfactory quality'.

The express terms of the contract

In order to determine if there has been a likely breach of any express term(s) of the contract I have considered the supplier's documentation from around the time Miss S bought the treatment and which has been made available to me by HFL, alongside other information such as Miss S's testimony.

I consider all parties agree Miss S entered into a contract for aligner treatment with the supplier. I acknowledge that I don't have a copy of Miss S's specific treatment plan or the contractual agreement signed. But from the information I have (including Miss S's testimony) I am satisfied that on balance the core contract was for a set of aligners used for straightening teeth over a short term treatment duration of several months.

Miss S does not dispute that she received the set of aligners and that she used them over the intended treatment period. So on this basis I don't think this can be characterised as a case of goods or services not received or a technically incomplete treatment. So prima facie – the core of the agreement was provided by the supplier to Miss S and there is no breach of contract in that sense.

A more accurate assessment of Miss S's claim (to me) is that she was unhappy with the results from the treatment she got compared to the expectation she had going in.

I don't know what Miss S's projected outcome was - unfortunately neither Miss S or HFL appear to have that information (and now the supplier is out of business this information held on its treatment system appears to be lost). We also don't have an expert report or similar information showing what results Miss S actually achieved following the initial treatment.

However, while this situation is not ideal I am not persuaded the lack of information disadvantages Miss S in the way that might be expected. I conclude this because, on balance, I am not persuaded the results of the treatment were contractually guaranteed to match a certain projection in any event. I will explain.

I consider it likely Miss S signed an agreement with the supplier which included a consent form – as is usually the case with such treatments. We don't have the one Miss S signed but HFL has provided the standard consent/terms and conditions form the supplier used and that states the various and numerous risks, uncertainties and variables with such a dental treatment. It seems likely to be the same form Miss S would have signed. Furthermore, Miss S has not persuasively disputed her awareness or agreement to the 'informed consent' clause including the provision I refer to below contained in the documentation as follows:

I understand that [the supplier] cannot guarantee any specific results or outcomes

I don't consider this being a particularly unusual or onerous term in the provision of such a treatment. It would not be reasonable to expect (noting all the variables outlined in the consent form – including how often aligners are worn and underlying health issues) that particular results would definitely be achieved in a medical/cosmetic treatment of this kind.

So my starting point is that regardless of how close the results are to the projection – this is not a breach of contract based on the likely agreement between Miss S and the supplier that the outcome is uncertain and not guaranteed.

Once again I recognise Miss S's point that the supplier had approved her for more than one touch-up. Which she says is an indication it didn't do what it should have done in the first place. However, because results are not guaranteed – I don't think the supplier attempting to refine things under its aftercare provision persuasively shows that there was a breach of contract in respect of the core treatment provision.

In summary, while I am sorry to hear Miss S is unhappy with the results, I don't consider that HFL had persuasive information to show it the supplier had breached its contract in respect of the results Miss S achieved. So, despite Miss S's clear dissatisfaction with the results, I don't think HFL would be expected to agree to a refund.

However, I am aware the supplier did provide a contractual 'guarantee' of sorts in relation to aftercare. Which I will turn to now.

Aftercare

From what I have seen the supplier offers further aligner 'touch-ups' after the core treatment at no extra cost. The information I have suggests it offers this after treatment is completed (if a customer is not satisfied with results) and on an ongoing once a year basis under a 'Lifetime Guarantee' banner.

It appears the availability of a 'touch-up' is not the same as saying that particular results will definitely be achieved. It seems more of an opportunity for refinement if possible. And despite the use of the term 'guarantee' I consider the 'Lifetime Guarantee' is not a guarantee of particular results. From what I have read it is a qualified guarantee in respect of ongoing aftercare.

It appears the 'touch-up' aftercare is basically a new set of aligners at no further cost to the patient which serves to provide the free refinement. However, in order to get a

‘touch-up’ there are certain qualifying criteria.

One of the criteria is around ordering retainers after treatment is complete. I note that Miss S appears not to have ordered retainers because she was receiving further aligner treatment as agreed by the supplier. On the face of it this doesn’t seem unreasonable, and it isn’t clear if this would have definitely stopped Miss S from being eligible from future coverage under the ‘Lifetime Guarantee’. However, because HFL has looked past this and made an offer to represent loss of aftercare (an offer which I ultimately find fair) I don’t consider it necessary to dwell on this point in any event.

To qualify for ‘touch-ups’ under the ‘Lifetime Guarantee’ it appears the key criteria is that the supplier’s dentist needs to approve it. To support this finding I note that the supplier’s website information about the ‘Lifetime Guarantee’ refers to the requirement to ‘receive touch-up approval from a UK registered [supplier] dentist or orthodontist’.

There also seems to be ongoing criteria in respect of any rolling yearly ‘touch-up’ under the ‘Lifetime Guarantee’. This includes the customer ordering retainers after treatment and replacing retainers every 6 months (at their cost) and wearing these as prescribed.

I recognise Miss S will not be able to receive further treatment via ‘touch-ups’ under the ‘Lifetime Guarantee’ (including the one she appears to have been approved for) because the supplier is now out of business. However, any loss in relation to this aspect of the contract is not easy to assess. I say this because:

- in order to qualify for the ongoing ‘touch-ups’ Miss S would have to continue to get retainers twice a year; and
- there is no certainty Miss S would be approved for further ‘touch-ups’ each year – as this is at the discretion of the supplier’s dentist.

I do accept there is a potential loss here though. It just isn’t easy to assess what the value of any perceived loss might be. It is, however, important to note that any potential loss I am considering is not to remedy a failure in respect of the core treatment or Miss S’s dissatisfaction with achieving the desired results from it. As I have said - I don’t consider there is persuasive evidence available to HFL that there was a breach of contract in respect of this. The loss here is that of future aftercare under the ‘Lifetime Guarantee’. Something, that is uncertain and difficult to quantify.

Furthermore, despite the ‘lifetime’ nature of the guarantee this would not have come at no further cost to Miss S, as she would have had to continue purchasing retainers twice a year too. She might have done this but there is no certainty this would have happened indefinitely.

I note HFL has provided information from the supplier to indicate the financial value of a ‘touch-up’ treatment is £220. Ultimately, it is difficult to say if that is exactly what it is worth. But it does represent a 15% refund of the cash price of Miss S’s treatment. I know Miss S had apparently been approved for a further ‘touch-up’ when the supplier ceased trading but considering the uncertainties about the extent of Miss S’s ongoing receipt of future benefits, and the fact Miss S has received the core treatment she signed up to (and at least one ‘touch-up’) it doesn’t seem unreasonable that HFL in considering the Section 75 claim would deem this an effective ‘price reduction’ to remedy any perceived loss of aftercare benefit from the supplier ceasing trading.

In deciding what is fair I have thought carefully about the proportionality of the proposed refund. In doing so I consider it is likely that the amount Miss S paid via finance was substantially for the initial core treatment she had received already and not any refinements via aftercare. So a significant refund would seem disproportionate here.

Following my decision, it is up to Miss S if she wishes to approach HFL in respect of discussing any plan to settle any outstanding amounts on the finance (if applicable) and what HFL will do in respect of her credit file as a result of an agreement it reaches. My decision here is not about this matter – but if Miss S considers HFL has not been positive and sympathetic in respect of this she may decide to complain about it separately.

I understand that HFL has applied £220 to the balance of Miss S's account to resolve this matter. Miss S also accepts this has occurred. So there is nothing for me to direct HFL to do here to resolve this complaint.

My final decision

I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss S to accept or reject my decision before 15 January 2025.

Mark Lancod
Ombudsman