DRN-4560549

The complaint

Mr and Mrs S's complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with them under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying claims under Section 75 of the CCA.

What happened

Mr and Mrs S first became members of a timeshare from a timeshare provider (the 'Supplier') when they bought a trial membership in March 2011 for £3,995. This allowed them to take five weeks of holidays from the Supplier's portfolio of resorts over the following three years.

Then, whilst on holiday in October 2011, Mr and Mrs S traded in this trial towards full membership of the Supplier's Fractional Property Owners Club (the 'FPOC1' membership). They entered into an agreement with the Supplier to buy 1,290 fractional points at a final cost of £16,049. This purchase was funded by a loan from a different lender ['Business A'][1]

But the subject of this complaint is Mr and Mrs S's purchase of an 'upgraded' membership of the Fractional Property Owners Club, which they bought on 28 October 2014 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,620 fractional points (the 'FPOC2' membership), and after being given a trade in value for their existing fractional points they ended up paying £6,246 (the 'Purchase Agreement') for this FPOC2 membership.

Fractional Property Owners Club memberships were asset backed – which meant the FPOC2 membership gave Mr and Mrs S more than just holiday rights. It also included a share in the net sale proceeds of a property named on their Purchase Agreement (the 'Allocated Property') after their membership term ends.[2]

Mr and Mrs S paid for their FPOC2 membership by taking finance of £6,246 from the Lender in their joint names (the 'Credit Agreement').

Mr and Mrs S – using a professional representative (the 'PR') – wrote to the Lender on 28 October 2020 (the 'Letter of Complaint') to raise a number of different concerns. As those concerns haven't changed since they were first raised, and as both sides are familiar with them, it isn't necessary to repeat them in detail here beyond the summary above.

The Lender dealt with Mr and Mrs S's concerns as a complaint and issued its final response letter on 7 March 2021, rejecting it on every ground.

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[1] A complaint about this purchase and the associated credit agreement was referred to this Service. However, no decision was made as 'Business A' then made an offer of redress which was accepted by the consumer.

[2] FPOC1 also had an allocated property, but by trading in their FPOC1 membership, Mr and Mrs S gave up the right to their share in the proceeds of the sale of its associated property.

Mr and Mrs S, via the PR, referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, did not think the complaint ought to be upheld.

Mr and Mrs S disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

The provisional decision

Having considered everything, I thought the complaint ought to be upheld. I set out my initial thoughts in a provisional decision (the 'PD') and invited both sides to submit any new evidence or arguments that they wished me to consider before I made my final decision.

In my PD I said:

"I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations[3] by marketing and/or selling FPOC2 membership to Mr and Mrs S as an investment, which, in the circumstances of this complaint, rendered the credit relationship between them and the Lender unfair to them for the purposes of Section 140A of the CCA.

However, before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I recognise that there are a number of aspects to this complaint, it is not necessary to make formal findings on all of them because, even if one or more of those aspects ought to succeed, the redress I am currently proposing puts Mr and Mrs S in the same or a better position than they would otherwise be in.

The witness testimony

As part of its initial submissions to this Service on 22 March 2021, the PR sent a written statement from Mr S, which was dated 30 August 2019. This statement sets out his and Mrs S's recollections of their entire relationship with the Supplier, including their purchase of the initial trial membership, along with their two fractional membership purchases. Although the merits of a complaint about the purchase of FPOC1 is not being considered here, I think what Mr S said about it provides useful background information, so I have included that here. Mr S said:

> *"In October 2011 we were on holiday in Spain. While we were there, the reps asked us to come along and have a meeting. When we got there, the rep began telling us that although the membership we currently had was good, we could have better. He told us that if we upgraded to fractional points, we would be making an investment. He told us that we would be buying a share in a property and that if we decided it was no longer for us, we would be able to sell it. He also told us that we would be able to exchange our weeks, and we would be able to stay in 5star luxury resorts. And that these resorts were exclusive and for members only. He also told us that if we signed up today, he would also [sic] through in some extra bonus points for us to use. We did feel under pressure at*

[3] The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations')

this point, he was intense and kept reminding us what an amazing opportunity this was, and how this was an investment for our children.

