DRN-5273241

The complaint

Mr B complains about how Healthcare Finance Limited ('HFL') responded to a claim he made to it in respect of dental treatment he 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.

Mr B purchased orthodontic dental treatment with a cash price of £1,569.56 from a remote supplier ('the supplier') using a fixed sum loan from HFL in January 2023.

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

- He was awaiting aligners for a new 4 month plan – which he did not receive; and
- He will no longer receive benefits under the supplier's 'Lifetime Guarantee' (abbreviated for my decision).

Mr B approached HFL for a refund. It considered the claim under Section 75 of the Consumer Credit Act 1974 ('Section 75'). It would not offer him a refund and said that he wasn't eligible for the 'Lifetime Guarantee' as he had not completed the required smile 'check-ins'.

Mr B is not happy with this and brought his complaint about the claim outcome to this service. Our investigator said that HFL had acted fairly. Mr B has asked for the matter to be looked at again by an ombudsman.

I issued a provisional decision which said:

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 Mr B is unhappy with the dental treatment he bought from the supplier. I am also sorry to hear about the impact of this on him. However, it is important to note that my decision here is about the actions of HFL– and what it should fairly have done for Mr B in its position as a provider of financial services. In looking at how it handled the claim Mr B brought to it I consider the information reasonably available to it at the time, along with the relevant protections available to Mr B. I consider Section 75 to be particularly relevant here.

Section 75 can allow Mr 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, 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 Mr B or misrepresented it.

Limited information

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

Misrepresentation

Mr 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 Mr 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 suggestion that the supplier was aware it would be going out of business when it sold Mr B 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 Mr B 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 Mr B has indicated he is unhappy with the results achieved to date. 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 Mr B had not achieved certain results he 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.

I note Mr B had received a course of follow up treatment and apparently been approved for another one. However, I am not persuaded this in itself shows that there was a lack of reasonable care and skill in the way the treatment was carried out. I say this noting that the availability of 'touch-ups' to refine results appears to be part of the supplier's regular aftercare offering.

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

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

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

Mr B does not dispute that he received the initial set of aligners and that he used these. However, when Mr B approached HFL with his complaint in December 2023 he has argued he was halfway through his treatment/it was incomplete.

From what I understand the supplier's aligner plans generally last around 4-6 months. After which a customer would order retainers to preserve the results. I can see Mr B took out his plan in January 2023 – so should have been finished by about June 2023. It seems this is supported by the fact his retainers were ordered in June 2023. I think this is around the time when the treatment plan ended. I understand that the supplier approved Mr B for a 'new' 2 month 'touch-up' plan in August 2023 as he wasn't happy with his results. But I don't think this means his core treatment was incomplete. It appears that had ended and further refinements were approved as part of an aftercare offering (subject to the approval of the treating dentist).

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 Mr B and there is no breach of contract in that sense.

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

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

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

In summary, while I am sorry to hear Mr 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 Mr B achieved. So, despite Mr 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 receipt of initial treatment (if a customer is not satisfied with results and at the discretion of the treating dentist) 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.

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.

HFL had said Mr B is not eligible for further aftercare because he had not completed the required 'check-ins' during his treatment. However, I note:

- *He has provided persuasive testimony backed up by circumstantial information (copies of the check-in requests) to support his claim that he did complete these requests.*
- *While HFL says the supplier provided data to show Mr B did not complete check-ins - we don't have access to Mr B's account (including the supplier's app) to validate for certain what Mr B did in respect of these.*
- *According to the supplier's paperwork, not checking in is not necessarily fatal to qualification for the 'Lifetime Guarantee' as long as other criteria is met such as continuing to order retainers and being up to date on payments. As far as I know Mr B was not in arrears when the supplier was trading – and he had ordered a set of retainers after his initial treatment was complete. I appreciate that he would have been expected to order retainers from December 2023 onwards too – but as the supplier was going out of business and he was awaiting a further 'touch-up' I can fairly see why he didn't at the time. And I note the supplier's documentation suggests that in some circumstances failing to order a retainer also won't exclude a customer from eligibility for aftercare.*

I don't know what decision the supplier would have made here. But in the circumstances, and based on the information Mr B has provided along with the supplier's documentation about its aftercare provision (and the discretion afforded in certain cases) I consider it was unfair of HFL to disqualify Mr B from eligibility for the aftercare provision here. Which means there is a prima facie breach of contract in it no longer being available to him.

However, in order 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 Mr B 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' Mr B would have to continue to spend money on retainers twice a year; and
• there is no certainty Mr B 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 Mr B'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 Mr B, as he would have had to continue purchasing retainers

twice a year too. He might have done this but there is no certainty this would have happened indefinitely.

I recognise that Mr B had already been approved for a 'touch-up' in November 2023 which he said he did not receive. So there is a more quantifiable loss there in respect of aftercare. However, I also have to factor in that it isn't certain if Mr B would have continued being approved for treatment after that on a yearly basis. And I also need recognise that he has benefited from receiving some initial aftercare prior to that.

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 almost a 15% refund of the cash price of Mr B's treatment. And considering the uncertainties about the extent of Mr B's ongoing receipt of future benefits, and the fact Mr B has received the aligners so that he 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. So in the particular circumstances here I think it should pay Mr B this.

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 Mr B paid via finance was substantially for the initial core treatment he had received already and not any refinements via aftercare. So a significant refund would seem disproportionate here.

Following my decision, it is up to Mr B if he 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 his credit file as a result of an agreement it reaches. My decision here is not about this matter – but if Mr B considers HFL has not been positive and sympathetic in respect of this he may decide to complain about it separately.

My provisional decision

I partially uphold this complaint and direct Healthcare Finance Limited to pay Mr B a £220 refund including yearly simple interest at 8% calculated from the date it gave him its claim outcome to the date of settlement.

If Mr B is currently in arrears HFL can apply the amount to the balance of his account – but if he is up to date with payments he can elect to have it paid directly to him.

If HFL considers it should deduct tax from the interest element of my award it should provide Mr B with a certificate of tax deduction.

HFL accepted my findings. Mr B said, in summary he only ordered retainers to ensure he was still eligible for aftercare. He does not accept that his treatment ended but continued with a 2 month course, and was meant to be followed by a further 4 months (which he did not receive). He says that there would be no reason to have aligners again so soon after his initial treatment if it had been completed.

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.

Neither party has given me cause to change my provisional findings – which I still consider fair for the reasons already given (above). These findings now form my final decision alongside the points below:

I am not persuaded that HFL should have concluded that Mr B's initial treatment had not completed (or was halfway through as he says). The facts indicate Mr B used the initial set of aligners over the intended duration before he was approved for further work. Whatever his motivation was for ordering retainers when he did it still acts as a reliable indicator that the initial treatment period had ended. So it wouldn't be fair to say he didn't receive the core service provision. And even if he wasn't happy with those results I have explained why that in itself is not a breach of contract. Furthermore, approval for more aligners does not in itself mean Mr B did not receive the core service he signed up for, noting that touch up aftercare is a part of the supplier's service.

Putting things right

I direct HFL to carry out the redress below if it has not already done so.

My final decision

I partially uphold this complaint and direct Healthcare Finance Limited to pay Mr B a £220 refund including yearly simple interest at 8% calculated from the date it gave him its claim outcome to the date of settlement.

If Mr B is currently in arrears HFL can apply the amount to the balance of his account – but if he is up to date with payments he can elect to have it paid directly to him.

If HFL considers it should deduct tax from the interest element of my award it should provide Mr B with a certificate of tax deduction.

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

Mark Lancod
Ombudsman