DRN-5406561

The complaint

Mrs A 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.

Mrs A purchased orthodontic dental treatment from a remote supplier ('the supplier') for £1,739 using a fixed sum loan from HFL in June 2023.

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

- She has not received the aligners she was due to get and will now have to seek alternative treatment at her own expense;
- she has not received the aftercare services including those under the supplier's 'Lifetime Guarantee' (abbreviated for my decision).

Mrs A 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 'Lifetime Guarantee' (abbreviated for my decision) as she had not completed the required smile 'check-ins' or ordered retainers.

Mrs A is not happy with this and brought a complaint about the claim outcome to this service. Our investigator said that HFL had acted fairly. Mrs A 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 Mrs A 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 Mrs A in its position as a provider of financial services. In looking at how it handled the claim Mrs A brought to it I consider the information reasonably available to it at the time, along with the relevant protections available to Mrs A. I consider Section 75 to be particularly relevant here.

Section 75 can allow Mrs A 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 A or misrepresented it.

Limited information

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

Misrepresentation

Mrs A'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 A 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 A the treatment.

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

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.

Furthermore, goods, such as the aligners themselves need to be of 'satisfactory quality' as implied into contracts like these by the CRA.

When Mrs A presented her claim to HFL I don't see where she claimed that the treatment she had received to date had not been provided with reasonable care and skill or that the aligners were not of satisfactory quality. However, I note that in her complaint form to this service she has said that the treatment plan has caused her medical problems such as impacting her bite. She has provided more information about this as the complaint has gone on including bills for subsequent medical treatment. She has also described issues with the fit of aligners – and how this caused gum bleeding.

I am sorry to hear about the issues Mrs A has described but if she didn't present this information to HFL at the time she made her original claim then it wouldn't be able to consider this aspect in the outcome.

However, in the interest of completeness there are inherent difficulties in concluding that a treatment was not carried out with reasonable care and skill in any event (or that the goods element was of unsatisfactory quality). Mrs A 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 say this noting the following:

- *Evidence of follow up dental treatment is not in itself persuasive in showing that the treatment received to date was carried out without reasonable care and skill.*
- *Even if I agreed Mrs A 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.*
- *Although Mrs A applied for follow up treatment – in itself it is not persuasive in showing 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.*
- *Mrs A appears to have limited evidence to show issues with the fit of aligners during her treatment – furthermore, gum irritation is listed (in the consent document I refer to below) as a possible risk and side effect of the treatment.*

In summary, based on the evidence available to it (and noting the lack of expert evidence to support Mrs A'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. Or that the goods element of the treatment breached the requirement 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 A bought the treatment and which has been made available to me by HFL, alongside other information such as Mrs A's testimony.

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

I note when Mrs A approached HFL with her complaint she indicated her treatment was not complete. However, the information available to HFL from the supplier indicated she had completed her core treatment.

*From what I understand the supplier's aligner plans generally last around 4-6 months. I can see Mrs A took out her plan in June 2023– so should have been finished by around December or January 2023**. I know Mrs A says she didn't use all her original aligners because of problems with them. Once again it doesn't look like she raised this with HFL at the time she made her claim to it. But, in any event Mrs A has provided limited information to show that the aligners were defective which prevented her using them. I also note that Mrs A does not appear to have any of these aligners sealed in their packets as I would have expected had she discontinued use during the treatment.*

I do note Mrs A has provided information to show she applied to the supplier for a 'touch-up' in December 2023. But I don't think this in itself shows the core aligners she received were

not fit for purpose – noting that 'touch-up' refinements are part of the usual supplier aftercare offering if a customer is not happy with their results to date.

On this basis I don't think HFL were unreasonable in not concluding this 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 A and there is no breach of contract in that sense.

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

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

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

In summary, while I am sorry to hear Mrs A is unhappy with the service she received, I don't consider that HFL had persuasive information to show it the supplier had breached its contract in respect of the results Mrs A achieved. So, despite Mrs A's dissatisfaction, 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 initial qualifying criteria.

