DRN-4976987

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 with a cash price of £1,459 from a remote supplier ('the supplier') using a fixed sum loan from HFL in January 2021.

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

- Her teeth are not straight years on from the start of her treatment;
- She is out of pocket and will no longer benefit from aftercare under the 'Lifetime Guarantee' (abbreviated for my decision).

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 her a full refund and said she was not eligible for aftercare benefits under the 'Lifetime Guarantee' as she had not carried out the required 'check-ins' or ordered retainers.

Miss S is not happy with this and brought her complaint about the claim outcome to this service. She says she never got to the point of ordering retainers as her teeth were never straightened so she was still wearing aligners when the supplier stopped trading.

Our investigator said that HFL had acted fairly in not compensating Miss S in the circumstances. 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.

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 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 - she says the treatment did not 'successfully straighten' her teeth. However, 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 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.

I note that Miss S appears to have received several 'touch-ups' after her initial treatment over several years while the supplier was still trading. However, this in itself is not persuasive in showing the treatment was not carried out with reasonable care and skill, noting that it forms part of the supplier's aftercare provision.

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.

When Miss S complained to HFL she said she had not 'finished my plan'. However, Miss S does not dispute that she received and completed the initial course of aligners. I note that the supplier's plans are generally 4-6 months and Miss S's initial plan was taken out in January 2021. So it would appear that at the latest this would have been completed by around June or July 2021. 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.

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.

I note Miss S has said that to date she did not receive a free retainer which she was told she would get and can no longer order it from the supplier as it is no longer trading. However, it does not appear that HFL financed the retainer so it would not be fairly liable for compensating Miss S for this (furthermore it appears these goods would be outside the financial limits for a valid Section 75 claim in any event).

Furthermore, while Miss S had said to HFL she was unable to log in to buy retainers from the supplier these were not part of the original treatment package as financed by HFL's loan. So not being able to order these is not a breach of contract in the context of the Section 75 claim here (and Miss S would have to source retainers from elsewhere).

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 (abbreviated for my decision).

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.

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.

The initial qualifying criteria are that a patient must complete 'check-ins' during their treatment and also order retainers on completion of that treatment.

There has been some debate about whether Miss S satisfied the initial eligibility criteria to qualify for the 'Lifetime Guarantee'. HFL says she didn't complete the 'check-ins' or order the retainers when she should have done.

Miss S is adamant that the did complete the 'check-ins' and has provided evidence in the form of emails which support this. I think it likely that Miss S did complete these – and also note that HFL in the information about the 'Lifetime Guarantee' shows that it is possible to re-qualify for the aftercare as long as a patient is up to date on payments and had ordered retainers when they were meant to.

I am not persuaded the situation with the retainers is clear-cut. I recognise that Miss S has had a lot of 'touch-ups' since her initial treatment ended in mid-2021 up until the supplier ceased trading around December 2023 – but I have also seen emails which indicate that the supplier asked her to order retainers at various points and she didn't do so. And one that suggests that by January 2023 the supplier considered she was outside of the terms of the 'Lifetime Guarantee' and was providing future aftercare on a goodwill basis (although the reason is not stated I think this could be because she had not ordered retainers to date). It seems Miss S's 'touch-ups' were not continuous so it stands to reason there would be times she was expected to order and wear retainers.

However, even if I accepted that Miss S did qualify for the 'Lifetime Guarantee' I also have to consider what is fair and reasonable in the particular circumstances. And after doing so I don't consider it would have been fair for HFL to decide compensation was due here in any event.

In coming to this conclusion I think it is important to note that:

> 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'.
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> 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' because the supplier is now out of business. However, in the particular circumstances here I note that:

- Miss S had already received four 'touch-ups' over the course of around two and a half years after her treatment ended – and more than she was contractually entitled

to under the ‘Lifetime Guarantee’ (even if she was deemed to have still qualified for it).
- In the time since her treatment ended Miss S was continuing to receive ‘touch-up’ benefits but had not been ordering and replacing retainers every 6 months as required by the terms of the aftercare (at a cost of around £80-£100 each time). And putting aside the questions as to why the supplier had still permitted her to benefit from aftercare in the circumstances, because of the time elapsed since her initial treatment ended it still represents a significant saving to Miss S of several hundred pounds in any event (and even if one retainer had been complimentary).

These factors are also to be considered alongside the uncertainty as to what extent the treating dentist would have seen scope for approving future aftercare, noting Miss S’s history of ongoing ‘touch-up’ treatment to date over an extended period.

In deciding what is fair I have thought carefully about the likely value of the aftercare provision. 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, overall, considering what is fair and reasonable in the particular circumstances here I don’t think that HFL were acting unfairly in determining that Miss S should not receive further compensation here.

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 7 March 2025.

Mark Lancod
Ombudsman