DRN-4989620

The complaint

Mr D 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 D purchased orthodontic dental treatment from a remote supplier ('the supplier') using a fixed sum loan from HFL in September 2022.

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

- His teeth did not look like the initial projection and despite follow up treatment he did not receive full alignment of his teeth.
- He paid to get his teeth straight and they are not - the aligner treatment did not work and was not fit for purpose.

Mr D 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 any money back because it said Mr D did not comply with the conditions to be eligible for the supplier's aftercare provision (which I will refer to as the 'Lifetime Guarantee').

Mr D was unhappy with this and referred the case to our service.

Our investigator did not agree that there was a breach of contract by the supplier in respect of the core treatment. However, she thought Mr D had lost out on the potential benefits of future aftercare under the 'Lifetime Guarantee' (which she was persuaded he would still have been eligible for). So she thought it fair that HFL pay Mr D £220 compensation for this.

HFL then agreed Mr D would likely have qualified for the 'Lifetime Guarantee' but it didn't think that Mr D was due any refunds. In summary, it said the treatment was provided with care and skill, and the supplier went beyond the terms of the 'Lifetime Guarantee' by providing multiple sets of additional aligners in one year. Furthermore, the supplier's dentist advised Mr D that he could not get a further 'touch-up' treatment as they felt no further movement could be achieved.

The matter has been referred to me for a final decision.

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 D 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. 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 D in its position as a provider of financial services. In looking at how it handled the claim Mr D brought to it I consider the information reasonably available to it at the time, along with the relevant protections available to Mr D. I consider Section 75 to be particularly relevant here.

Section 75 can allow Mr D 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 D or misrepresented it.

Limited information

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

Misrepresentation

Mr D'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 Mr D 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 D 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 D 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 D has indicated his teeth are not fully aligned. He has also pointed to the fact the supplier approved him for several additional aligner treatments. However, this in itself does not persuasively show 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 D 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 D'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 D bought the treatment and which has been made available to me by HFL, alongside other information such as Mr D's testimony.

I consider all parties agree Mr D entered into a contract for aligner treatment with the supplier. I acknowledge that I don't have a copy of Mr D's specific treatment plan or the contractual agreement signed. But from the information I have (including Mr D'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 around 4 months.

Mr D does not dispute that he received the set of aligners and that he used them over the intended initial 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 Mr D and there is no breach of contract in that sense.

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

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

However, while this situation is not ideal I am not persuaded the lack of information disadvantages Mr D 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 D 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 Mr D 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 D would have signed. Furthermore, Mr D 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 D and the supplier that the outcome is uncertain and not guaranteed.

I note that Mr D has shown that he was approved for re-treatments following his initial aligner treatment. And he has claimed the supplier modified the projection over time. But as the results were not guaranteed I don't think these things persuasively show there was a breach of any express term of the contract.

In summary, while I am sorry to hear Mr D 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 D achieved. So, despite Mr D'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.

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.

HFL now accepts that Mr D is unlikely to have been excluded from eligibility from the 'Lifetime Guarantee' on the basis of not initially ordering retainers every 6 months. So I don't consider it necessary to dwell on this point. For completeness – I agree it is unlikely Mr D would have lost the potential benefits here. In brief because it appears he did order retainers – but this was delayed by the supplier in order for Mr D to get 'touch-up' treatments shortly after the core treatment was completed.

However, 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 would also be additional criteria in respect of any rolling yearly 'touch-up' under the 'Lifetime Guarantee'. Going forward for Mr D this would be (as I have already indicated) ordering retainers after treatment and replacing retainers every 6 months (at his cost) and wearing these as prescribed.

I recognise Mr D 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 D would have to continue to spend money on retainers twice a year; and
- there is no certainty Mr D would be approved for further 'touch-ups' each year – as this is at the discretion of the supplier's dentist.

I note that HFL has made the point that Mr D has already received several 'touch-up' treatments (2 or 3 by the looks of it) in a relatively short time period after the initial core treatment. And I note after a further request for treatment the supplier confirmed his treating dentist had *'determined that no further movement can occur on your teeth….we have been able to release crowding, close spacing, improve bite and provide you a healthy U shape on both arches. It is recommended that you move to retainers to keep your new smile'.* It appears that HFL is indicating that because of these things – Mr D would not be entitled to further treatment under the 'Lifetime Guarantee' – and there would be no breach of contract to remedy here.

However, I think it is important to note that the 'Lifetime Guarantee' appears to be a long term benefit with no fixed expiry date. And while it is clear a request is subject to dentist approval I don't see where Mr D can be excluded from making future requests under the 'Lifetime Guarantee'. Furthermore, I don't see anything persuasive to confirm Mr D would *never* be entitled to a 'touch-up' in future years (for example if some minor adjustments were needed at some stage due to movement). So while I accept that Mr D is arguably less likely to get a 'touch-up' going forward than other patients (certainly in the short term). I don't think it is something that can be completely ruled out based on the evidence here. And while I acknowledge Mr D would only be entitled to one 'touch-up' a year going forward under the 'Lifetime Guarantee', I don't think the fact the supplier decided to offer him several new aligner sets in one year (post his core treatment) contractually excludes him from potential future benefits under the 'Lifetime Guarantee'.

So I think there is a prima facie breach of contract through the failure of the supplier to provide future aftercare and a potential loss here. 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 D'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 D, as he would have had to continue purchasing retainers twice a year too. Mr D 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 around a 13% refund of the cash price of Mr D's treatment. And considering the uncertainties about the extent of Mr D's ongoing receipt of future benefits, and the fact Mr D has received the core treatment he signed up to (along with several 'touch-ups') it doesn't seem unreasonable that HFL in considering the Section 75 claim should fairly 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 D paid via finance was substantially for the initial core treatment received already and not any refinements via aftercare. So a significant refund would seem disproportionate here.

Following my decision, it is up to Mr D 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 D 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 set out below. I also note that Mr D has accepted our investigator's proposal already. In the circumstances (and considering the points that I have covered above about Mr D's specific case) I am not persuaded it fair to award further amounts (such as simple interest) here.

My final decision

I partially uphold this complaint and direct Healthcare Finance Limited to pay Mr D £220 to settle his complaint. If he is in arrears it can apply this to his outstanding account balance – but if he is up to date with his payments it can pay it directly to him or to paying down his account balance (Mr D can choose what he wants to do in this latter situation).

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 27 January 2025.

Mark Lancod
Ombudsman