DRN-4586349

The complaint

Mr M, who is represented by a professional representative ("PR") complains that Clydesdale Financial Services Limited trading as Barclays Partner Finance ("BPF") rejected his claim under the Consumer Credit Act ("CCA") 1974 in respect of a holiday product.

What happened

In March 2015 Mr M bought a holiday product from Silverpoint Vacations SL giving him membership of a holiday club at Club Paradiso ("the Club"). The sale documents recorded that Mr M would be able to use his membership from 2016. He also received a membership certificate saying membership of the Club would continue until 1 January 2050. The purchase price was £20,686, which was funded with a fixed sum loan from 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 said too that it would not be able to take bookings for 2020 either, 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.

In October 2020 Mr M received a letter from the liquidators of CPL telling them that the company had been placed into liquidation. 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; 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. I do not know if Mr M made 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 November 2021 PR contacted BPF on Mr M's behalf. It submitted a claim under s.75 CAA claiming there had been a breach of contract. As he could no longer use his membership.

BPF said however that Mr M 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 done so.

PR brought a complaint to this service, where it was considered by one of our investigators who didn't recommend it be upheld. The case was therefore referred to me for further consideration.

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.

When doing that, I'm required by DISP 3.6.4R of the FCA's Handbook to take into account the:

"(1) relevant:

(a) law and regulations;

(b) regulators' rules, guidance and standards;

(c) codes of practice; and

(2) ([when] appropriate) what [I consider] to have been good industry practice at the relevant time."

And when evidence is incomplete, inconclusive, incongruent or contradictory, I've made my decision on the balance of probabilities – which, in other words, means I've based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

S. 75 of the Consumer Credit Act

One effect of s. 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 M's claim was made between him as buyer and Silverpoint Vacations SL as seller. Silverpoint 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 s. 75 were also met, so I have considered the effect of the liquidation of CPL and the closure of the Club.

Breach of contract

PR says Mr M has not received what he paid for under the contract with Silverpoint. He bought membership of the Club and the use of a timeshare week from 2016 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 M 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 M a member of the Club in 2020?

I am satisfied that Mr M 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. I

have not seen a copy of the 2019 letter, but the 2020 letter begins: "We write further to our letter of July 2019". The 2020 letter was addressed "Dear Member", rather than being addressed expressly to Mr M.

I believe that CPL said that a lot of information about the Club and its operations were 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 have also considered the issue of annual fees paid by Mr M. I have seen a final demand for annual fees due in November 2017 dated 28 June 2018. This states that his membership may be suspended if the outstanding sum is not paid. I have also seen a subsequent invoice dated 11 November 2018 for fees which shows a service fee of £828 was due on 31 December 2018. This also shows that his previous balance was zero. I consider it reasonable to assume this shows that he had paid off the earlier arrears.

PR has said that Mr M was concerned with the state of the Club's finances and didn't pay the 2019 invoice. I gather Silverpoint didn't file accounts after 2017. I have not seen anything that shows Silverpoint terminated Mr M's membership and given the reminder letter for 2017 states that membership 'may' be suspended rather than terminated I think that, on balance,

it more likely than not that Mr M was a member at the time CPL became unable to provide membership services and at the time of the liquidation.

If BPF wishes to argue that he did not, I would expect it to provide some evidence of that.

Given the difficulties set out in CPL's 2019 communication, it seems unlikely that it was in a position to deal with membership issues at that time As such I think it unlikely that it suspended or terminated his membership.

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

Conclusion

It is not for me to say whether the liquidation of the company gives rise to a claim against Silverpoint in respect of the sale of the membership in 2015. Nor is it for me to say whether any such breach in turn gives rise to a claim against BPF under s. 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 M's claim in broadly the same way as if he had made a claim against the seller.

Redress

PR has asked that BPF refund everything Mr M paid under the credit facility plus interest at 8%. I do not believe that a refund of what he has paid is the correct way to assess Mr M's claim.

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 M would have had the benefit of his timeshare and the associated club membership from 2016 until 2050 – that is, for 34 years. Instead, he has had the benefit of the Club Paradiso timeshare and club membership for just four years.

I propose to direct BPF to work out compensation in the following way:

a. Work out the total of the repayments that Mr M made on his BPF loan;

b. Add the maintenance fees paid by Mr M;

c. Deduct the market value of any holidays Mr M took using his club membership; ("the net repayments") (Any reasonable method to be used to calculate the market value);

d. Add simple interest to each of the net repayments from the date each one was made until the date BPF settles this complaint. The rate of interest is 8% per annum simple;

e. Pay the balance to Mr M;

f. End the BPF loan and remove any adverse information about it from Mr M's credit file; and,

g. If necessary, arrange for club membership to be relinquished so that there are no ongoing liabilities.

I would like BPF to provide a calculation of what this compensation would look like in response to this provisional decision.

In addition, I think that BPF's (in my view, incorrect) decision to decline Mr M'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 think it should pay £300."

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.

PR accepted my provisional decision on behalf of Mr M and BPF has provided a copy of the offer made to Mr M which it says has been paid. The offer does not set out in detail how the final sum has been calculated. It states that the sum due to be refunded is £26,317.85 plus gross interest of £9406.97. However, I have taken the bank's response to indicate it accepts my provisional decision.

It is not clear if the offer follows my proposals precisely, but it would appear that it may well do. That said I consider there is no reason why my proposals should be altered and so I will formally confirm these and uphold the complaint.

Putting things right

I direct BPF, if it has not already done so, to:

a. Work out the total of the repayments that Mr M made on his BPF loan;

b. Add the maintenance fees paid by Mr M;

c. Deduct the market value of any holidays Mr M took using his club membership; ("the net repayments") (Any reasonable method to be used to calculate the market value);

d. Add simple interest to each of the net repayments from the date each one was made until the date BPF settles this complaint. The rate of interest is 8% per annum simple;

e. Pay the balance to Mr M;

f. End the BPF loan and remove any adverse information about it from Mr M's credit file; and,

g. If necessary, arrange for club membership to be relinquished so that there are no ongoing liabilities.

In addition, I think that BPF's (in my view, incorrect) decision to decline Mr M'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 think it should pay £300.

If the offer of £33,843.43 (net of tax) falls short of this determination BPF should remedy that. In particular I would draw attention to the compensation sum due of £300 and the removal of any adverse information from Mr M's credit file.

My final decision

My final decision is that I uphold this complaint and I direct Clydesdale Financial Services Limited trading as Barclays Partner Finance to pay redress as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 3 April 2024.

Ivor Graham
Ombudsman