DRN-5051557

The complaint

Mrs K 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 K purchased orthodontic dental treatment with a cash price of £1,739 from a remote supplier ('the supplier') using a fixed sum loan from HFL at the start of October 2023 .

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

- She did not get the service she signed up to and her teeth were not straightened;
- she did not get support from the supplier or any 'touch-ups' via aftercare including the 'Lifetime Guarantee' (abbreviated for my decision).

Mrs K approached HFL for a refund. It considered the claim under Section 75 of the Consumer Credit Act 1974 ('Section 75'). It said she could return unopened and unused aligners for a refund.

Mrs K is not happy with this and brought her complaint about the claim outcome to this service.

As it appeared Mrs K had used the aligners, HFL said it would instead offer to pay her £220 to reflect the loss of aftercare benefits.

Our investigator said that HFL had made a fair offer. Mrs K 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 K 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 Mrs K in its position as a provider of financial services. In looking at how it handled the claim Mrs K brought to it I consider the information reasonably available to it at the time,

along with the relevant protections available to Mrs K. I consider Section 75 to be particularly relevant here.

Section 75 can allow Mrs K 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 Mrs K or misrepresented it.

Limited information

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

Unused aligners/incomplete treatment

When Mrs K approached HFL with her claim it appeared she had not completed her treatment.

So at the time the claim was made to HFL I don't consider it was unreasonable in looking to remedy this by offering a pro-rated refund under the supplier's 'money back' provision for unopened and unused aligners.

As Mrs K appears to have used all her aligners I don't consider that HFL has a contractual obligation to reimburse her for these. So I have gone on to consider its subsequent offer of £220 and whether that is fair in light of any other breach of contract or misrepresentation

Misrepresentation

Mrs K'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 K 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 Mrs K 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 Mrs K 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 Mrs K has said the treatment was unsuccessful and she says she has been told the product should never have been sold to her – and can cause 'trauma to the ligaments'. She has also provided research which she says backs up her claim that the product was not fit for purpose. She has also said she has agreed to have follow up treatment with a different provider. I am not persuaded Mrs K raised all of this with HFL when she made her Section 75 claim to it. So I wouldn't have expected it to have addressed this. However, without an expert report on Mrs K's specific case it is difficult to conclude that the treatment received from the supplier was carried out without reasonable care and skill in any event.

It is also important to note that even if I agreed Mrs K 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 Mrs K'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 Mrs K has mentioned aligners did not fit properly to this service. However, she does not appear to have mentioned this to HFL when she raised her claim to it or provided it with persuasive evidence to show she tried contacting the supplier about it while it was still trading. I also note Mrs K told HFL she was still using the aligners. Overall, I don't consider that HFL were acting unreasonably in not concluding 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 Mrs K bought the treatment and which has been made available to me by HFL, alongside other information such as Mrs K's testimony.

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

Mrs K appears to have been part way through her treatment when the supplier went out of business in December 2023, however, she does not dispute that she received the set of aligners and that she ended up using them all in the end (albeit she says they were not making a difference). 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 K and there is no breach of contract in that sense.

A more accurate assessment of Mrs K'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 Mrs K's projected outcome was - unfortunately neither Mrs K 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 Mrs K actually achieved following the initial treatment.

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

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

I note in her claim to HFL Mrs K pointed out that as the supplier had gone out of business she would not get any continuing support from it such as 'check-ins' or guidance. While this treatment appears to be primarily remote and largely self-directed (which appears to be reflected in the lower price compared to traditional treatment) I don't dispute that there is an aspect of the general aftercare service that Mrs K lost in the form of the ability to contact the supplier about any issues that may arise while completing the course of aligners. However, in deciding what is fair here I note:

- Mrs K subsequently chose to continue with her treatment and use all the aligners;

- Mrs K hasn't persuasively shown how she was disadvantaged (in respect of the results she achieved) by not being able to contact the supplier in the final months of treatment;
- HFL has made an offer to remedy the loss of aftercare provision (which I will come on to below).

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. But HFL has not disputed that Mrs K would have been eligible on this basis. And I think that is fair in the circumstances as the supplier went out of business during her treatment. So 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 Mrs K 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' Mrs K would have to continue to spend money on retainers twice a year; and
- there is no certainty Mrs K 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 Mrs K'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 Mrs K, 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 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 Mrs K's treatment. And considering the uncertainties about the extent of Mrs K's ongoing receipt of future benefits, and the fact Mrs K has received the 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 K 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 Mrs K 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 K considers HFL has not been positive and sympathetic in respect of this she may decide to complain about it separately.

Putting things right

If HFL has not already done so it should pay Mrs K the £220 compensation. If Mrs K is in arrears then it can apply it to the outstanding balance. If she is up to date with payments it can give her the choice of having the money returned to her directly.

My final decision

I partially uphold this complaint and direct Healthcare Finance Limited to pay Mrs K £220.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs K to accept or reject my decision before 3 March 2025.

Mark Lancod
Ombudsman