HFL had said Mrs A is not eligible for further aftercare because she had not completed the required 'check-ins' during treatment or ordered retainers when required. However, I note:

- *Mrs A has provided persuasive testimony to support her claim that she did complete these requests. I also note Mrs A has provided information to HFL when she made her claim to it to show the supplier had allowed her to begin the process for arranging a 'touch-up' – and while I accept this may have been provided via goodwill – it can also suggest Mrs A was doing everything she needed to qualify for aftercare.*
- *While HFL says the supplier provided data to show Mrs A did not complete check-ins - we don't have access to Mrs A's account (including the supplier's app) to validate for certain what Mrs A 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 Mrs A was not in arrears when the supplier was trading. I appreciate she had not ordered a retainer yet– but as the supplier was going out of business and she was in the process of applying for a 'touch-up' I can fairly see why she 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 Mrs A 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 Mrs A 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 Mrs A 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 A would have to continue to spend money on retainers twice a year, which she might have done, but there is no certainty this would have happened indefinitely; and*
- *there is no certainty Mrs A 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 Mrs A'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 recognise that Mrs A was in the process of applying for a further 'touch-up' just before the supplier went out of business. However, I also have to factor in that it isn't certain if Mrs A would have continued being approved for treatment.

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 Mrs A's treatment. And considering the uncertainties about the extent of Mrs A's ongoing receipt of future benefits, and the fact Mrs A 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 Mrs A 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 Mrs A 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.

My provisional decision

I partially uphold this complaint and direct Healthcare Finance Limited to refund Mrs A £220 including yearly simple interest at 8% calculated from the date it gave her its claim outcome (on the 6 Feb 2024) to the date of settlement.

If Mrs A is currently in arrears (I don't think she is as she indicates she has now paid off her loan) HFL can apply the amount to the balance of her account – but if she is up to date with payments she can elect to have it paid directly to her.

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

[*please note this is a typographical error in the provisional finding and should have said '2024']

I asked the parties to respond to my provisional finding.

HFL agreed to my decision.

Mrs A says, in summary:

- She was never able to complete the original treatment;
- while she appreciates the settlement I have recommended the total cost to her has been much more than this, especially adding the initial product cost to the amount she has spent for remedial work; and
- she has not been provided with aligners that straighten her teeth and maintains there is a breach of contract by the supplier as she has not achieved any outcome.

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.

Despite further submissions from Mrs A I am not minded to depart from my provisional findings. My decision is the same for the reasons given above alongside the following comments:

I note Mrs A has said she didn't finish her original treatment due to ill fitting aligners. However, I can only fairly look at the claim she brought to HFL. And unfortunately there was limited evidence of this presented to it at the time– and due to the time passed it appeared Mrs A would likely have completed her initial treatment. Furthermore, Mrs A didn't appear to have any unopened and unused aligners from the original course of treatment to show she had not used these. Her claim to HFL appeared to be focused on a lack of aftercare.

I am sorry to hear about the overall cost to Mrs A here and what she says are a lack of any results. However, I have already explained why I don't think her claim to HFL persuasively showed that the supplier had breached its contract with her in regard to the way the treatment was carried out or the results achieved. There is a breach of contract in respect of aftercare – and I have proposed what I consider a fair remedy for this. It is now up to Mrs A if she wishes to accept my decision to resolve matters.

Putting things right

I direct HFL to carry out the redress below.

My final decision

I partially uphold this complaint and direct Healthcare Finance Limited to refund Mrs A £220 including yearly simple interest at 8% calculated from the date it gave her its claim outcome (on the 6 Feb 2024) to the date of settlement.

If Mrs A is currently in arrears (I don't think she is as she indicates she has now paid off her loan) HFL can apply the amount to the balance of her account – but if she is up to date with payments she can elect to have it paid directly to her.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs A to accept or reject my decision before 15 April 2025.

Mark Lancod
Ombudsman