DRN-5066587

The complaint

Miss P 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 P purchased orthodontic dental treatment from a remote supplier ('the supplier') using a fixed sum loan from HFL in June 2022.

Miss P says the supplier has now gone out of business, and she says:

- She understood her treatment plan would last for 4 months – however, due to unmet expectations she had to extend it several times;
- the promised results (as she says were depicted in 'the initial 3D scan') were not achieved even after two years of following the plan;
- she is left with an incomplete treatment and no option to further extend her plan.

Miss P 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 refund.

Miss P is not happy with this and brought her complaint about the claim outcome to this service. Our investigator said that HFL had not acted unfairly. Miss P disagreed and has asked for the matter to be looked at again by an ombudsman. Miss P has said while she is no longer requesting a refund she wants her existing arrears to be waived by HFL.

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.

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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 P 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 P in its position as a provider of financial services. In looking at how it handled the claim Miss P brought to it I consider the information reasonably available to it at the time,

along with the relevant protections available to Miss P. I consider Section 75 to be particularly relevant here.

Section 75 can allow Miss P 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 P or misrepresented it.

Limited information

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

Misrepresentation

Miss P'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 P 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 P 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 P 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 although Miss P had written to the supplier to say that she '*appreciated the progress she had made so far'* and was '*more than happy with the top row of teeth*', her bottom teeth were still not in line with the results she was expecting.

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 P had not achieved certain results she was expecting (or that there was a realistic possibility of improvement as she says her dentist has suggested) 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 am also aware that Miss P had been approved for 'touch-up' treatment by the supplier after her treatment was complete. But this in itself is not persuasive evidence that the supplier acted without reasonable care and skill as it appears to relate to its aftercare offering where it identifies the opportunity for refinement.

In summary, based on the evidence available to it (and noting the lack of expert evidence to support Miss P'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'.

I note Miss P has recently referred to getting further evidence from her dentist. I am unsure of what she was going to get. Expert evidence can be relevant to a finding of skill and care but as Miss P didn't present this to HFL at the time she made her claim it wouldn't be fair for me to say that it should have taken it into account when considering the Section 75 claim which is the subject matter of this complaint.

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

I consider all parties agree Miss P entered into a contract for aligner treatment with the supplier. I acknowledge that I don't have a copy of Miss P's specific treatment plan or the contractual agreement signed. But from the information I have (including Miss P'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 (around 4 months in Miss P's case it would appear).

Miss P does not dispute that she received the set of aligners and that she used them over the intended treatment period – which appears to have been from around from around June 2022 to October 2022. 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 P and there is no breach of contract in that sense.

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

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

Miss P has said her dentist has confirmed that her teeth are capable of achieving the desired alignment and has recommended a different provider. However, even if this were the case it does not show that the supplier has breached its contract with Miss P here.

In summary, while I am sorry to hear Miss P is unhappy the results didn't achieve exactly what she wanted, I don't consider that HFL had persuasive information to show it the supplier had breached its contract in respect of the results Miss P achieved. So, despite Miss P'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 ongoing ‘touch-up’ aftercare offering 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 be eligible for this aftercare in the first instance there are certain qualifying criteria. This includes:

- Responding to the required ‘check-ins’ during treatment.
- Ordering retainers at the end of treatment and renewing these every 6 months.

HFL says that Miss P did not meet either of these criteria. And Miss P has not provided persuasive evidence that she did these things either.

I note that the supplier’s documentation indicates a customer can qualify for the aftercare provision if they miss check-ins or ‘forget’ to order retainers. However, this appears to be at the discretion of the supplier and a requirement is that a customer is current on their payments and that they purchase retainers and then replace them every 6 months.

Even if I accepted that Miss P completed the check-ins, or that missing a check-in would not automatically disqualify her from the aftercare, there are other factors to consider here, namely:

- Despite Miss P’s initial treatment ending in late 2022 – there is no persuasive evidence to date that she ordered retainers after that point. Due to the time elapsed from her initial treatment I would have fairly expected her to have ordered these to continue being eligible for the aftercare. And although I recognise Miss P was authorised for some touch up treatments, I also note it appears there were periods where Miss P was not having touch ups such as when she was denied requests on more than one occasion. Overall, it seems she would reasonably have been expected to have ordered retainers based on the criteria for getting further treatment. I don’t see anything from the supplier telling her not to order these either.
- Because Miss P was not happy with the treatment she stopped paying for it (this happened in September 2023 – several months before the supplier stopped trading) so she did not meet the eligibility criteria of being up to date with her payments.

While I appreciate Miss P has information to indicate she was approved for touch ups I don’t think this alone persuades me that she would have been contractually eligible for the ‘Lifetime Guarantee’ going forward. HFL has indicated the supplier provided some ‘touch-ups’ as a gesture of goodwill rather than because a customer had strictly complied with the terms of the eligibility. In the particular circumstances here that seems more likely to be the case than not.

All things considered, I don’t think there was persuasive evidence available to HFL that Miss P contractually qualified for the ongoing aftercare provision. So HFL were not acting unfairly in declining the Section 75 claim.

Following my decision, it is up to Miss P if she wishes to approach HFL in respect of discussing any plan to settle any outstanding amounts on the finance and what HFL will do in respect of her credit file as a result of any agreement it reaches. My decision here is not about this matter.

My final decision

I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss P to accept or reject my decision before 11 February 2025.

Mark Lancod
Ombudsman