So, on the 24th of October 2011 we purchased 2 weeks at the Marina Del Sol, apartment 7-3-B. This gave us 1290 fractional points. The total purchase price was for £16,049.00 and this was paid for with a loan from [Business A].

[…]

In October 2014 we were on holiday in Tenerife. While we were there, we were invited to come along to a free breakfast. While we were there, the rep began telling us about a special offer he had on for that day for an upgrade. He told us that if we upgraded to a gold membership, we would have a lot more flexibility and availability. And we would have better rooms with more facilities. They also told us that this would be much easier to sell in future. The rep reminded us that this was an investment and it wasn't just a membership we had it was a property. The rep did mention to us perpetuity, they told us that this was a good thing as it meant our children could have it and they would also benefit from this.

So, on the 28th of October 2014 we purchased a 1bedroom apartment at the Paradise resort, room number H205. This gave us 1620 fractional points. The total purchase price was for £6,246.00 and this was paid for with a loan from Shawbrook."

I have considered how much weight I can place on this statement when assessing the merits of Mr and Mrs S's complaint.

The statement is dated prior to the Letter of Complaint, and was probably prepared as part of the PR's case preparation. Indeed, I can see an appointment was made for a call to be made to Mr and Mrs S on that day. And as the Letter of Complaint is generally consistent with the contents of the statement, that leads me to think it was probably used to inform the Letter of Complaint.

But the statement was, in my view, clearly prepared and written by the PR, and taken during a telephone call. And because the statement was prepared by the PR, I am mindful of the risk that Mr S may have been guided through the process, and the associated risk that what has been written may not be his and Mrs S's own specific recollections. But it does contain personal information about their circumstances and what happened at the Time of Sale that only Mr and/or Mrs S would have known, and it goes into some detail to explain why they are now unhappy with the membership and how it was sold to them. So, I have no doubt that Mr and Mrs S had a significant input into the statement's contents. It is also not unusual for statements to be prepared on complainants' behalf by professional representatives.

Also, when considering how much weight I can place on Mr S's statement, I am assisted by the judgement in the case of Smith v Secretary of State for Transport [2020] EWHC 1954 (QB).

At paragraph 40 of the judgment, Mrs Justice Thornton helpfully summarised the case law on how a court should approach the assessment of oral evidence. Although in this case I have not heard direct oral evidence, I think this does set out a useful way to look at the evidence Mr and Mrs S have provided. Paragraph 40 reads as follows:

"At the start of the hearing, I raised with Counsel the issue of how the Court should assess his oral evidence in light of his communication difficulties. Overnight, Counsel agreed a helpful note setting out relevant case law, in particular the commercial case of Gestmin SPGS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm) (Leggatt J as he then was at paragraphs 16-22) placed in context by the Court of Appeal in Kogan v Martin [2019] EWCA Civ 1645 (per Floyd LJ at paragraphs 88-89). In the context of

language difficulties, Counsel pointed me to the observations of Stuart- Smith J in Arroyo v Equion Energia Ltd (formerly BP Exploration Co (Colombia) Ltd) [2016] EWHC 1699 (TCC) (paragraphs 250-251). Counsel were agreed that I should approach Mr Smith's evidence with the following in mind:

