DRN-5171663

The complaint

Mrs I 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 I purchased orthodontic dental treatment from a remote supplier ('the supplier') using a fixed sum loan from HFL in September 2023 .

Mrs I said the supplier went out of business during her treatment. She approached HFL for a refund as she was unhappy with this and the results achieved to date.

HFL considered the claim under Section 75 of the Consumer Credit Act 1974 ('Section 75') for a full refund. HFL said that subject to certain criteria (such as the return of unused aligners) Mrs I was eligible for a partial refund.

Mrs I complained about the outcome of her claim and it was referred to this service. Mrs I says:

- She has completed her aligner treatment but not received satisfactory results and adds *'my treatment plan has partially failed because my gap is still showing and I still have an overbite'*; and
- the aftercare/guarantee is no longer valid.

Subsequently HFL offered Mrs I £220 to resolve her claim – which it says is the value of a 'touch-up' treatment under the supplier's 'Lifetime Guarantee' (abbreviated for my decision).

Our investigator said HFL had made a fair offer in the circumstances. Mrs I disagreed and asked for the matter to be considered 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 has 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 I is unhappy with the dental treatment she bought from the supplier. I am also sorry to hear about the financial difficulties she says it has caused 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 I in its position as a provider of financial services. In looking at how it handled the claim Mrs I brought to it I consider the information reasonably available to it at the time, along with the relevant protections available to Mrs I. I consider Section 75 to be particularly relevant here.

Section 75 can allow Mrs I 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 I or misrepresented it.

Limited information

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

Refunds for unused aligners

I note that in its response to Mrs I's claim HFL focused on her eligibility for a refund in respect of unopened and unused aligners. However, it appears that it understood at the time that Mrs I had not yet completed her treatment. Based on the content of Mrs I's original claim to HFL I don't consider this was an unreasonable stance.

However, it has since been clarified that Mrs I had completed her treatment. She was just not happy with it and wanted a follow up. As Mrs I has not disputed that she used the aligners and completed her treatment any eligibility for a partial refund based on the information from HFL falls away here. Therefore, I have focused on HFL's subsequent offer to pay Mrs I £220 for the loss of aftercare and if that is fair in the circumstances here.

Misrepresentation

Mrs I'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 I 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 Mrs I 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 I 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 I has said she is going to need to pay for more dental treatment to get things as she wants and has sent in pictures of her teeth to illustrate problems which she has described. 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 Mrs I 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 I'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 Mrs I bought the treatment and which has been made available to me by HFL, alongside other information such as Mrs I's testimony.

I consider all parties agree Mrs I entered into a contract for aligner treatment with the supplier. I acknowledge that I don't have a copy of Mrs I's specific treatment plan or the contractual agreement signed. But from the information I have (including Mrs I'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 (in this case Mrs I says her treatment started in September 2023 and ended in January 2024).

Mrs I does not dispute that she received the set of aligners and that she used them over the intended 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 Mrs I and there is no breach of contract in that sense.

A more accurate assessment of Mrs I's claim (to me) is that she was unhappy with the results from the treatment. More precisely she says she has only seen partial gains and the results do not match the initial 3D projection from the supplier. She says this is despite her wearing the aligners continuously day and night.

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

However, while this situation is not ideal I am not persuaded the lack of information disadvantages Mrs I as she has indicated (I note in particular she has referred to the 3D projection being crucial in supporting her case). I conclude this because, on balance, I am not persuaded the results of the treatment were contractually guaranteed to match the projection in any event. I will explain.

I consider it likely Mrs I 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 I 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 I would have signed. Furthermore, Mrs I 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 I and the supplier that the outcome is uncertain and not guaranteed.

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

From what I can see 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.

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 replacing retainers every 6 months (at their cost) and wearing these as prescribed.

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

It isn't clear to me whether this criteria would have been satisfied had Mrs I requested further treatment. Furthermore, despite the 'lifetime' nature of the guarantee this would not have come at no further cost to Mrs I, 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 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 I'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 being possibly approved for future aftercare under the 'Lifetime Guarantee'. Something, that is uncertain and difficult to quantify.

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 just over a 10% refund of the cash price of Mrs I's treatment. And considering the uncertainties about Mrs I's ongoing receipt of future benefits, and the fact Mrs I has received the core treatment she signed up to 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 future 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 I paid via finance was substantially for the initial core treatment she had received already and not any refinements via aftercare. So a significant refund (or the cost for a re-treatment as Mrs I has requested) would seem disproportionate here.

Deciding fair compensation is not a science. But this service is here to resolve disputes informally. Mrs I is free to reject my decision and consider any options (seeking appropriate legal advice) she has against HFL through other more formal means.

Before concluding I want to mention a couple of other things. Neither have been the focus of Mrs I's claim or complaint but for completeness:

- I am aware Mrs I says she didn't get the retainers she paid the supplier for – but in any event she has had the money back for this now – so I don't consider it necessary to focus on this here.
- I note Mrs I has made passing reference to a £10 incentive in relation to an impressions kit. It seems like the £10 was available by a prepaid MasterCard which Mrs I didn't want to sign up to – but there is no persuasive evidence from what I can see to support this being a breach of an agreed term or a specific misrepresentation.

I also note that Mrs I has mentioned her financial difficulties in paying the agreement off which I am sorry to hear about. Following my decision, it is up to Mrs I if she wishes to approach HFL in respect of discussing any plan to settle outstanding amounts 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 I considers HFL has not been positive and sympathetic in respect of this she may decide to complain about it separately.

Putting things right

HFL has not provided persuasive evidence that it has paid Mrs I the £220 it offered. If it has not done so it should pay this.

My final decision

I direct Healthcare Finance Limited to pay Mrs I £220.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs I to accept or reject my decision before 26 December 2024.

Mark Lancod
Ombudsman