DRN-5089692

The complaint

Mr K has complained about the way American Express Services Europe Limited ("AESEL") dealt with his request for money back.

What happened

In August 2022 Mr K paid around £1,500 using his AESEL credit card for dental treatment from a supplier I'll call "S". Mr K received sets of night-time dental aligners from S and he was due to use them over the next few months. Mr K thinks he received 22 sets of aligners to be worn for two weeks each. The treatment was due to complete around July 2023.

Mr K said S agreed a 'touch up' plan for him in January 2023 because his teeth weren't moving correctly, and he switched over to these aligners once they were delivered. Mr K said he was supplied 20 'touch up' aligners, also to be worn for two weeks each. He said the plan was due to end in January 2024.

In December 2023 S went out of business. Mr K said he was part way through treatment, so he contacted AESEL to put in a claim and ask for a refund. He said he wasn't given the ongoing support, and S wouldn't be able to provide the lifetime guarantee it had offered.

AESEL said it didn't think the necessary conditions were met for a valid claim to be considered under section 75 of the Consumer Credit Act 1974 ("s.75"). Mr K decided to refer the matter to the Financial Ombudsman. AESEL dealt with it as a complaint but reiterated the valid relationship didn't exist.

One of our investigators looked into things and ultimately didn't uphold the complaint. He thought the conditions for a claim to be considered under s.75 did exist but didn't think Mr K had submitted enough evidence to show there was a breach of contract. And he didn't think a chargeback would have had a reasonable prospect of success.

Mr K didn't agree. He said he'd shown there'd been a breach of contract. He said he lost out on dental supervision and the lifetime guarantee, and that the aligners weren't fit for purpose. AESEL accepted the findings and had nothing further to add. But as things weren't resolved, the complaint has been passed to me to decide.

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.

I want to acknowledge I've summarised the events of the complaint. I don't intend any discourtesy by this – it just reflects the informal nature of our service. I'm required to decide matters quickly and with minimum formality. But I want to assure Mr K and AESEL that I've reviewed everything on file. And if I don't comment on something, it's not because I haven't considered it. It's because I've concentrated on what I think are the key issues. Our powers allow me to do this.

What I need to consider is whether AESEL – as a provider of financial services – has acted fairly and reasonably in the way it handled Mr K's request for getting money back. It's important to note AESEL isn't the supplier. I've gone on to think about the specific card protections that are available. In situations like this, AESEL can consider assessing a claim under s.75 or raising a chargeback.

S.75 is a statutory protection that enables Mr K to make a like claim against AESEL for breach of contract or misrepresentation by a supplier paid by credit card in respect of an agreement it had with him for the provision of goods or services. But there are certain conditions that need to be met for s.75 to apply. The value of the transaction falls within the financial limits. And I think the necessary relationships exist between the parties.

Implied terms

In cases such as this it is often complex to assess the quality of the service Mr K paid for. Results from such treatments are subject to many variables. Mr K has not provided supporting evidence such as an independent, expert opinion that sets out the treatment he paid for has not been done with reasonable care and skill as implied by the Consumer Rights Act 2015 ('CRA'). I'm mindful it is the manner in which the service was provided that is the crucial issue for me in considering whether there's been a breach of an implied term in relation to the service.

I'm not a dental expert, and neither is AESEL. Without sufficient supporting evidence, I don't think AESEL was unfair to not uphold the claim on the basis of a breach of an implied term of the contract because I've not seen enough to determine the service S offered wasn't carried out with reasonable skill and care.

Express terms and guarantee

I also need to consider what I think Mr K's contract with S agreed to provide in terms of treatment so I can determine whether there has been a breach of an express term of it. I don't have a contract signed by Mr K as I understand they were kept in an online application that's no longer available. There's a lack of evidence, which makes it very difficult to assess. But it's not in dispute Mr K was due to receive a set of aligners when he entered into the contract in August 2022 and that he received and went on to use at least some of them. I think the core contract was for that set of aligners that he was due to use for a few months.

While I appreciate Mr K is put in a difficult position because some of the evidence isn't available, I can only consider how AESEL acted based on what was able to be supplied. In the absence of a specific signed contact, I've looked at S's website from around the time Mr K entered into the contract. This says most treatment lasts between 4 to 6 months. Although I understand that night-time aligner treatment can take longer – as is the case with Mr K. S says if the customer hasn't achieved the results they want, and providing they've met certain conditions, the customer might be eligible for additional 'touch up' aligners. Moreover, I understand S should have been there to support the customer if there were issues during treatment.

Mr K's original treatment plan was due to end in July 2023. But he said he entered into a new plan for 'touch up' aligners in January 2023. He's shown us an email from S from 20 January 2023 saying the 'touch up' aligners should be with him within 4 or 5 weeks. Mr K said he would have switched to the 'touch up' aligners when they were delivered.

While I don't agree with the reasons AESEL gave for not upholding the s.75 claim, even putting that to one side I'm not persuaded it had sufficient information to have upheld Mr K's claim. The evidence is incomplete and inconclusive.

