

The complaint

Mrs L has complained about the way Healthcare Finance Limited (“HFL”) dealt with a claim for money back in relation to dental treatment which she paid for with credit it provided.

What happened

In June 2023 Mrs L entered into a two-year fixed sum loan agreement with HFL to fund the provision of dental aligners from a third-party supplier I’ll call “S” for her daughter who was a minor. The cash price was around £1,750 and Mrs L was due to pay back the agreement with monthly payments of around £75.

S went out of business in December 2023. Mrs L contacted HFL to make a claim. She said S couldn’t fulfil its obligations.

HFL considered the claim as a potential breach of contract under Section 75 of the Consumer Credit Act 1974 (“s.75”). HFL acknowledged S provided a ‘lifetime’ guarantee, but it didn’t think Mrs L (or her daughter) met all the conditions for it because it said she’d not registered the aligners, completed virtual check ins, or ordered retainers.

Mrs L decided to refer her complaint to the Financial Ombudsman. She said her daughter was using the last set of aligners, but she needed further refinement because her teeth were not aligned properly. In summary she said she did register the aligners and complete the check ins. She also said her daughter wasn’t at the stage to order retainers when the claim was submitted.

Our investigator looked into things and ultimately didn’t think Mrs L’s daughter met the conditions for the guarantee, so didn’t make any recommendations. HFL indicated the necessary relationship didn’t exist for a claim to be considered under s.75 and didn’t think Mrs L’s daughter met the conditions for the guarantee either.

Mrs L didn’t agree. I issued a provisional decision that said:

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 Mrs L and HFL 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 HFL – as a provider of financial services – has acted fairly and reasonably in the way it handled Mrs L’s request for getting her money back. But it’s important to note HFL isn’t the supplier.

S.75 is a statutory protection that enables Mrs L to make a ‘like claim’ against HFL for breach of contract or misrepresentation by a supplier paid using a fixed sum loan in respect of an agreement it had with her for the provision of goods or services. But there are certain conditions that need to be met for s.75 to apply. The cost of the treatment was within the

relevant financial limits for a claim to be considered under s.75. But HFL didn't think the necessary relationships existed under a debtor-creditor-supplier agreement.

One of the conditions for a claim to be considered under s.75 is that the borrower (debtor) needs to have used the credit to pay the same company which they have a like claim against for breach of contract or misrepresentation.

In this case, Mrs L is the debtor and so she'd be the one who'd need to have a claim against S for breach of contract or misrepresentation. But it was her daughter who underwent the treatment. The nature of the treatment is that it's very personal to Mrs L's daughter. She was the one who had the scan, received the aligners, and was provided the ongoing support from S. I think it's difficult to argue that it's anyone other than Mrs L's daughter that received the treatment and would be party to the contract with S. But I'm also conscious Mrs L's daughter was a minor. So while this doesn't necessarily mean Mrs L's daughter wasn't able to enter into a contract, I also need to decide if Mrs L was jointly contracting.

We don't have a signed copy of the Consent and History Form that is normally completed. But I've reviewed a copy of the form. And I can see that in the space for a patient signature it says: "Signature of Patient (Or Parent/Guardian If Minor)". Given Mrs L's daughter was a minor at the time, I think it likely Mrs L would have been the person to sign the form. Mrs L also said she was the one who arranged the appointment. So, on balance, I think Mrs L was jointly contracting with S. And therefore she's able to bring a like claim against HFL for breach of contract or misrepresentation.

HFL didn't accept Mrs L's claim. I've gone on to consider if there is persuasive evidence of a breach of contract or misrepresentation by S that means HFL should have accepted it. But I want to explain from the outset that I can only consider Mrs L's complaint on that narrow basis – that is, whether it was fair and reasonable for HFL to respond to her claim the way it did.

Mrs L entered into the agreement in June 2023, and the treatment was expected to last a few months. She tells us her daughter wore the aligners for slightly longer than expected but updated the expected end date on the online app. This seems plausible. She's indicated she wasn't completely happy with the results and that she can no longer use the guarantee. So I've focussed on that when thinking about my decision.

Implied terms

In cases such as this it is often complex to assess the quality of the service Mrs L paid for. Results from these sorts of treatments are subject to many variables and there are generally disclaimers by the providers of such services, and accepted risks that results cannot be guaranteed.

Mrs L has not provided supporting evidence such as an independent, expert opinion that sets out the treatment she paid for, for her daughter, has not been carried out 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, rather than the results of the treatment, 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 HFL. Without sufficient supporting evidence, I don't think HFL was unfair at the time to not uphold the claim on the basis of a breach of an implied term of the contract because I don't think it was supplied enough evidence that the service S offered wasn't carried out with reasonable skill and care.

Express terms

I need to consider what I think Mrs L'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 Mrs L as I understand they were kept in an online application that's no longer available. So there's a lack of evidence. But it's not in dispute Mrs L's daughter was due to receive a set of aligners when Mrs L entered into the contract in June 2023 and that she received and used them. I think the core contract was for those set of aligners that she was due to use for a few months.

