DRN-5094493

The complaint

Miss D 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 D 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 end of August 2023.

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

- She did not get the full service she paid for;
- her teeth have been left partially straightened and she has ongoing issues that were not addressed due to not getting the advertised service;
- she did not get support from the supplier or any 'touch-ups' via aftercare including the 'Lifetime Guarantee' (abbreviated for my decision); and
- she did not get her final retainers.

Miss D 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.

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

As it appeared Miss D did not have unopened and unused aligners to return, 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. Miss D 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.

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.

Miss D has mentioned customer service issues with HFL's communication with her. Which occurred after it sent its 'Final Response Letter' with referral rights to this service. My role here is to deal with matters leading up to this response. So I won't be commenting on the issues which occurred afterward.

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

Section 75 can allow Miss 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 Miss D or misrepresented it.

Limited information

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

Unused aligners/incomplete treatment

When Miss D 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.

Miss D has since clarified she threw the aligners away (she refers to 'retainers' but clearly means aligners). As she does not appear to have unopened/unused aligners to return 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

Miss 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 Miss 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 persuasive evidence that the supplier was aware it would be going out of business when it sold Miss D the treatment.

Therefore, I have focused on breach of contract here. Which I turn to now.

Miss D has recently said she never stated she was not happy with the results of her treatment. She has said she was never able to complete her treatment because the supplier went out of business. She says she did not receive the product 'in full'.

Although I will consider to what extent the supplier has breached express terms of service, because Miss D has said she could not use the aligners/had issues with her gums bleeding I have, for completeness considered if there was any persuasive evidence available to HFL of a breach of contract in respect of implied terms around quality of goods and services.

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 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 Miss D has said the treatment only partially straightened her teeth and was causing her gum problems so she threw the aligners away. However, without an expert report on Miss D'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 Miss D 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 Miss 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.

Overall, and based on the limited information presented to it at the time of the claim 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' either.

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

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

From what I understand the supplier offers plans which are generally 4-6 months. Miss D's treatment started in September 2023 so should have been finished by around February 2024. Miss D says she thinks it was due to finish around May but there isn't persuasive evidence to show that.

Miss D does not dispute that she received the set of aligners for treatment. And while she says she wasn't able to use all of them due to problems there is not persuasive evidence to substantiate this such as correspondence with the supplier or an expert report. So on this basis I don't think this can be fairly characterised as a clear case of goods or services not received. So prima facie – the core of the agreement (and I will come onto the discontinuation of support and aftercare) was provided by the supplier to Miss D and there is no breach of contract in that sense.

Furthermore, while Miss D is not focusing on the results of her treatment, for completeness I note she has not persuasively disputed her awareness or agreement to the 'informed consent' clause including the provision I refer to below contained in the supplier's standard contractual 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 regardless of how close the results are to any projection – this is not a breach of contract based on the likely agreement between Miss D and the supplier that the outcome is uncertain and not guaranteed.

I know Miss D has referred to not receiving a retainer at the end of treatment – however, I understand HFL did not finance the end of treatment retainers so it wouldn't be something that it is responsible for under Section 75 (I note the cash price of the retainers which are normally around £80 would likely exclude them from protection under Section 75 in any event). So I can't fairly say HFL should have accepted it was liable for a refund in this respect.

I also note in her claim to HFL Miss D 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 Miss D lost in the form of the ability to

contact the supplier about any issues that may arise while completing the course of aligners. By discontinuing these aspects of its service the supplier has breached its contract with Miss D. However, in deciding what is fair here I note:

- Miss D hasn't persuasively shown how she was disadvantaged (in respect of the results she achieved to date) by not being able to contact the supplier in the final months of treatment;
- If Miss D had chosen not to finish the last phase of her treatment due to the supplier going out of business, she has not shown how she was acting fairly in also disposing of unopened and unused aligners rather than mitigating her loss and returning these for a refund instead;
- HFL has made an offer to remedy the loss of aftercare provision (which I will come on to below).

I am also 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 Miss D 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 Miss 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' Miss D would have to continue to spend money on retainers twice a year; and
- there is no certainty Miss 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 Miss 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. 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 Miss D, 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 Miss D's treatment. And considering the uncertainties about the extent of Miss D's ongoing receipt of future benefits, and the fact Miss D has received the aligners so that she could (on the face of it) complete the core treatment (or return unused aligners for a refund) 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 Miss D paid via finance was substantially for the initial core set of aligners she had received and not any refinements via aftercare. So a significant refund would seem disproportionate here.

Miss D has specifically mentioned the stress the actions of the supplier have caused her. I am very sorry to hear that. However, it is important to note here that under Section 75 losses for distress and inconvenience caused by the supplier of goods and services are generally not recoverable as a court would be unlikely to award these. And when they are, these are in limited circumstances (say for breach of contract for a holiday). So, even though the supplier had breached its contract by discontinuing services I don't consider it was unreasonable for HFL not to offer additional compensation to reflect distress and inconvenience in the circumstances.

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

Putting things right

HFL should pay Miss D the £220 if it hasn't already done so. If her account is in arrears it can apply it to the balance. If not then Miss D can elect to have it paid directly to her.

My final decision

I partially uphold this complaint and direct Healthcare Finance Limited to pay Miss D £220 compensation.

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

Mark Lancod
Ombudsman