

The complaint

Mr L bought timeshare products and holiday club memberships with the help of finance provided by Clydesdale Financial Services Limited (which I'll call "BPF"). The company which managed one of the holiday clubs is in liquidation, and so Mr L says he has a claim for breach of contract against the seller.

Because BPF financed the purchase of the club membership, Mr L says he has a like claim against it under section 75(1) of the Consumer Credit Act 1974 ("the Act"). His complaint is that BPF has not agreed to meet that claim.

Mr L has been represented by a lawyer, so where I refer to his arguments and submissions, I include those made on his behalf.

What happened

In July 2009 Mr and Mrs L agreed to buy from Resort Properties Limited timeshare interests and holiday club memberships at Club Paradiso ("the Club") and the Hollywood Mirage Club. The sale documents recorded that Mr and Mrs L would be able to use their timeshare weeks from 2010. They received a membership certificate saying membership of the Club would continue until 1 January 2050. The overall purchase price for both memberships was £24,950, which was funded with a running account credit facility in Mr L's name, provided by BPF.

In or around July 2019, Club Paradiso Limited ("CPL") wrote to club members to say that, because of difficulties with inventory providers, it had had to suspend bookings from approximately June 2019. It also said that it would not be able to take bookings for 2020, and that it was looking for alternative solutions for members. The letter said too that, following the appointment of a new director in May 2019, it had become apparent that membership details were not complete.

CPL was later placed into liquidation, and in October 2020 Mr and Mrs L received a letter from the liquidators telling them that. The letter explained that CPL had been the manager of the Club and that there was no realistic prospect of the Club being able to continue to provide services to its members. The liquidators had been able to arrange a deal with another holiday business, whereby members could buy accommodation on an annual basis at what was said to be a discounted rate. Members taking up the offer would have to relinquish their membership of the Club; alternatively they could elect to relinquish their membership without taking up the offer. Members who did not elect to do either would retain membership, but they would receive no benefits and would not have to pay any further fees. Mr and Mrs L did not make any election.

At around the same time, another company which had sold memberships of the Club, Silverpoint Vacations SL, was also placed into bankruptcy in Spain.

In July 2021 Mr L contacted BPF. He said that, as BPF had financed the purchase of his membership of the Club, he had a claim against it because he could no longer use the membership he had paid for. He said he should receive a refund of everything he had paid

under the credit agreement, together with interest. BPF said however that Mr L needed to show that he remained a member of the Club at the time of the liquidation, but that it did not believe he had been able to demonstrate that he was.

Mr L referred the matter to this service, but our investigator did not recommend that his complaint be upheld. The case was therefore referred to me for further consideration.

I considered what had happened and, because I thought I was likely to reach a different conclusion from that reached by the investigator, I issued a provisional decision. I said, in summary:

- I was satisfied that the arrangements between BPF and the seller were such that section 75 of the Act could apply.
- On balance, I was satisfied too that Mr L had been a member of the Club when CPL was placed into liquidation and became unable to provide the services which Mr L had paid for.
- It was likely therefore that Mr L had a claim for breach of contract against the seller.
- It followed that, having in mind section 75 of the Act, it would be fair for BPF to meet that claim.
- Any compensation payment should take into account: the fact that the Hollywood Mirage Club was still operating; any use Mr L had already had of the Club; and anything which Mr L owed in respect of his membership.

Mr L accepted my provisional decision, but BPF did not. It did not agree that Mr L had been a Club member at the time of CPL's liquidation. It said too that it had recently written to Mr L inviting him to take part in its own remediation scheme.

I have therefore considered the complaint afresh.

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.

Section 75 of the Consumer Credit Act

One effect of section 75 of the Act is that a customer who has a claim for breach of contract or misrepresentation against a supplier can, subject to certain conditions, bring that claim against a credit provider. Those conditions include:

- that the lending financed the contract giving rise to the claim; and
- that the lending was provided under pre-existing arrangements or in contemplation of future arrangements between the lender and the supplier.

The contract giving rise to Mr L's claim was made between him and Mrs L as buyer and Resort Properties Limited as seller. That company is also named as the intermediary on the credit facility agreement. I am satisfied therefore that the facility was provided under pre-existing arrangements between the seller and BPF. The other conditions in section 75 were also met, so I have considered the effect of the liquidation of CPL and the closure of the Club.

Mr L's claim for breach of contract

Mr L says that he has not received what he paid for under the contract with Resort

Properties Limited. He bought membership of the Club and the use of a timeshare week from 2010 until 2050. The closure of the Club and the liquidation of CPL means that he no longer has the benefit of either.

BPF accepts that the removal of membership and of the right to use a timeshare unit for the week purchased would give rise to a claim for breach of contract if brought by a member of the Club. It does not believe however that Mr L has shown he was still a member of the Club at the time of the liquidation. I have therefore considered the evidence on that issue.

Was Mr L a member of the Club in 2020?

I am satisfied that Mr L was sent letters from CPL and from its liquidators in 2019 and 2020, detailing the difficulties the Club was facing and telling him of the company's liquidation. Both letters I have seen were addressed "*Dear Member*", rather than being addressed expressly to Mr and Mrs L.