With regards to the results, as I've said above, I think it likely Mrs L signed a consent form, as is common with these sorts of treatments. We don't have a signed copy, but I've seen an example copy. This sets out the various risks and uncertainties with such a dental treatment. And it indicates Mrs L would have understood S couldn't guarantee specific results or outcomes for her daughter. So even if Mrs L's daughter didn't quite get the results she wanted after the core treatment, without sufficient evidence to show otherwise, I don't think that in itself would be considered a breach of contract.

While I appreciate Mrs L is put in a difficult position because some of the evidence isn't available, I can only consider how HFL acted based on what was able to be supplied. In the absence of a specific signed contract, I've looked at S's website from around the time Mrs L and her daughter entered into the contract. This says most treatment lasts a few months. It says if the customer hasn't achieved the results they want, and providing they've met certain conditions, they might be eligible for additional 'touch up' aligners, which I'll come on to.

While I'm sympathetic Mrs L's daughter wasn't happy with the results, I don't think HFL had persuasive enough evidence to show S breached express terms of the contract in respect of the results she achieved.

Guarantee

On S's website from the time, the frequently asked questions ("FAQ") page has a section for further treatment under the guarantee. This suggests customers can request further aligner 'touch ups' after the core treatment at no cost on an ongoing once a year basis.

From what I can see the guarantee provided the possibility of having further aligners, provided that Mrs L (or her daughter) registered the aligners; wore them as prescribed; completed virtual check ins; and stayed up to date on payments. It also said after the core treatment Mrs L (or her daughter) was required to buy retainers every 6 months at their own cost and wear them as prescribed. Moreover, a dentist was required to approve the further treatment. My understanding is that a dentist would only do so if they assessed that further progress to straighten the teeth would be possible.

HFL didn't think Mrs L's daughter met the conditions for the guarantee when Mrs L contacted it because she'd not registered the aligners, completed virtual check ins, or ordered retainers. We've seen other cases where S has told HFL the customer did meet the conditions. So I can't completely disregard what HFL has told us.

Putting the lack of evidence to one side for the moment, Mrs L's daughter met some of the qualifying conditions for the guarantee. And I note S's website from around the time had a section titled: "I missed a check-in (or forgot to register my aligners or order retainers), and I'm not sure my [guarantee] is still in effect. Is there anything I can do to become eligible again?" This says:

If you are currently in treatment, you will become eligible again as long as you:

1. Check in your aligners (check your email or the app to do this)
2. Complete your future Smile Check-ins (via email or our app)
3. Are current on your payments
4. Purchase retainers after treatment, replace them every 6 months, and wear them as prescribed

If you just finished treatment, you can become eligible again as long as you:

1. Are current on your repayments
2. Replace retainers every 6 months and wear them as prescribed

If you're unsure whether you're eligible, contact us to find out.

I think when Mrs L first contacted HFL she was up to date on payments. And Mrs L's testimony is that her daughter hadn't quite got to the point to order retainers when the claim was raised. While it's not definitive, and the FAQs could have been clearer in setting out the exact steps and timescales/deadlines, I think there's a good chance Mrs L's daughter would have been able to requalify for the guarantee had S not gone out of business. Bearing in mind I need to resolve the complaint quickly and informally by deciding what I think is fair and reasonable, on balance, I think HFL should have treated Mrs L's daughter as if she'd met the conditions for the guarantee.

Mrs L thinks she should be provided with a full refund of the treatment costs. There is a potential breach identifiable because her daughter can no longer use the guarantee. However, given the stage of treatment she was at, the guarantee would never have given her the option of a refund of the core treatment cost. From what I've seen, a full refund was only available for the first 30 days after Mrs L's daughter began her treatment in June 2023 and only if she'd not opened or used the aligners. I don't think it would be fair or reasonable for me to tell HFL that it should now provide Mrs L with a full refund to recompense her for the potential breach that has happened. I don't think it was unreasonable for HFL to not offer to refund the value for what was provided under the core contract, but I've thought about what could be done to resolve the complaint.

There are many ways in which the guarantee could have ceased to be of use to Mrs L's daughter. Firstly, she may not have done what she needed to in terms of continuing to buy retainers. The retainers were not supplied under the original contract – Mrs L (or her daughter) needed to buy them separately. S may not have approved further 'touch-up' aligners if its dentists had assessed that they would not be beneficial. The guarantee only gave the possibility of annual touch-up aligners – not the certainty that they would actually be provided.

Even if I accept there's a potential loss, it's not straight-forward to establish the value of the perceived loss. And I'm required to resolve the complaint quickly and with minimum formality. As I've explained, I don't think HFL is required to remedy a failure in relation to the core treatment or results Mrs L's daughter received. But I think there's a possible loss because Mrs L's daughter may have been able to further utilise the guarantee.

HFL shared information from S saying the financial value of a 'touch-up' treatment is £220. It's difficult to know for certain if that's accurate. But this represents a refund of over 10% of the cost of the treatment. Taking into account Mrs L's daughter received the core treatment, I think HFL should offer this price reduction to remedy any potential loss. It seems like a fair compromise given I think the total amount paid was substantially for the core treatment.

