

## **complaint**

Miss W complains that NewDay Limited won't refund the cost of liposuction treatment that she paid for, in the main, using her NewDay credit card. She brings her complaint under section 75 of the Consumer Credit Act 1974.

## **background**

Miss W contracted with a supplier, whom I'll call "S", to have liposuction treatment in September 2012. She paid most of the cost of this using her NewDay credit card.

In June 2015, Miss W contacted NewDay. She said she was unhappy with the treatment S had provided. In particular S had provided her with an incorrect recovery garment after her operation which had created permanent indentations in her body and "a lumpy bumpy figure". She had complained to S but it wouldn't resolve the issues she had raised. So she asked NewDay to refund what she had paid for the treatment under section 75.

NewDay contacted S. It accepted that Miss W was initially provided with the wrong recovery garment, but didn't think it had caused the problems Miss W complained of. It said that in liposuction there were risks of 'Residual Fat' and 'Irregularities' which the patient accepted ahead of surgery. It had explained this to Miss W, and also when she complained previously in 2013. So NewDay didn't accept her complaint. It referred her to an independent arbitration service to which S belonged, whose representative I'll call "the arbitrator".

The arbitrator delivered her report in May 2016. She didn't uphold all Miss W's complaints. But she did agree that S had provided the wrong recovery garment, and should have done more to deal with her concerns about the effect of this on her recovery.

It seemed S and Miss W's surgeon had been in contact at the time of her complaint in July 2015. Each seemed to think the other was responsible for Miss W's indentations. She had supplied photos of these which S said it would have reviewed by an independent liposuction specialist. But it doesn't seem it did so, or that it suggested a consultation with Miss W's surgeon which would have been appropriate.

The arbitrator noted that Miss W had seen the surgeon in October 2012 after her operation, when she had been wearing the correct recovery garment. She had seen the surgeon again in February 2013. The surgeon's notes from that meeting said that the scars were healing nicely and that Miss W should continue massaging. She also noted that both sides were very symmetrical, and that Miss W was pleased with the post-operative [result]. It seems a further review was planned for September 2013.

The arbitrator didn't express a view on what had caused the indentations. She awarded Miss W compensation for the way S had dealt with her complaints. Miss W resumed her complaint with NewDay. She complained about a further breach of contract by S. She said that when S was in contact with her surgeon in July 2015, the surgeon had told S that she thought it likely that the incorrect garment had caused Miss W's indentations, and had asked S to arrange for her to see Miss W. But S hadn't mentioned this to Miss W.

Miss W's contract with S contained the following provision:

*"For up to 3 years after your operation, where you and your surgeon both agree that further surgery is required, [S] will provide, if clinically appropriate, corrective surgery, hospital*

*accommodation and nursing care free of charge. However, if your surgeon decides that the results of the surgical procedure fall within the acceptable normal limits of surgery, further free surgery will not be available."*

Her surgery took place in 18th September 2012. Miss W said that within the three year time limit, she and her surgeon were agreeing that the indentations were caused by the incorrect garment and further surgery was required. By not acting on this S was in breach of contract. NewDay still didn't accept that it had any liability under section 75. So Miss W complained to us.

Our adjudicator didn't recommend that this complaint should be upheld. She hadn't seen any evidence that the surgeon had agreed further surgery was required within the three year limit. And she couldn't say that failure to provide the correct recovery garment, and to remove a stitch in a timely manner, were breaches of contract.

Miss W produced a letter from her surgeon written following an examination of Miss W in June 2016. It says:

*"Examining this lady, she is well generally. Examining her trunk, she has a good figure and the areas on her flanks that were treated with liposuction look essentially symmetrical one side with the other. There are mild contour irregularities on both sides of the body and these are at the same height on either side. The small scars from the liposuction are well healed and hard to see, and the overall impression assessing her trunk is that she has an attractive figure.*

*The first two weeks after surgery are a critical time – if the garment she was given to wear was incorrect then ischaemic tissue may have died under the garment's pressure. In my opinion, on the balance of probability, the use of the incorrect garment for the first two weeks post surgery has made a significant contribution to the final outcome."*