I note that CPL said that a lot of information about the Club and its operations was not available, and that included "*member contact information*". It's possible therefore that some former members received those communications and that some existing members did not.

I note as well that Mr L has not been able to provide proof that he paid fees due in 2019/2020. In or around May 2019 he had been sent a reminder of fees due the previous year.

On balance, however, I think it more likely than not that he and Mrs L remained members of the Club at the time CPL became unable to provide membership services and at the time of the liquidation. BPF does not accept that, but it has provided no further evidence in response to my finding on that point in my provisional decision. A reminder to pay outstanding fees is not in my view sufficient to show that Mr L's membership had been brought to an end. And, given the difficulties set out in CPL's 2019 communication, it seems unlikely that it was in a position to deal in full with membership issues at that time.

It follows that the removal of Mr L's membership of the Club and the right to use his timeshare week gave rise to a claim for breach of contract.

BPF's remediation programme

After I issued my provisional decision, BPF wrote to Mr L, noting that he had expressed concerns about the timeshare and asking him if he would like a review of the sales process and loan. It invited him to indicate whether he would like to take part in the review.

BPF's letter did not explain precisely what it was intending to review. That is unsurprising in my view, since it is likely to vary, depending on the particular circumstances of each customer. The letter appears to be a generic one. It seems to me however that, in Mr L's case, any review would almost certainly touch on the very issues he has raised in bringing this complaint. BPF has therefore already considered them, or it should have done.

If BPF were to decide that Mr L is entitled to compensation under its remediation programme, I have no way of knowing how much he might be offered. It might be more than my award, but it might be less. But I believe Mr L should be able to continue with this complaint.

In the circumstances, I don't believe that the existence of a wider remediation programme is a reason for me to change my view about how Mr L's complaint should be resolved.

What is the appropriate remedy?

Mr L's original claim against BPF sought a refund of everything he had paid under the credit facility plus interest at 8%. The credit facility was a running account facility with a minimum, rather than a fixed, payment due each month. The payments Mr L has made do not therefore necessarily reflect his loss. But in any event, I do not believe that a refund of what he has paid is the correct way to assess Mr L's claim – even if it might be appropriate in other cases.

The usual remedy for breach of contract is to put the parties in the position they would have been in if the contract had been performed. If the contract had been performed in this case, Mr L would have had the benefit of two timeshares and their associated club memberships from 2010 until 2050 – that is, for 40 years in each case. Instead, he has had the benefit of the Club Paradiso timeshare and club membership for just 10 years. As far as I am aware, the Hollywood Mirage Club remains in operation; Mr L has made no claim in respect of it.

Any compensation Mr L receives should therefore reflect the fact that, as a result of the closure of the Club, he has received less than he paid for. Put another way, it should recognise that he has had some benefit from the contract and that – all being well – he will continue to have the benefit of membership of the Hollywood Mirage Club until the end of 2050.

The contract did not price the two memberships separately – there was one price for both. In the absence of any evidence to the contrary, I have assumed that they were of equal value and that the price to be attached to the Club Paradiso membership is therefore £12,475.

Mr L had the benefit of Club Paradiso membership for 10 years – that is, for around one quarter of the duration he contracted for. So, the value of the “missing” 30 years is three quarters of the total price of that membership – or £9,356.25.

I note that Mr L received a reminder in respect of maintenance fees due for 2018. He has not provided any evidence that he paid these. I have no reason to think that, if the Club had made a claim for the fees, they would not have been payable. These were fees which covered the period before the Club closed. Had they been paid when due, I believe Mr L would have been able to benefit, in the sense that he would have been able to use his Club membership for the period those fees covered. It would therefore be fair to deduct £912.45 from Mr L's claim for breach of contract.

Mr L's claim included a claim for interest at 8% a year. I believe that is reasonable in the circumstances and that interest should be calculated from the date from which membership benefits were removed – which was around June 2019.

In addition, I think that BPF's (in my view, incorrect) decision to decline Mr L's claim has caused him distress and inconvenience, for which he should receive further compensation. In saying that, I draw a distinction between the distress and inconvenience caused by the closure of the Club and that resulting from BPF's handling of the claim. I note too that, even though my provisional decision explained why I thought that Mr L remained a member of the Club, BPF's only reason for not accepting that decision was its own view that he was not still a member. It produced no additional evidence for me to consider, however. That will have contributed further to Mr L's inconvenience

Conclusions

It is not for me to say whether the liquidation of Club Paradiso Limited gives rise to a claim against Resort Properties Limited in respect of the sale of the membership in July 2009. Nor

is it for me to say whether any such breach in turn gives rise to a claim against BPF under section 75. They are however matters which I must take into account in deciding what's fair and reasonable in all the circumstances.

Having done that, I believe BPF should meet Mr L's claim in broadly the same way as if he had made a claim against the seller.

My final decision

My final decision is to uphold Mr L's complaint. In order to resolve it in full, Clydesdale Financial Services Limited should pay Mr L:

- £8,443.80 (£9,356.25 – £912.45);
- interest at 8% simple on £8,443.80 from 30 June 2019 until the date of payment; and
- £300 in recognition of the distress and inconvenience Mr L has suffered.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 29 November 2023.

Mike Ingram
Ombudsman