Mrs L had nothing further to add. HFL responded to say, in summary:

- It took a fair and reasonable approach to assessing whether the customer met the conditions for the guarantee.
- There was no certainty a customer would be able to requalify for the guarantee if they didn't meet the conditions.
- HFL made an assessment as to whether there was a breach of contract by S when it went out of business, and S confirmed it wouldn't honour the guarantee for Mrs L.
- Mrs L had ample time and opportunity to comply with the required check-ins while S was operational, but she didn't. The loss of the ability to requalify was down to Mrs L's earlier non-compliance as opposed to S going out of business.
- The actual omission (of failing to do a check in on time) should be given more weight than the customer's testimony that they would have done the check-ins if they had the chance on an ongoing basis.
- Check-ins are only relevant during the actual treatment phase. They're there to track progress during treatment to determine if a mid-course correction is needed. The suggestion Mrs L would have requalified post-treatment is not applicable or relevant.
- The guarantee was designed with a requalification option to encourage customers to continue their treatment despite minor lapses in compliance. It's not fair to allow the customer to rely on the provision indefinitely after S went out of business. This would imply that compliance with the conditions was irrelevant.
- Decisions should be consistent.
- There were other conditions that needed to be satisfied independently in order for the customer to be able to comply.
- Mrs L didn't meet the conditions for the guarantee and so her claim doesn't meet the conditions for a refund. There's been no breach of contract.

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'd like to thank the parties for their responses. I do understand that HFL was reliant on information supplied to it by S when deciding whether customers met the qualifying conditions for the guarantee. From the information it received the customer either did or didn't meet the conditions.

I appreciate there's some uncertainty on whether or not a customer would be able to requalify for the guarantee. It's interesting for customers within treatment it says you *will* become eligible but for customers who've just finished treatment it said you *can* become eligible. It's not conclusive and, as I said in my provisional decision, I think the FAQs could have been set out clearer. I agree decisions should be consistent, but I need to set out what I think is fair and reasonable in the individual circumstances of Mrs L's complaint.

I'm never going to know for certain if Mrs L's daughter would have been able to requalify. And I'll never know if Mrs L's daughter wore the aligners as prescribed. But where I think the possibility for requalification was a good one because I think she was either within treatment or had just finished treatment when S went out of business, I think it's fairer to read the contract in her favour. I think that's the right thing to do if there's some ambiguity. And where the evidence is incomplete or inconclusive (as some of it here) I reach my decision on the balance of probabilities.

It should be pointed out this wasn't a situation where Mrs L's daughter finished the treatment many months or years before S went out of business. If that was the case, I agree she'd either not be within treatment or having 'just' finished treatment. Even had she completed the treatment within the original estimated time, given most treatments lasted around 4 to 6 months, S went out of business around the time she was due to finish her treatment. And we've seen other customers that've extended their treatment time because they wore aligners for slightly longer. This was ultimately an option, and I'm aware that customers shouldn't change their aligners too soon. I understand S's online app had a way for customers to 'get back on track' if they didn't follow the initially predicted treatment period. Mrs L said her daughter was told that if switching to a new aligner caused any pain or didn't fit properly, she could revert to the previous aligner for another week before attempting the switch. She said this happened, which is why the treatment took slightly longer than expected. She also said she was told not to order a retainer until she was happy with the results. I think these are plausible explanations.

HFL said the check ins were only relevant during the treatment phase. But S acknowledged in its requalifying conditions that 'Things come up. We get it'. Mrs L's daughter ultimately may have been less worried about registering her aligners or carrying out check ins when S was still in business because she was reassured S would offer support if she needed it – as we've seen it did with several other customers in similar situations. And things might've been more complicated because Mrs L's daughter needed Mrs L's help to complete the check ins.

If the checks ins are only relevant during the treatment phase for tracking progress to see if a mid-course correction was needed, there's an argument Mrs L's daughter was within the treatment phase when S went out of business. So she could have requalified had S not gone out of business. If she'd just finished treatment (and the check ins weren't relevant), she still looks like she may have been able to requalify simply by buying retainers. But S went out of business, so it was no longer able to fulfil that – even if it was an option. I'm not sure the data S sent to HFL about Mrs L was a confirmation the guarantee wouldn't have been honoured had it not gone out of business.

I appreciate HFL is saying that Mrs L's daughter had time to comply with the check ins while S was still trading. And I can accept that HFL would want to know the customer was engaged in the process when deciding whether or not the customer should be due a price reduction for the loss of the guarantee. But I also think it would be unfair to not recognise there could be a loss to a customer where I think it's likely they could have continued with further treatment for further refinement that may have been possible.

Overall, I've taken on board HFL's submissions, and while I agree the matter isn't straight forward to decide or put right, I still think the conclusions I reached in my provisional decision are fair.

My final decision

My final decision is that I uphold this complaint and direct Healthcare Finance Limited to pay Mrs L £220.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs L to accept or reject my decision before 1 April 2025.

Simon Wingfield
Ombudsman