DRN-5424674

The complaint

Miss W 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 W purchased orthodontic dental treatment from a remote supplier ('the supplier') for £1,639 using a fixed sum loan from HFL in January 2023.

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

- She did not receive the product she bought and is now left with aligners that do not fit;
- she is not receiving aftercare via the supplier's 'Lifetime Guarantee' (abbreviated for my decision.

Miss W 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.

Miss W 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 W has asked for the matter to be looked at again by an ombudsman.

I issued a provisional decision 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 W 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 W in its position as a provider of financial services.

I note that since referring the matter to this service Miss W has made some additional arguments that she didn't present to HFL originally. However, in looking at how it handled the claim Miss W brought to it I consider the information reasonably available to it at the

time, along with the relevant protections available to Miss W. I consider Section 75 to be particularly relevant here.

Section 75 can allow Miss W 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 W or misrepresented it.

Limited information

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

Misrepresentation

Miss W'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 W 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 W the treatment.

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

Refund for unused aligners

Later in my decision I explain why I consider HFL should consider Miss W eligible for aftercare under the supplier's 'Lifetime Guarantee'. However, it is worth clarifying that this does not mean she meets the criteria for a partial refund under the supplier's refund policy. In order to qualify for a pro-rated refund Miss W would have had to discontinue her original treatment and return unused and unopened aligners. And while I understand she has unused and unopened aligners these appear to relate to 'touch-up' treatment rather than the original treatment – so would not contractually entitle her to a pro-rated refund here in any event.

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 W 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. Noting that there are certain reasonably expected risks around potential side effects.

I note Miss W has evidence showing she was approved for 'touch-up' treatment (and she offered to provide this information to HFL when she made her claim to it). However, being approved for more treatment in itself is not persuasive evidence that the supplier acknowledged it acted without reasonable care and skill. Noting that refinements if a customer is unhappy with treatment progress are part of its regular aftercare offering.

I am mindful that Miss W has said in regard to her 'touch-up' treatment that the aligners did not fit properly. She has also sent an email showing the supplier responded to the issue suggesting some ways to alleviate fitting issues. I am sorry to hear about the discomfort experienced. But I am not in a position to say that based on the limited information it had HFL should have concluded the supplier had acted without reasonable care and skill in providing the treatment.

It is also important to note that even if I agreed Miss W 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 W'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.

I note Miss W has referred to fitting issues specifically in respect of her aligners. It isn't really clear from the evidence presented to HFL if there was any issue with the initial aligner set. And without expert or similarly persuasive evidence it is difficult to conclude that the later issues with the 'touch-up' set were due to a faulty product or similar. So based on the evidence provided to it I don't think 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'.

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

I consider all parties agree Miss W entered into a contract for aligner treatment with the supplier. I acknowledge that I don't have a copy of Miss W's specific treatment plan or the contractual agreement signed. But from the information I have (including Miss W'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 W approached HFL about her claim she said that her treatment was not complete. However, I don't think HFL were unreasonable in concluding her initial treatment had been completed. I can see that the information it had from the supplier indicated this. And based on when her treatment started and the usual length of the supplier's plans (4-6 months) it would appear that she would have been finished with the initial course of treatment when she made her claim.

Miss W does not appear to dispute she received the initial course of aligners. And from the evidence presented to HFL I don't think there was persuasive evidence showing Miss W was unable to use aligners due to a fault of the supplier. I do note Miss W has provided information showing she had issues with her 'touch-up' treatment (which I will come on to) but I don't think this means the core treatment was incomplete. 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. Prima facie – the core of the agreement was provided by the supplier to Miss W and there is no breach of contract in that sense.

A more accurate assessment of Miss W'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 Miss W's projected outcome was - unfortunately neither Miss W 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 W actually achieved following the initial treatment. However, while this situation is not ideal I am not persuaded the lack of information disadvantages Miss W 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 W 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 W 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 W would have signed. Furthermore, Miss W 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 W and the supplier that the outcome is uncertain and not guaranteed.

In summary, I don't consider that HFL had persuasive information to show it the supplier had breached its contract in respect of the results Miss W achieved. So I don't think HFL would be expected to agree to a refund on that basis.

I note Miss W has said she was unable to receive retainers from the supplier to enable her to maintain results. I can't see where she specifically raised this with HFL as part of her claim but the provision of retainers is not part of the contract she had for treatment as funded by its loan. These are purchased separately. Therefore, I wouldn't expect HFL to take responsibility for this in respect of the Section 75 claim presented to it.

I do note Miss W has said she had issues with the fit of aftercare aligners she received as part of 'touch-up' treatment. As I have said it isn't clear if these issues were the fault of the supplier (poor quality goods/treatment) and there is limited correspondence about it available to HFL. However, I am proposing a remedy in respect of the discontinuation of aftercare in any event. Which I turn to now.

Aftercare

I am aware the supplier did provide a contractual 'guarantee' of sorts in relation to 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 Miss W 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:

- *Miss W has provided detailed and persuasive testimony backed up by circumstantial information (copies of the check-in requests) to support her claim that she did complete these requests. She also makes the point that she was approved for further 'touch-ups' – and while I accept these may have been provided via goodwill – they can also suggest that Miss W was doing everything she needed to qualify for aftercare.*
- *While HFL says the supplier provided data to show Miss W did not complete check-ins - we don't have access to Miss W's account (including the supplier's app) to validate for certain what Miss W 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 W was not in arrears when the supplier was trading. I appreciate that she would have been expected to order retainers after her initial treatment but as she was in the process of receiving 'touch-ups' soon after it finished 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 correspondence about 'touch-up' treatment Miss W has provided (which she offered to provide HFL when she made a claim to it) 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 W 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 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 W 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 W would have to continue to spend money on retainers twice a year, she might have done this but it isn't clear if she would have done it indefinitely; and
• there is no certainty Miss W 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 any 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 Miss W was in the process of applying for a further 'touch-up' treatment just before the supplier went out of business. However, I also have to factor in that it isn't certain if Miss W would have continued being approved for treatment.

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 around a 13% refund of the cash price of Miss W's treatment. And considering the uncertainties about the extent of Miss W's ongoing receipt of future benefits, and the fact Miss W 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 W this along with out of pocket interest from the date it gave her its claim outcome.

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 W 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 W 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 W 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 refund Miss W £220 including yearly simple interest at 8% calculated from the date it gave her its claim outcome (25 April 2024) to the date of settlement.

If Miss W is currently in arrears 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 Miss W with a certificate of tax deduction.

HFL accepted my decision and Miss W 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.

My final decision

I partially uphold this complaint and direct Healthcare Finance Limited to refund Miss W £220 including yearly simple interest at 8% calculated from the date it gave her its claim outcome (25 April 2024) to the date of settlement.

If Miss W is currently in arrears 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 Miss W with a certificate of tax deduction.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss W to accept or reject my decision before 22 April 2025.

Mark Lancod
Ombudsman