DRN-4974401

The complaint

Mr B complains about how Healthcare Finance Limited ('HFL') responded to a claim he made to it in respect of dental treatment 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.

Mr B purchased orthodontic dental treatment from a remote supplier ('the supplier') using a fixed sum loan from HFL in September 2023 .

Mr B says the supplier has now gone out of business, and he is unhappy because:

- He didn't get regular virtual 'check-ins' with the supplier during treatment;
- although he completed the treatment and his teeth have moved he has an 'open bite' to his molars which needs further adjustments to get satisfactory results;
- he is no longer able to receive follow up treatment under the 'Lifetime Guarantee' (abbreviated for my decision) which the supplier offered.

Mr B approached HFL for a refund. It considered the claim under Section 75 of the Consumer Credit Act 1974 ('Section 75'). At the time it said that Mr B might be eligible for a partial refund based on unused aligners.

The complaint about the claim was escalated to this service.

As Mr B had completed his treatment our investigator thought HFL should pay Mr B £220 to reflect the loss of aftercare benefits.

Mr B has asked for the matter to be looked at again by an ombudsman. He says he is entitled to at least a 50% refund.

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.

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.

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 Mr B is unhappy with the dental treatment he bought from the supplier. I am also sorry to hear about the impact he says it has had on him, such as causing stress. However, it is important to note that my decision here is about the actions of HFL– and what it should fairly have done for Mr B in its position as a provider of financial services. In looking

at how it handled the claim Mr B brought to it I consider the information reasonably available to it at the time, along with the relevant protections available to Mr B. I consider Section 75 to be particularly relevant here.

Section 75 can allow Mr B 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 Mr B or misrepresented it.

Limited information

It is worth noting there are challenges presented by limited information in respect of Mr B'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 Mr B's testimony.

Misrepresentation

Mr B's claim to HFL appears to have been focused on breach of contract through the supplier discontinuing services rather than specific allegations of 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 Mr B 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 Mr B 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 Mr B 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 Mr B has said that he has feedback from his dentist showing that although his teeth have moved, further refinements can be made to resolve the 'open bite' to his molars. I am not persuaded this information was available to HFL when it handled the claim. However, and in any event this in itself does not persuasively show that the treatment received from the supplier was carried out without reasonable care and skill.

It is also important to note that even if I agreed Mr B had not achieved certain results he 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 Mr B'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 Mr B bought the treatment and which has been made available to me by HFL, alongside other information such as Mr B's testimony.

I consider all parties agree Mr B entered into a contract for aligner treatment with the supplier. I acknowledge that I don't have a copy of Mr B's specific treatment plan or the contractual agreement signed. But from the information I have (including Mr B'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.

Mr B does not dispute that he received the set of aligners and that he used them over the intended treatment period. Mr B says that he has now used all the sets of aligners over the plan. 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 Mr B and there is no breach of contract in that sense.

A more accurate assessment of Mr B's claim (to me) is that he was unhappy with the results from the treatment he got compared to the expectation going in.

I don't know what Mr B's projected outcome was - unfortunately neither Mr B 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 Mr B actually achieved following the initial treatment.

However, while this situation is not ideal I am not persuaded the lack of information disadvantages Mr B 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 Mr B signed an agreement with the supplier which included a consent form – as is usually the case with such treatments. We don't appear to have the one Mr B 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 Mr B would have signed. Furthermore, Mr B has not persuasively disputed his 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 Mr B and the supplier that the outcome is uncertain and not guaranteed.

In summary, while I am sorry to hear Mr B 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 Mr B achieved. So, despite Mr B's clear dissatisfaction with the results, I don't think HFL would be expected to agree to a refund.

I note that since the case has been with this service Mr B has focused on a claim he was misled about the region of the registration of the supplier's dentist. This doesn't appear to be something he raised with HFL in the first instance – so it isn't necessarily something I would have expected it to fairly consider when it was looking into his Section 75 claim. However, in the interest of completeness I also note that Mr B has since confirmed that the dentist was registered correctly at the time the treatment began. And while I know he has indicated the registration lapsed once the supplier went out of business, in any event I don't consider this material to a finding in respect of the quality of treatment Mr B actually received from the supplier at the time it was trading.

I know that Mr B has specifically said that he did not receive the periodic support from the supplier he was expecting. From what I can see the treatment appears primarily remote, with upfront instructions to change aligners at set intervals – and without the sort of intervention that would be expected with traditional clinic led treatments.

The main contact the supplier will have with the customer during treatment will be requesting virtual 'check-ins' every 60 days or so to monitor the progress of the treatment (which the customer will also need to comply with via sending pictures of progress to maintain eligibility for aftercare provisions). So it seems Mr B would have expected to have got two or three of these during a 5 month treatment plan. I can see Mr B had confirmation of virtual sessions with the supplier – and as this was before the supplier stopped trading it seems likely these were honoured. I appreciate that it is likely Mr B might not have received all the check ins or support he was entitled to as the trader went out of business when Mr B had about two months left of his treatment. However, even if I were to accept there was a breach in respect

of a failure to provide further support I note Mr B chose to continue his treatment in any event. And it isn't clear if the lack of support during these two months or so has led to demonstrably different results to those he would have achieved otherwise. I also note that HFL has made an offer of compensation (which I will discuss below) in respect of aftercare, despite it being unclear if Mr B would have been approved for further treatment.

I note when HFL initially answered Mr B's claim it gave him information in respect of a money back guarantee. Based on the information available to it at the time I don't consider this was an unreasonable response. However, it is worth noting this guarantee does not apply where aligners have been used or opened. Mr B has since confirmed he has used all the aligners so this recourse would not be available to him now. 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.

From what I can see the availability of a 'touch-up' is not the same as saying that particular results will definitely be achieved. It appears 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.

There appears to be some initial eligibility requirements for getting the 'Lifetime Guarantee' as far as completing 'check-ins' during the core treatment and ordering retainers. However, I will not focus on these matters as since this dispute has been with this service, it has become clearer that Mr B has completed his treatment and HFL has not disputed that Mr B would qualify for the 'Lifetime Guarantee'.

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.

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 Mr B will not be able to receive further treatment via 'touch-ups' under the 'Lifetime Guarantee' 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' Mr B would have to continue to spend money on retainers twice a year; and

- there is no certainty Mr B 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 Mr B’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 Mr B, as he would have had to continue purchasing retainers twice a year too. Mr B 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 that 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 almost a 14% refund of the cash price of Mr B’s treatment. And considering the uncertainties about the extent of Mr B’s ongoing receipt of future benefits, and the fact Mr B has received the core treatment he signed up to 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 Mr B paid via finance was substantially for the initial core treatment he had received already and not any refinements via aftercare. So a significant refund would seem disproportionate here.

Following my decision, it is up to Mr B if he 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 his credit file as a result of an agreement it reaches. My decision here is not about this matter – but if Mr B considers HFL has not been positive and sympathetic in respect of this he may decide to complain about it separately.

Putting things right

HFL should put things right as I have directed below.

My final decision

I direct Healthcare Finance Limited to pay Mr B £220 to resolve this complaint. If he is up to date with his payments he can elect to have this paid directly to him rather than applied to the balance of any outstanding finance.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr B to accept or reject my decision before 17 February 2025.

Mark Lancod
Ombudsman