DRN-5209245

The complaint

Miss H 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

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.

Miss H purchased orthodontic dental treatment from a remote supplier ('the supplier') using a fixed sum loan from HFL in June 2023.

Miss H said the supplier went out of business during her treatment. She approached HFL for a refund as she was unhappy with this and the results achieved to date.

HFL considered the claim under Section 75 of the Consumer Credit Act 1974 ('Section 75'). HFL said that Miss H was not eligible for money back and she had to continue making her loan payments.

Miss H complained about the outcome of her claim and it was referred to this service. Miss H says:

- Although she received her aligners her teeth are not how she fully wants them and she will not have access to more treatment via the 'Lifetime Guarantee' (abbreviated for my decision) as the supplier is out of business;
- she is continuing to pay for a service she cannot access; and
- she is now having to seek medical advice and has been quoted '£500+' for retainers and has been told she might not be eligible for these as her teeth are not "perfect".

Our investigator said HFL had acted fairly. Miss H disagreed and asked for the matter to be considered by an ombudsman.

I issued a provisional decision as follows:

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 H is unhappy with the dental treatment she bought from the supplier. I am also sorry to hear about the impact she says it has had 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 H in its position as a provider of financial services. In looking at how it handled the claim Miss H brought to it I consider the information reasonably available to it at the time, along with the relevant protections available to Miss H. I consider Section 75 to be particularly relevant here.

Section 75 can allow Miss H 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 H or misrepresented it.

Limited information

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

Refunds for unused aligners

I note that in its response to Miss H's claim HFL mentioned the supplier's 'Money Back' guarantee. And that Miss H was not eligible for this. However, from what I understand any refund under this is in respect of unopened and unused aligners. As Miss H has not disputed that she used the aligners and completed her core treatment any eligibility for money back under this guarantee falls away.

Therefore, I have focused on the other key points of Miss H's claim which is that she is unhappy with the results she got and the lack of access to further treatment.

Misrepresentation

Miss H'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 H 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 H 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 Miss H 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 Miss H has said she is unhappy with the results. She says her teeth are better but not as good as the supplier said they would be. She says they are not straight and causing her pain sometimes in the areas that are 'wonky'. She also says she is having trouble sourcing retainers due to the results she got. I am sorry to hear this. 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 Miss H 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 H'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'.

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

I consider all parties agree Miss H entered into a contract for aligner treatment with the supplier. I acknowledge that I don't have a copy of Miss H's specific treatment plan or the contractual agreement signed. But from the information I have (including Miss H'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. Miss H says her treatment was finished by February 2024

Miss H does not dispute that she received the set of aligners and that she 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 of the agreement was provided by the supplier to Miss H and there is no breach of contract in that sense.

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

I don't know what Miss H's projected outcome was - unfortunately neither Miss H 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 H actually achieved following the initial treatment.

However, while this situation is not ideal I am not persuaded the lack of information disadvantages Miss H 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 H 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 H 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 H would have signed. Furthermore, Miss H has not persuasively disputed her 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 H and the supplier that the outcome is uncertain and not guaranteed.

In summary, while I am sorry to hear Miss H 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 Miss H achieved. So, despite Miss H'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.

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.

From what I can see from the supplier's information about the 'Lifetime Guarantee' the various criteria for further treatment include participating in virtual 'check ins' every 60 or 90

days (depending on the treatment plan). HFL has said that Miss H does not qualify for the guarantee because she did not participate in sufficient virtual 'check-ins'. It also said she did not order retainers at the end of the treatment which is another part of the qualifying criteria (and this appears to be confirmed by the supplier's information about the aftercare requirements too).

I can see why Miss H might not have ordered retainers as the supplier had ceased trading before her treatment finished. However, it appears that she did not complete the 'check-ins' required prior to the supplier going out of business. Miss H says she completed only one of these because that is all that was asked of her (she provided an email from the supplier from around August 2023 to show this request). What Miss H says is credible and she has even provided screen grabs of her email inbox in an attempt to show she didn't get other requests from the supplier to 'check in'.

The 'check in' process (from the 'Lifetime Guarantee' website information) is not described as a passive process. It says that the customer must respond to each regular request from the treating dentist. But HFL has not persuasively shown the supplier did request these while it was still trading like it was meant to. So this factors into the fairness of my decision here as I can't be sure the supplier (which was soon due to cease trading) did do what it needed to ensure Miss H was 'checking in'.

Furthermore, and arguably more crucially the information I have seen about the 'Lifetime Guarantee' shows that even if a customer fails to complete the 'check-ins' they can still become eligible for the guarantee again during or after treatment (for example, if they keep up with payments and the treatment/post-treatment plan). We won't know if Miss H would have become eligible again because it appears that towards the end of, and by the time she finished treatment the supplier had ceased trading.

Looking at what is fair here – I think HFL should have considered there was a breach of contract in respect of the supplier ceasing trading, through a failure to provide Miss H aftercare services that she might have become eligible for again.

However, it is also worth noting here that even if I were to find that Miss H was eligible for the 'Lifetime Guarantee' that wouldn't likely mean I consider a failure to provide it would give Miss H the right to significant compensation (or the full refund she wants). Any compensation is likely to be modest. I will explain.

