DRN-5391989

The complaint

Miss J 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

The parties are familiar with the background details of this complaint – so I will briefly summarise them here. It reflects my role resolving disputes with minimum formality.

Miss J purchased orthodontic dental treatment from a remote supplier ('the supplier') for a cash price of £1,639 using a fixed sum loan from HFL in April 2023.

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

- She has not been able to complete her treatment;
- she can no longer access aftercare via the 'Lifetime Guarantee' (abbreviated for my decision) which she says is one of the key features of the product.

Miss J approached HFL for a refund. It considered the claim under Section 75 of the Consumer Credit Act 1974 ('Section 75'). It would not offer her a refund and said she wasn't eligible for aftercare under the supplier's 'Lifetime Guarantee' (abbreviated for my decision) as she had not completed the required smile 'check-ins'.

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

I issued a provisional finding which said:

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 Miss J is unhappy with the dental treatment she bought from the supplier. I am also sorry to hear about the impact of this 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 J in its position as a provider of financial services. In looking at how it handled the claim Miss J brought to it I consider the information reasonably available to it at the time, along with the relevant protections available to Miss J. I consider Section 75 to be particularly relevant here.

I note that Miss J has made specific reference to a 'Right of Redress' clause in the finance agreement. It is worth noting that this clause informs Miss J of her rights in respect of Section 75 – however, it does not guarantee a refund in all circumstances.

Section 75 can allow Miss J 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 J or misrepresented it.

Limited information

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

Misrepresentation

Miss J'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 J 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 J 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.

I note that Miss J's claim to HFL was not focused on the manner in which the treatment had been provided or the quality of treatment to date – only that she was no longer going to be receiving ongoing treatment. So I don't consider HFL should have concluded that the treatment was provided without reasonable care and skill. However, it is worth noting for completeness that due to the complex nature of a medical/cosmetic treatment (and the fact that it is reasonably expected that results might vary for a number of reasons) it would be difficult for HFL to conclude this without an expert finding of some kind in any event.*

Furthermore, for completeness I don't consider HFL should have concluded that the aligners received by Miss J were not of 'satisfactory quality' under the CRA as Miss J does not appear to have provided persuasive evidence of this to it at the time she raised the claim.

[*Please note: A typographical error in the original provisional decision sent to the parties has been amended here for clarity.]

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

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

When Miss J approached HFL she said that she has been unable to complete her treatment. However, the usual length of the supplier's treatments are 4-6 months after which a customer would order retainers to preserve results. Miss J started her treatment around April 2023 so would have completed this by the time she approached HFL with her claim. This is underlined by the fact she has shown she ordered retainers in August 2023. So I don't consider HFL was wrong in concluding that Miss J had completed her treatment.

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 J and there is no breach of contract in that sense.

Miss J did not specifically appear to say she was unhappy with the results of this treatment when claiming to HFL. However, for completeness I note the following:

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

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

So based on the information reasonably available to it at the time I don't think HFL should have concluded that there was a specific breach of contract in respect of the provision of the core service or the outcome of said service.

However, I am aware the supplier did provide a contractual 'guarantee' of sorts in relation to aftercare. Which appears to be the focus of Miss J's claim to HFL and 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 initial qualifying criteria.

HFL had said Miss J is not eligible for further aftercare because she had not completed the required 'check-ins' during treatment. However, I note:

- *Miss J has maintained that she did complete her 'check-in' requests. And while HFL says the supplier provided data to show Miss J did not complete check-ins - we don't have access to Miss J's account (including the supplier's app) to validate for certain what Miss J 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 Miss J was not in arrears when the supplier was trading – and she had ordered a set of retainers after her initial treatment was complete in August 2023.

I don't know what decision the supplier would have made here. But in the circumstances, and based on the information Miss J 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 Miss J from eligibility for the aftercare provision here. Which means there is a prima facie breach of contract in it no longer being available to her.

However, in order to qualify for 'touch-ups' under the 'Lifetime Guarantee' it appears the key ongoing 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 J 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 J would have to continue to spend money on retainers twice a year (she might have done so but there is no certainty this would have happened indefinitely); and*
- *there is no certainty Miss J 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 J'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.

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 J's treatment. And considering the uncertainties about the extent of Miss J's ongoing receipt of future benefits, and the fact Miss J 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. So in the particular circumstances here I think it should pay Miss J 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 Miss J 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 Miss J 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 J considers HFL has not been positive and sympathetic in respect of this she may decide to complain about it separately.

My provisional decision

I partially uphold this complaint and direct Healthcare Finance Limited to pay Miss J £220 compensation plus 8% yearly simple interest from the date it gave her its claim outcome to the date of settlement.

If HFL considers it should deduct tax from my interest award it should provide Miss J with a certificate of tax deduction.

HFL agreed and Miss J did not respond.

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.

Putting things right

See below. If Miss J is in arrears then HFL can apply this settlement to the balance of her account. If she isn't in arears she can decide to have the amount directly paid to her.

My final decision

I partially uphold this complaint and direct Healthcare Finance Limited to pay Miss J £220 compensation plus 8% yearly simple interest from the date it gave her its claim outcome to the date of settlement.

If HFL considers it should deduct tax from my interest award it should provide Miss J with a certificate of tax deduction.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss J to accept or reject my decision before 21 April 2025.

Mark Lancod
Ombudsman