a. *In assessing oral evidence based on recollection of events which occurred many years ago, the Court must be alive to the unreliability of human memory. Research has shown that memories are fluid and malleable, being constantly rewritten whenever she are retrieved. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts (Gestin and Kogan).*
b. *A proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence (Kogan).*
c. *The task of the Court is always to go on looking for a kernel of truth even if a witness is in some respects unreliable (Arroyo).*
d. *Exaggeration or even fabrication of parts of a witness' testimony does not exclude the possibility that there is a hard core of acceptable evidence within the body of the testimony (Arroyo).*
e. *The mere fact that there are inconsistencies or unreliability in parts of a witness' evidence is normal in the Court's experience, which must be taken into account when assessing the evidence as a whole and whether some parts can be accepted as reliable (Arroyo).*
f. *Wading through a mass of evidence, much of it usually uncorroborated and often coming from witnesses who, for whatever reasons, may be neither reliable nor even truthful, the difficulty of discerning where the truth actually lies, what findings he can properly make, is often one of almost excruciating difficulty yet it is a task which judges are paid to perform to the best of her ability (Arroyo, citing Re A (a child) [2011] EWCA Civ 12 at para 20)."*

Having considered how much weight I can place on the contents of Mr S's statement, I feel I am able to rely on what he has said. I do so whilst being cognisant of the fact that memories can fade over time, and that inconsistencies and errors in evidence are a normal part of someone trying to remember what happened in the past. So, I'm not surprised that there may be some inconsistencies between what he says has happened over the course of their purchases, and what other evidence shows. For example, Mr S has made mention of upgrading to 'gold' membership when they bought FPOC2. This doesn't accord with what I have seen and how the Supplier referred to their memberships.

The question to consider, therefore, is whether there is a core of acceptable evidence from Mr S, such that the inconsistencies have little to no bearing on whether his testimony can be relied on, or whether such inconsistencies are fundamental enough to undermine, if not contradict, what the Supplier was likely to have said and/or done during the sale of FPOC2.

And I don't find Mr S referring to a 'gold 'membership material to whether the membership itself was sold as an investment or not.

So overall, having considered his testimony, whilst being mindful that he is recalling events which occurred between five and eight years prior to the statement being written and that memories can fade over time, I am satisfied that I am able to place weight on and rely on what Mr S has said when considering the merits of his and Mrs S's complaint.

Section 140A of the CCA: did the Lender participate in an unfair credit relationship?

Having considered the entirety of the credit relationship between Mr and Mrs S and the Lender along with all of the circumstances of the complaint, I think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. *The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale;*
2. *The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;*
3. *Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale; and*
4. *The inherent probabilities of the sale given its circumstances.*

I have then considered the impact of these on the fairness of the credit relationship between Mr and Mrs S and the Lender.

The Supplier's alleged breach of Regulation 14(3) of the Timeshare Regulations

The Lender does not dispute, and I am satisfied, that Mr and Mrs S's FPOC2 membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling FPOC2 membership as an investment. This is what the provision said at the Time of Sale:

"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."

But Mr and Mrs S say that the Supplier did exactly that at the Time of Sale – saying, in summary, that they were told by the Supplier that FPOC2 membership was an investment in property.

The term "investment" is not defined in the Timeshare Regulations. But for the purposes of this provisional decision, and by reference to the decided authorities, an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit.

Mr and Mrs S's share in the Allocated Property clearly constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But it is important to note at this stage that the fact that FPOC2 membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment

element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.

In other words, the Timeshare Regulations did not ban products such as the FPOC2. They just regulated how such products were marketed and sold.

To conclude, therefore, that FPOC2 membership was marketed or sold to Mr and Mrs S as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that FPOC2 membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the FPOC2 as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs S, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that FPOC2 membership was not sold to Mr and Mrs S as an investment.

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And for reasons I'll now come on to, given the facts and circumstances of this complaint, I think the Supplier is likely to have breached Regulation 14(3) of the Timeshare Regulations.