- *The benefits under the 'Lifetime Guarantee' are qualified. For example, they need to be approved by the supplier's dentist. It isn't clear to me whether this criteria would have been satisfied had Miss H requested further treatment. Furthermore, despite the 'lifetime' nature of the guarantee this would not have come at no further cost to Miss H, as she would have had to continue purchasing retainers twice a year to qualify as well. She might have done this but there is no certainty this would have happened indefinitely.*

- *Miss H had received the core aligner treatment and I am not persuaded a significant element of the contract price was for aftercare.*

There is a potential loss here. 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 Miss H'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 cash price of Miss H's treatment. And considering the uncertainties about Miss H's ongoing receipt of future benefits, and the fact Miss H has received the core treatment she signed up to it doesn't seem unreasonable that HFL in considering the Section 75 claim should award this effective 'price reduction' to remedy any perceived loss of future 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 Miss H paid via finance was substantially for the initial core treatment she had received already and not any refinements via aftercare. So a significant refund (or the cost for a re-treatment as Miss H has requested) would seem disproportionate here.

Customer service

I note Miss H has also complained about the way her claim was handled. She has made reference to the time HFL took to look into things. She says it took over 4 weeks to look at her claim despite her chasing it. She said she got automated responses to her emails and HFL did not contact her in the timescales it promised in these emails.

I can see Miss H raised her claim towards the end of December 2023 and HFL responded in early February 2024. I don't think this is an unreasonable amount of time to deal with a claim overall. However, it would be annoying not to hear back from an agent in the timescales she was expecting. I can see in her chaser emails to HFL Miss H shows she is annoyed and frustrated about not hearing from it – and feels like she has been ignored. Luckily the situation didn't go on too long – but I think a small monetary amount should reflect the distress caused by what appears to be less than ideal communication from HFL. I think £50 is fair.

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

My provisional decision

I uphold this complaint in part and direct Healthcare Finance Limited to:

- *Pay Miss H £220 with 8% simple yearly interest calculated from the date it gave her its original claim outcome to the date of settlement; and*

- *pay Miss H £50 to represent the distress caused by its customer service in handling the claim.*

If HFL considers it must deduct tax from my interest award it should provide Miss H with a certificate of tax deduction.

Miss H responded to say, in summary, that she is happy with the provisional decision but would also like HFL to write off the balance of her finance agreement (which she says is £589.28) without adverse information to compensate her for not receiving a service and for the lack of communication on its side.

HFL responded to say, in summary:

1. Miss H did not comply with the terms of the 'Lifetime Guarantee' – she only completed one 'Check-in' when more would have been expected, and it maintains the accuracy of the data it has from the supplier. Re-qualification for the guarantee was at the discretion of the supplier – so it cannot be assumed it is contractually due.

2. It handled Miss H's matter in a reasonable and timely way – sending her an acknowledgement email on the day she raised concerns – then an update a month later. It sent her a resolution to her complaint within eight weeks.

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 alongside the points below:

I note Miss H's request to have her loan balance written off. However, I don't see any reasonable basis for that. I have already explained in my provisional findings what I consider to be fair compensation for both the discontinuation of service by the supplier, and the handling of the claim by HFL.

For clarity, I will deal with HFL's objections with the numbering I have used above:

1. While I acknowledge that the supplier likely expected Miss H to have completed more than one 'Check-in' she made it clear to HFL when she raised her Section 75 claim that she had only received one request from the supplier to do so. HFL does not appear to have explored this at the time and I don't think this can be ruled out – particularly as Miss H was having her treatment leading up to (and during) the time the supplier was going out of business. Furthermore, while we can't be certain Miss H would have re-qualified for the 'Lifetime Guarantee' I don't consider HFL has provided persuasive information to show that in the circumstances here Miss H would not have re-qualified, particularly as the key factors for post-treatment 'requalification' mentioned by the supplier do not appear to relate to completing 'Check-ins'.

2. I want to make it clear that (regardless of how HFL responded to the Section 75 claim as if it were a complaint) I am not looking at HFL's complaint handling process. I am looking at how it handled the Section 75 claim Miss H brought to it. I have already accepted that the overall time it took to deal with the claim was not unreasonable. However, I maintain that it was not as responsive to Miss H as it could have been particularly in light of the fact that I can see it acknowledged some of her communication with standard emails that said 'it may take us up to 72h to get back to you, although we are usually much faster'. There is no persuasive evidence it met those timescales it promised. I appreciate that HFL says it was dealing with high volumes but that does not mean that Miss H's particular expectations were fairly met. Miss H has maintained that she sent enquiries that were not replied to in the timescales promised. And I can see it has frustrated her. So I think that a modest award of £50 is not unreasonable to reflect that here.

Putting things right

HFL should put things right as I have set out below. If Miss H is in arrears it can apply the award (apart from the £50 distress and inconvenience – which it should pay to her) to her account. However, if she is up to date with payments it can give her the choice to pay down her account or receive the money directly.

My final decision

I uphold this complaint in part and direct Healthcare Finance Limited to:

- Pay Miss H £220 with 8% simple yearly interest calculated from the date it gave her its original claim outcome to the date of settlement; and

- pay Miss H £50 to represent the distress caused by its customer service in handling the claim.

If HFL chooses to deduct tax from the interest award it should provide Miss H with a certificate of tax deduction.

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

Mark Lancod
Ombudsman