DRN-4886529

The complaint

Mr G 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

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.

Mr G purchased orthodontic dental treatment from a remote supplier ('the supplier') using a fixed sum loan from HFL in June 2022. The supplier is no longer trading and Mr G says he has lost out because the treatment was not finished. He approached HFL to raise a claim under Section 75 of the Consumer Credit Act 1974 ('Section 75') for a full refund.

HFL acknowledged that Mr G would no longer be able to claim under the supplier's 'Lifetime Guarantee' (abbreviated for my decision) which entitled Mr G to ongoing 'touch-up' treatment. It noted there was specific eligibility criteria for getting further treatment but in the circumstances it offered Mr G £220 to resolve his claim - which it says is the value of one 'touch-up'.

Mr G is unhappy with this and approached our service with a complaint about the outcome of his Section 75 claim. Our investigator said HFL had acted fairly in the circumstances. Mr G disagreed and has asked for the matter to be considered by an ombudsman.

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.

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 has had another entity respond to this complaint on its behalf. However, my references to HFL here are taken to include representations made on its behalf.

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

Section 75 can allow Mr G 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 G or misrepresented it.

Limited information

It is worth noting there are challenges presented by limited information in respect of Mr G'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 his 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 G's testimony and documentation he retained.

Misrepresentation

Mr G'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 G 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 G 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 G 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 G has shown information in the form of quotes for further dentistry work (such as for a veneer/fillings and retainer) and pictures of his teeth. However, this in itself does not persuasively show that the treatment Mr G received from the supplier was carried out without reasonable care and skill.

I know Mr G is not happy with the results he has achieved to date. And I also note he has pointed out that after his initial treatment the supplier agreed to 'touch-up' treatment. He has shown documentation confirming that the supplier's dentist approved at least one new set of aligners. However, a finding in respect of reasonable care and skill is not dependant 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.

And while in this case the supplier appeared to be in agreement that Mr G could improve his results (by authorising at least one 'touch-up') – this in itself isn't persuasive in showing the original treatment was carried out without reasonable care and skill– only that the dentist considered the results could possibly be refined via its aftercare program (which I go on to discuss in more detail later in this decision).

And as I have already said, based on the evidence available to it (and noting the lack of expert evidence to support Mr G'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 that 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 G bought the treatment and which has been made available to me by HFL, alongside other information such as Mr G's testimony.

I consider all parties agree Mr G entered into a contract for aligner treatment with the supplier. I acknowledge that I don't have a copy of Mr G's specific treatment plan or the contractual agreement he signed. But from the information I have (including Mr G'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 (in this case Mr G says his treatment was for 6 months).

Mr G does not dispute that he received the set of aligners and that he used them over the intended treatment period. 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. So prima facie – the core service was provided by the supplier to Mr G and there is no breach of contract in that sense.

A more accurate assessment of Mr G's claim (to me) is that he was unhappy with the results from the treatment. More precisely he says they were 'nowhere near the projected outcome'. By this he appears to be referring to the initial 3D projection from the supplier. Mr G says the supplier agreed to provide him with another set of aligners to help get a better outcome (a 'touch-up') but he was still not happy with his results vs the initial projection. I have thought about what he has said here carefully.

I don't know what Mr G's projected outcome was - unfortunately neither Mr G 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 G actually achieved following the initial treatment and any 'touch-up' aligner treatment either.

However, while this situation is not ideal I am not persuaded the lack of information disadvantages Mr G in the way he has said. I conclude this because, on balance, I am not persuaded the results of the treatment were contractually guaranteed to match the projection in any event. I will explain.

I consider it likely Mr G 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 G 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 G signed. Furthermore, Mr G does not appear to dispute his 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 G and the supplier that the outcome is uncertain and not guaranteed.

I once again note Mr G did receive follow up treatment from the supplier. And he has indicated this shows that something must have been wrong with the initial treatment. But I don't consider an agreement to carry out 'touch-ups' shows a breach of contract in itself. A 'touch-up' appears to be a part of the supplier's aftercare offering for further refinement (subject to dentist approval). It isn't clear whether the supplier approved a 'touch-up' merely because it thought results could be improved upon – or due to some more significant failing on its side. But even if it were the latter, there is not persuasive evidence that the 'touch-up' treatment did not remedy that issue in any event.

