DRN-5204183

The complaint

Mr M 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

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.

Mr M purchased orthodontic dental treatment from a remote supplier ('the supplier') using a fixed sum loan from HFL in March 2023.

Mr M says the supplier has now gone out of business, and he is unhappy because he says his treatment was not finished. He says his teeth are not straight and at risk of shifting further. He adds that he will have to pay full price to another provider to fix '*the minor teeth crowding I still have'* as he no longer has access to the aftercare the supplier was providing under its 'Lifetime Guarantee' (abbreviated for my decision). Mr M says he did what the supplier asked of him and should qualify for a full refund.

Mr M approached HFL for a full refund. It considered the claim under Section 75 of the Consumer Credit Act 1974 ('Section 75'). It concluded that Mr M had not complied with the requirements of the supplier to complete 'check ins' so he didn't qualify for further treatment under the 'Lifetime Guarantee'.

The matter came to this service. And as a result HFL offered Mr M £220 to reflect the loss of aftercare benefits. Which our investigator thought was fair.

Mr M is not happy with this and has asked for the matter to be looked at again 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 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 Mr M is unhappy with the dental treatment he bought from the supplier. I am also sorry to hear about the impact on him. 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 M in its position as a provider of financial services. In looking at how it handled the claim Mr M brought to it I consider the information reasonably available to it at the time, along with the relevant protections available to Mr M. I consider Section 75 to be particularly relevant here.

Section 75 can allow Mr M 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 M or misrepresented it.

Limited information

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

'Money back promise'

Mr M has referred to qualifying for the 'Lifetime Guarantee' and indicted he believes this also qualifies him for a full refund of treatment. I note that in its response to Mr M's claim HFL referred to the 'Lifetime Guarantee' including the 'Money Back Promise', which is where I consider this impression has come from. However, from what I can see from the information about the 'Lifetime Guarantee' this only applies in respect of requests for a refund within the first 30 days of treatment, or the return of unopened and unused aligners.

That wouldn't apply here because it is quite clear that Mr M used the aligners and completed his initial treatment. Therefore, any eligibility for a full or partial refund based on a 'Money Back Promise' falls away here. So, I have focused on HFL's subsequent offer to pay Mr M £220 for the loss of aftercare and if that is fair in the circumstances here.

Misrepresentation

Mr M'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 M 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 M 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 industry in question.

The difficulty here is Mr M 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 M has said he 'did not get the promised result' and has sent in pictures of his mouth. He has also shown the supplier agreed to provide further 'touch-up' treatment. However, this in itself does not persuasively show that the treatment received from the supplier was carried out without reasonable care and skill.

It is also important to note that even if I agreed Mr M had not achieved certain results he 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 Mr M'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 the goods element of the treatment (the aligners themselves) breached the requirement under the CRA to be of 'satisfactory quality'.

For completeness, I note that Mr M has specifically referred to 'retainers' not fitting properly. To a non-expert it isn't clear whether they do or not (despite Mr M providing photos) and nor does this claim in itself persuasively show there was a breach of implied terms in respect of the treatment carried out. It is also important to note that the 'retainers' do not appear to be financed by the loan here and if so HFL would not be liable for issues with the quality of these specifically in any event.

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

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

Mr M does not dispute that he received the set of aligners and that he used them over the intended treatment period. He says the treatment started in March 2023 and was due to finish in September 2023. 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 (or as Mr M puts it 'unfinished') treatment. So prima facie – the core of the agreement was provided by the supplier to Mr M and there is no breach of contract in that sense.

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

We don't have a full treatment plan for Mr M - unfortunately neither Mr M 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). Mr M has provided some screenshots to this service of what he says his '3D projection' was. And pictures of his mouth. However, we don't have an expert report or similar information showing in what way Mr M's results might differ from the projection.

However, while this situation is not ideal I am not persuaded the lack of information disadvantages Mr M 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 Mr M 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 M 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 M would have signed. Furthermore, Mr M 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 Mr M and the supplier that the outcome is uncertain and not guaranteed. And while the supplier has agreed to 'touch-ups' in Mr M's case – this appears to be part of its aftercare offering – rather than an admission of breach of contract. So I don't consider that makes a difference here.

In summary, while I am sorry to hear Mr M is unhappy with the results, I don't consider that HFL had persuasive information to show it the supplier had breached its contract in respect of the results Mr M achieved. So, despite Mr M's clear dissatisfaction with the results, 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 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.

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.

Initially when Mr M contacted HFL to make a claim about his treatment it responded to say that its data showed he hadn’t completed his treatment ‘Check-ins’ so didn’t qualify for the ‘Lifetime Guarantee’. However, Mr M has says he did do what he needed to qualify as shown by the evidence of the ‘touch-up’ treatment he had and his approval for more. He says he supplied all this information to HFL but it did not consider it. While I take HFL’s point that the ‘touch-up’ treatments might have been agreed out of goodwill, that isn’t clear, and I still think there is sufficient information to suggest that Mr M would have continued to qualify for coverage under the ‘Lifetime Guarantee’ here. As HFL has now made an offer in line with coverage under the ‘Lifetime Guarantee’ I don’t consider it necessary to cover this point in any further detail.

However, 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.

Mr M has already received some follow up treatment and I recognise he will not be able to receive further treatment via ‘touch-ups’ under the ‘Lifetime Guarantee’ because the supplier is now out of business. I also note Mr M says that the supplier had agreed to provide him with a further ‘touch-up’ treatment (after the first one he had) and has sent an email to confirm this. 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 further ‘touch-ups’ Mr M would have to continue to spend money on retainers twice a year; and
- there is no certainty Mr M 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 loss here though. It just isn’t easy to assess what the extent of any perceived loss might be. It is, however, important to note that any loss I am considering is not to remedy a failure in respect of the core treatment or Mr M’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’. And although Mr M has been approved for more, the extent of his aftercare entitlement is uncertain and difficult to quantify.

Furthermore, despite the ‘lifetime’ nature of the guarantee this would not have come at no further cost to Mr M, as he would have had to continue purchasing retainers twice a year too. He might have done this but there is no certainty this would have happened indefinitely.

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 almost a 15% refund of the cash price of Mr M's treatment. And considering the uncertainties about the extent of Mr M's ongoing receipt of future benefits, and the fact Mr M has received the core treatment he signed up to (and an initial 'touch-up') it doesn't seem unreasonable that HFL in considering the Section 75 claim should now accept this an effective 'price reduction' to remedy any perceived loss of aftercare benefit from the supplier ceasing trading.

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 Mr M paid via finance was substantially for the initial core treatment he had received already and not any refinements via aftercare. So a significant refund would seem disproportionate here.

Following my decision, it is up to Mr M if he 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 his credit file as a result of an agreement it reaches. My decision here is not about this matter – but if Mr M considers HFL has not been positive and sympathetic in respect of this he may decide to complain about it separately.

Putting things right

If it hasn't already done so HFL should pay Mr M the £220 it has offered plus interest from the date it originally gave him his Section 75 claim outcome. I think this is fair in the circumstances - it appears at the time of the claim there was sufficient information to make an offer.

If Mr M is in arrears it can apply this award to the balance of his account – or if he is not in arrears Mr M can elect to have it paid directly to him.

My final decision

I direct Healthcare Finance Limited to pay Mr M £220 compensation if it has not already done so plus 8% yearly simple interest calculated from the date of its claim outcome to the date of settlement.

If HFL considers it needs to deduct tax from the interest award it should provide Mr M with a certificate of tax deduction.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 14 January 2025.

Mark Lancod
Ombudsman