It doesn't seem to be in dispute the original plan was due to end around July 2023. Mr K said he received 'touch up' aligners in January 2023. He said he received 20 aligners and was due to wear them for two weeks each. I can't see there's supporting evidence of the number of 'touch up' aligners he was given. But if the 'touch up' plan was 20 aligners and it started at the end February 2023 this would have taken him broadly to the end of November 2023 or the beginning of December 2023. S went out of business on 8 December 2023.

Mr K said the 'touch up' plan was due to end in January 2024. It's not clear why it was pushed back, but it's of course possible that Mr K wore some aligners for longer than planned. Although I think it's important to note that Mr K hasn't shown he wasn't able to complete the 'touch up' plan within the right time. If Mr K had any issues during the 40 weeks S would have likely been around to support him. We've asked Mr K for evidence of the 'time to switch aligners' emails that S sent him. He supplied one from 12 November 2023 saying it was time for him to switch to aligner 16, which he said indicated he had four left after this (8 weeks). But it's curious that this email said he needed to wear the aligner for 1 week, and not 2. Mr K said this was because the emails weren't customised. That may be right, but the timeline isn't as clear as it could be.

Mr K also previously supplied a photo of an aligner packet (number 20). It's not clear if this was for the first treatment or the 'touch up' set. The packet sets out the aligners should be worn for 2 weeks, unlike the email referred to above. We've seen other cases where the aligner packet has details of when they are estimated be worn so we asked Mr K to send us photos showing the whole packet, and all other packets he had. But he said he no longer has these which again makes it more difficult to reach firm conclusions. And it would have been difficult for AESEL to have established whether, for example, Mr K decided to go on to complete his treatment. This would've been possible because it was largely self-directed.

Bearing in mind I need to consider how AESEL handled the s.75 claim based on the evidence supplied to it, while I'm not saying something definitely hasn't gone wrong, I'd like to have been more certain of the stage of treatment Mr K reached or should have reached, particularly when S went out of business and he put in his claim. I think AESEL would have had those same evidential challenges. Without being more certain of what happened, with supporting evidence, it's not clear he'd have been due any further service from S at the time it went out of business.

I'm aware S provided a lifetime guarantee of sorts, but there were several conditions Mr K needed to meet in order for him to have benefitted from the guarantee. I'm conscious that if Mr K had completed the 'touch up' plan within the time stated above, he'd have likely been at the stage to know whether he could ask for further refinement through the guarantee, while S was still trading. It's not clear AESEL would have been able to safely conclude he met the qualifying conditions, based on what was supplied. And even if Mr K met the conditions, I understand a dentist would only have approved further 'touch ups' if it thought further refinement was possible, which is something else AESEL didn't have evidence of. It could also be relevant that it looks like Mr K was in treatment for much longer than the original 10-month plan, indicating he may have already received more than was due under the core treatment. I think the total amount paid was substantially for the core treatment.

Even had AESEL agreed the necessary relationships existed for a claim to be considered under s.75 I think it may have had valid concerns that Mr K may not have due to have been within treatment when he put in his claim. The core treatment he originally paid for should have ended. The 'touch up' treatment likely should have ended based on the number of 'touch up' aligners he said he ordered. Mr K didn't supply supporting evidence of the total number of 'touch up' aligners he was supplied. And the November 2023 reminder email referred to a 1-week plan, but Mr K has said it was a 2-week plan. It's of course possible Mr K forgot something or wasn't correct in the dates he supplied; or that S made a mistake in its reminder email. Without evidence of unopened aligners, it would have been more difficult for AESEL to know if Mr K completed his treatment. It's also not clear AESEL had enough information to determine Mr K met the conditions for the guarantee.

In thinking about how AESEL handled things I need to consider what information it could rely on. Mr K wasn't able to supply further supporting information. So I think it would therefore have been difficult for AESEL to reach firm conclusions on whether there was a breach of contract and, even if that wasn't in dispute, how it could fairly put things right or quantify a loss. Therefore, I don't think AESEL's ultimate answer to the s.75 claim was unfair.

Chargeback

The chargeback process provides a way for a card issuer to ask for a payment to be refunded in certain circumstances. The chargeback process is subject to rules made by the relevant card scheme. It's not a guaranteed way of getting money back. While it's good practice for a card issuer to attempt to chargeback where certain conditions are met and there's some prospect of success, there are grounds or dispute conditions set by the relevant card scheme that need to be considered. If these are not met, a chargeback is unlikely to succeed. And something going wrong with a merchant won't always lead to a successful claim. American Express was the card scheme in this case.

Even if Mr K raised his claim in time, it's not clear on what basis the chargeback may have had a reasonable prospect of success because the evidence the services were either not provided or were defective was limited. So even had AESEL considered chargeback further, I'm not persuaded it would have led to a different outcome.

All things considered, while I'm very sorry to hear Mr K is unhappy, I don't find I have the grounds to direct AESEL to take any further action.

My final decision

My final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 28 March 2025.
Simon Wingfield
Ombudsman