In summary, while I am sorry to hear Mr G is unhappy with the results he got I don't consider that HFL had persuasive information to show it the supplier had breached its contract in respect of the results Mr G achieved. So, despite his clear dissatisfaction with the results, I don't think HFL would be expected to agree to refund him for this aspect as he wanted it to.

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 treatment is completed (if a customer is not satisfied with results) 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.

From what I can see 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.

For an initial ‘touch-up’ and for ongoing ‘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:

- Mr G has provided specific information that says the supplier’s dental team will request ‘*some specific photos of your smile so that your treating dentist can determine if you need additional aligners’*; and

- Information about the ‘Lifetime Guarantee’ refers to ‘*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 replacing retainers every 6 months (at their cost) and wearing them as prescribed.

It appears Mr G has already had at least one free ‘touch-up’ treatment from the supplier. However, I recognise that Mr G will not be able to receive further ‘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 G would have to continue to spend money on retainers twice a year; and

- there is no certainty Mr G would be approved for further ‘touch-ups’ each year – as this is at the discretion of the treating dentist.

I know Mr G has said he had not ordered retainers after his initial treatment ended because he was getting further ‘touch-up’ treatment from the supplier. However, even putting that aside there is no certainty that the supplier’s dentist would have continued approving him for further treatment. I know Mr G is certain that he would have been approved for more treatment– but I don’t think it is clear. And while I know Mr G has shown information about the cost of further dental work – I don’t consider that in itself persuasively shows that the supplier’s dentist would have agreed to ongoing refinements.

And while I note Mr G has referred to the 'lifetime' nature of the guarantee in respect of the impact on him and the apparent loss of ongoing benefit – this benefit would not be at no further cost to Mr G, as he would have had to continue to purchase retainers twice a year too. He might have done this – but there is no certainty this would have happened indefinitely.

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 G'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 being possibly approved for 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 a 'touch-up' treatment is £220. Ultimately, it is difficult to say if that is exactly what it is worth. But it does represent just over a 10% refund of the cost of Mr G's treatment. And considering the uncertainties about Mr G's ongoing receipt of future benefits, and the fact Mr G has received the core treatment he signed up to 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 future benefit from the supplier ceasing trading.

And while I note Mr G has referred to the fairness and proportionality of the proposed refund, I consider it is likely that the amount he paid via finance was substantially for the initial core treatment he had received already and not any refinements via aftercare. So his call for a significant refund would seem disproportionate here.

Deciding fair compensation is not a science. But this service is here to resolve disputes informally. Mr G is free to reject my decision and consider any options (seeking appropriate legal advice) he has against HFL through other more formal means if he wishes.

A note about chargeback

It appears Mr G made a chargeback claim through his third party bank against HFL for payments he had made to the HFL loan using his third party bank account. It seems he was able to get some money back as a result of this but it has resulted in arrears on his loan with HFL.

It is important to note that Mr G's obligation to pay HFL for the loan instalments is separate to any dispute he has with the supplier. His bank payments to HFL were to pay off the credit it agreed to give him, not payments made directly to the supplier for the treatment. I don't know why the chargeback succeeded. And whether this was an oversight on HFL's part in not defending it. But in any event (and based on the information I have) I don't consider it fair in the circumstances to say this chargeback means HFL should cancel the resulting arrears on the loan. I make this finding also noting that the terms of the loan say HFL can reclaim its losses as a result of Mr G disputing a validly authorised payment (Mr G has not claimed he did not authorise these payments originally and there is no persuasive he didn't in any event). Nor do I think recovery of finance payments this way means that HFL has to uphold his Section 75 claim, which is a separate matter.

Following my decision, it is up to Mr G if he wishes to approach HFL in respect of discussing any plan to settle outstanding arrears 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 G considers HFL has not been positive and sympathetic in respect of this he may decide to complain about it separately.

My final decision

I partly uphold this complaint and direct Healthcare Finance Limited to pay Mr G £220 (if it has not already done so) in respect of the Section 75 claim he made to it.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 26 December 2024.

Mark Lancod
Ombudsman