In answer to the adjudicator's suggestion that her surgeon wasn't saying that corrective surgery was needed, Miss W produced a further email from her surgeon as follows:

*"It is my standard practice to weigh up the risks vs benefits for all patients wanting revisional surgery. This patient has small irregularities after her Liposuction. She has asked me to state whether I would have offered revisional surgery in 2015 - had I seen her for follow-up then. I would have tried my best to help her be as satisfied after the surgery as possible. Further Liposuction with fat injections to the minor dips might improve the outcome. If the patient understood the risks and wanted to proceed -I would have offered her further surgery in 2015."*

Miss W commented further, in summary, that:

- failure to provide services with reasonable care and skill was a breach of contract;
- the recovery garment S provided didn't match the description of the garment its documentation said would be provided, which was a breach of contract;
- the garment wasn't fit for purpose as it caused damage, which was another breach of contract; and
- S withheld information from her by failing to tell her that her surgeon had suggested a further consultation in July 2015 (within the three year period), which was a "misrepresentation".

## **my findings**

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I understand that Miss W is very unhappy with the results of her liposuction procedure. She blames the incorrect recovery garment S provided, and thinks only corrective surgery will put this right. She blames S again for not putting this in hand within the three year period mentioned in the contract.

Miss W wants NewDay to refund under section 75 what she paid for the first surgery to fund the cost of the corrective surgery. I don't agree it would be reasonable for me to require NewDay to do so for the following reasons.

### Removal of the stitch

The arbitrator, who is more experienced than I am in reviewing such matters, considered at length Miss W's complaint about the removal of her stitch, but didn't uphold it. For the reasons the arbitrator set out, I don't think S's conduct in relation to the stitch amounted to a breach of contract.

### The recovery garment

I agree that S initially provided the wrong recovery garment to Miss W. The two parties involved in the procedure – S and Miss W's surgeon – each blame the other for the indentations that Miss W now has. There is no independent evidence to say the garment caused the indentations.

Even Miss W's surgeon will only say that on balance she thinks it "*made a significant contribution to the final outcome*". So although there was a breach of contract by S in relation to the type of garment provided, I can't say that this was responsible for the damage Miss W complains of.

### The corrective surgery clause

The contract provided a three year period within which S would meet the cost of corrective surgery. Miss W met her surgeon twice after the liposuction. The surgeon's notes don't suggest she was unhappy at that time with the results.

S says Miss W did complain during 2013, but she doesn't seem to have followed this up until 2015. A follow up consultation between Miss W and her surgeon in September 2013 is mentioned, but I haven't seen any mention of this being attended, or what was said then. Miss W doesn't seem to have approached her surgeon again until 2016. I think Miss W had ample time to arrange to see her surgeon within the three year period if she wanted to take advantage of the clause.

I think it would have been good practice, as the arbitrator said, for S to have arranged a follow up consultation for Miss W with her surgeon when S and the surgeon were in contact in July 2015. But I can't say that its failure to do so was a breach of contract by S. And its conduct didn't amount to a misrepresentation by S. Failure to do something isn't a misrepresentation.

Even if a consultation had been arranged in 2015, I'm not persuaded that the requirements of the clause for corrective surgery would have been satisfied. The report of Miss W's surgeon in June 2016 portrays a very positive outcome of the procedure. Far from the "lumpy bumpy figure" Miss W complains of, the surgeon says:

*"There are mild contour irregularities on both sides of the body and these are at the same height on either side. ....the overall impression assessing her trunk is that she has an attractive figure."*

The surgeon's later email says she would have offered further surgery in 2015 if Miss W wanted it, and understood the risks. This is different from saying that further surgery was "required", or that the results of her surgery didn't "fall within the acceptable normal limits of surgery".

So I don't think S is responsible under the contract for now meeting the cost of the corrective surgery Miss W wants. It follows that I can't reasonably require NewDay to meet this cost under section 75.

#### **my final decision**

For the reasons I have set out above, my decision is that I don't uphold this complaint, and make no order against NewDay Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss W to accept or reject my decision before 27 April 2017.

Lennox Towers  
**ombudsman**