DRN-5025504

The complaint

Mrs B 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.

Mrs B purchased orthodontic dental treatment for her daughter ('D') with a cash price of £1,639 from a remote supplier ('the supplier') using a fixed sum loan from HFL in September 2022.

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

- The treatment did not work, the aligners did not fit properly and D did not get the straight teeth she was promised she would get by the end of the treatment;
- D will no longer benefit from any 'touch-ups' via aftercare including the 'Lifetime Guarantee' (abbreviated for my decision).

Mrs B approached HFL for a refund. It considered the claim under Section 75 of the Consumer Credit Act 1974 ('Section 75'). It said it would offer £220 compensation for the loss of future aftercare benefits.

Mrs B 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. Mrs B 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 Mrs B 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. However, it is important to note that my decision here is about the actions of HFL– and what it should fairly have done for Mrs B in its position as a provider of financial services. In looking at how it handled the claim Mrs B brought to it I consider the information reasonably available to it at the time, along with

the relevant protections available to Mrs B. I consider Section 75 to be particularly relevant here.

Section 75 can allow Mrs 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.

Because the claim against HFL is a *'like claim'* to any brought against the supplier in court, Mrs B needs to have a relevant agreement with the supplier that would allow her to take legal action against it for the issues she is claiming here. However, because Mrs B financed the treatment for D there is a question mark over whether Mrs B has the relevant contractual agreement with the supplier, in order to have a '*like claim'* against HFL here.

The patient (in this case D) would usually have the explicit contractual agreement with the supplier for receiving treatment. Noting that medical treatment is highly personal, and would involve the signing of consent forms.

However, there is arguably complexity introduced here, because D at the time the contract was entered into was 16 years old and Mrs B is the parent. D was not necessarily too young to understand the nature of the treatment, or sign a consent form. But it does introduce some uncertainty as to what the nature of the agreement with the supplier was here. It could be something that warrants further investigation – but because I am not upholding this complaint in any event I do not see it necessary to cover this matter further and will proceed on the basis that Mrs B does have the relevant agreement with the supplier for her to have a Section 75 claim against HFL in respect of the provision of treatment.

Limited information

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

Misrepresentation

Mrs B'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 Mrs 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 persuasive evidence that the supplier was aware it would be going out of business when it sold 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 this claim concerns 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 Mrs B has said the treatment for D was unsuccessful and she says some of the original aligners did not fit properly. However, without an expert report on D's specific case it is difficult to conclude that the treatment received from the supplier was carried out without reasonable care and skill.

I note Mrs B has pointed out D was approved for further treatment by the supplier about a year after signing up to the first treatment. She says the supplier agreed to provide a different type of treatment (night-time aligners instead) for an extra charge. And that this in itself shows that the original treatment did not work/was not suitable. Mrs B has provided correspondence to show that different treatment was agreed. However, I note:

- There is a lack of information (such as other correspondence) showing HFL why this treatment was offered – noting there are many reasons outside an admission of wrongdoing, including a customer's changing preference/desire to improve results with more discretion/convenience than daytime aligners.
- Even if I agreed this did show HFL that D had not achieved preferential results with the original aligner treatment, 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 Mrs 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.

I also note Mrs B has mentioned the original course of aligners did not fit properly. However, I don't see where Mrs B presented HFL with compelling evidence the original aligners were not of satisfactory quality such as correspondence with the supplier from the time or an expert report. I know she has sent in a recent video to this service to demonstrate they did not fit D properly but I don't think this was presented to HFL at the time the claim was raised. In any event I am not an expert and in a position to say this shows the aligners were not of satisfactory quality. I note Mrs B has shown that of the original set of aligners there are 7 unopened packets. However, I don't think this in itself shows the original aligners were not of

satisfactory quality (noting my comments below about the reasons why Mrs B might have unopened aligners and whether this in itself shows a likely breach of contract).

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 Mrs B bought the treatment and which has been made available to me by HFL, alongside other information such as Mrs B's testimony.

I consider all parties agree D or Mrs B entered into a contract for aligner treatment with the supplier. I acknowledge that I don't have a copy of D's specific treatment plan or the contractual agreement signed. But from the information I have (including Mrs 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 5 months (from what I understand the supplier offers plans which are generally 4-6 months).

I note that HFL had information from the supplier indicating that D had finished her course of aligner treatment. However, I note Mrs B indicates that D never finished the original treatment because the aligners did not fit properly. She points to 7 unused aligner packets from the original course.

Unopened aligner packets can indicate problems with the initial treatment. However, they can also indicate that:

- A customer simply did not keep up the course of treatment provided for reasons other than the fault of the supplier;
- A customer was approved for mid-treatment 'touch-ups' or received replacement aligners to address fitment problems.

With this in mind, based on the information available to it at the time I do not think HFL were acting unfairly in not accepting D had not received a complete treatment. From what Mrs B has said there were issues with fitting less than halfway into the 5 month course (this would have been around the start of 2023). But it isn't clear what went on around this time, if fitment issues were raised, and whether replacements were offered for these– or why the treatment ended up lasting ten months in total instead of five (as confirmed by an email from HFL in September 2023 which asks Mrs B to order retainers). There also isn't clear evidence showing Mrs B escalated a complaint about the quality of the treatment through the supplier or HFL closer to the start of the treatment as I would have expected if the supplier had not addressed problems at the time.

I am not saying that Mrs B is not providing an accurate account of what occurred. I am looking at the information which would have been available to HFL – which is not persuasive in showing that D had not received the core treatment agreed (setting aside whether the parties were happy with the end results). 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 Mrs B and there is no breach of contract in that sense.

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

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

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

In summary, while I am sorry to hear Mrs 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 D achieved. So, despite Mrs B'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 (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 involves completing 'check-ins' during treatment and then ordering aligners. There is a question mark about whether Mrs B not ordering retainers for D

at the end of the initial course of treatment would have impacted her eligibility for the 'Lifetime Guarantee'. However, as HFL has offered to provide a remedy for the loss of aftercare in any event I am not going to dwell on that here.

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 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 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' D (or Mrs B) would have to continue to spend money on retainers twice a year; and
- there is no certainty D 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 the 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 Mrs B or D, as they would have had to continue purchasing retainers twice a year too. They 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 '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 D's treatment. And considering the uncertainties about the extent of D's ongoing receipt of future benefits, and the fact D has received aligners so that she could complete the core treatment, 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 Mrs B paid via finance was substantially for the initial core treatment D had received already and not any refinements via aftercare. So a significant refund would seem disproportionate here.

I note that HFL has paid Mrs B the £220 via an account adjustment – so there is nothing for me to direct it to do here.

Following my decision, it is up to Mrs B 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 Mrs B considers HFL has not been positive and sympathetic in respect of this she may decide to complain about it separately.

My final decision

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 17 March 2025.

Mark Lancod
Ombudsman