DRN-4719856

The complaint

Mr W, 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. The product was purchased by Mr W and his wife, but the loan was in Mr W's name alone and so he is the eligible complainant. For simplicity I will refer to him as the sole purchaser.

What happened

In October 2013 Mr W purchased membership of a timeshare from Silverpoint Vacations SL ("Silverpoint"). I understand this gave him timeshare interests and holiday club membership at Club Paradiso ("the Club"). This purchase was an upgrade on a previous membership which had been funded by another lender. The cost was £25,348 of which £15,000 was funded by a loan from BPF. I gather the balance was funded by Silverpoint's in house lender.

The sale documents recorded that Mr W had access to a City property for two persons beginning in 2014. I have not seen the full purchase agreement and before I reach a final decision I would ask that PR let me have a copy. However, PR says that it lasts until 1 January 2050.

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 either and that it was looking for alternative solutions for members. The letter also said 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, I believe in February 2020, and in October 2020 letters notifying members were issued. I have presumed that this letter was sent to Mr W and I would ask that PR lets me have a copy if available. 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. I do not know if Mr W made any election and I would ask that both parties provide clarification of this point with evidence if available.

PR has more recently informed this service that in November 2020 Mr W engaged the services of a barrister to seek relinquishment of the timeshare. It has provided emails from the barrister and one dated 5 September 2021 states:

"A termination letter setting out a comprehensive legal argument was sent to the timeshare company by me and in that letter it stated that they had 14 days to challenge the legal

argument which I set out for termination.

The timeshare company failed to respond (as is the case at least 99% of the times).

As such your timeshare product is now deemed terminated and I have informed the timeshare company accordingly."

PR submitted a letter of claim to BPF in November 2022 and I have not seen a response to that letter. In it PR made a number of claims under s.75 CAA and s.140A CAA. These are well known to both parties so I will not repeat details the here. Also as I am minded to uphold this complaint on the basis of breach of contract rather than any other grounds I do not propose to address those claims in this decision. If it transpires that I am persuaded that there was no breach of contract I will at that point examine the other claims.

The complaint was considered by one of our investigators who didn't recommend it be upheld, but noted that if it could be established that Mr W retained his membership at the point the CSL went into liquidation it would be likely that he had suffered a breach of contract. At that point the emails form the barrister had not been made available to this service.

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.

Section 75 CAA

One effect of s. 75 of the Act is that a customer who has a claim for breach of contract against a supplier can, subject to certain conditions, bring that claim against a credit provider. I am satisfied that the necessary conditions were met here and that relevant financial limits were not broken. I have therefore considered the effect of the liquidation of Silverpoint and the closure of the Club.

Mr W's claim for breach of contract

PR says that Mr W 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 2014 until 2050.

The closure of the Club means that he no longer has the benefit of either and Silverpoint's liquidation and that there is no realistic prospect of any recovery from it.

As our investigator pointed out 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. That means I have to consider if the evidence shows Mr W was a member of the club at the time of liquidation?

Was Mr W a member of the Club in 2020?

I think it reasonable to presume that Mr W 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. However, I would like PR to let me have copies of any letters Mr W has retained.

PR has submitted copies of invoices for management fees payable for the years 2016, 2017 and 2018. These refer to the same membership reference number as shown on the purchase agreement. It has not submitted evidence that these invoices were paid by Mr W. Nor has it submitted any later invoices.

However the evidence of the emails from the barrister indicate that he was seeking to terminate his membership in 2020. That would suggest he was still a member in 2020 at the time Silverpoint went into liquidation.

However, the evidence on this issue is not wholly conclusive either way. On balance, however, I think it more likely than not that Mr W was a Club member at the time CPL became unable to provide membership services and at the time of the liquidation of Silverpoint. I am satisfied too that his membership had been partly financed by the BPF loan.

I think it unlikely in particular that Mr W P would have sought to terminate his membership of a timeshare interest he no longer owned.

It follows that the removal of Mr W's membership of the Club and the right to use his timeshare week gave rise to a claim for breach of contract and that I must therefore consider the effect of s. 75 CAA.

What is the appropriate remedy?

PR sought a refund of everything Mr W had paid in respect of the Club timeshare, all payments made under the loan agreement, and interest at 8%. I do not believe however that is the correct way to assess Mr W'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 W would have had the benefit of his timeshare and the associated club membership from 2014 until January 2050 that is for 36 years. Instead, he has had the benefit of the Club Paradiso timeshare and club membership for just 5 years.

Any compensation Mr W receives should therefore reflect the reduction in what he has received as a result of the closure of the Club. Put another way, it should recognise that he has had some benefit from the contract.

The purchase price was £25,438. Mr W had the benefit of Club Paradiso membership for 5 years assuming he did not make use of it in 2019 which means he had it for 5/36ths of the period of the contract. So, the value of the "missing" 31 years is 31/36 x £35,438 which is £21,904.

Mr W'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 not to address Mr W'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.

Conclusions

It is not for me to say whether the liquidation of Club Paradiso Limited gives rise to a claim against Silverpoint in respect of the sale of the timeshare and Club membership in 2014. Nor is it for me to say whether any such breach in turn gives rise to a claim against BPF under s.75 CAA. 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 W's claim in broadly the same way as if he had made a claim against the seller.

However, before reaching a final decision I would ask both parties to supply the material I have asked for above.

My provisional decision

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

- *£21,904;*
- *annual interest at 8% simple on £21,904 from 30 June 2019 until the date of payment; and*
- *£300 in recognition of the distress and inconvenience Mr W has suffered."*

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.

Following my provisional decision BPF made an offer in settlement to Mr W which he has accepted and I see no reason why that should be amended.

Putting things right

BPF should pay the sum offered and accepted by Mr T, if it has not already done so.

My final decision

My final decision is that I uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 1 May 2024.

Ivor Graham
Ombudsman