<u>How the Supplier marketed and sold the FPOC2 membership</u>

During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier has provided training material used to prepare its sales representatives – including:

1. *A document called the 2013/2014 Sales Induction Training (the '2013/2014 Induction Training');*
2. *screenshots of an Electronic Sales Aid (the 'ESA'); and*
3. *a document called the "FPOC2 Fly Buy Induction Training Manual" (the 'FPOC2 Training Manual')*

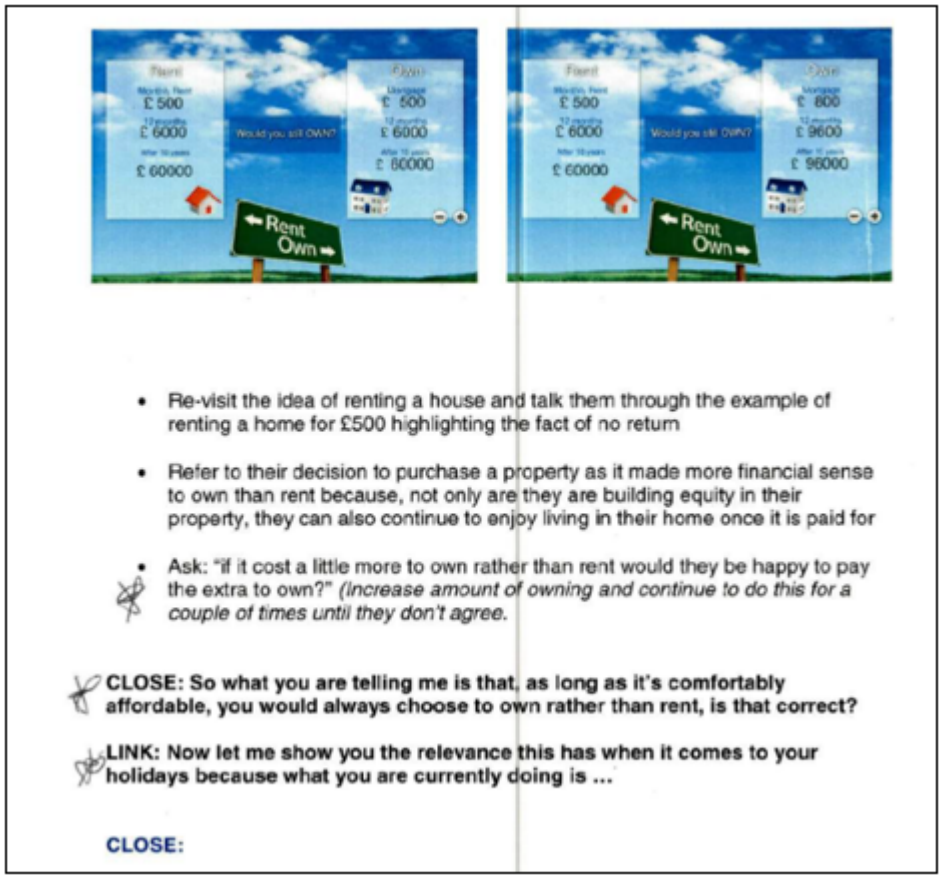
Neither the 2013/2014 Induction Training nor the ESA I've seen included notes of any kind. However, the FPOC2 Training Manual includes very similar slides to those used in the ESA. And according to the Supplier, the FPOC2 Training Manual (or something similar) was used by it to train its sales representatives at the Time of Sale. So, it seems to me that the Training Manual is reasonably indicative of:

(1) *the training the Supplier's sales representatives would have got before selling FPOC2 membership; and*

(2) *how the sales representatives would have framed the Supplier's multimedia presentation (i.e., the ESA) during the sale of FPOC2 membership to prospective members – including Mr and Mrs S.*

The "Game Plan" on page 23 of the FPOC2 Training Manual indicates that, of the first 12 to 25 minutes, most of that time would have been spent taking prospective members through a comparison between "renting" and "owning" along with how membership of the FPOC2 worked and what it was intended to achieve.

Page 32 of the FPOC2 Training Manual covered how the Supplier's sales representatives should address that comparison in more detail – indicating that they would have tried to demonstrate that there were financial advantages to owning property, over 10 years for example, rather than renting:



- Re-visit the idea of renting a house and talk them through the example of renting a home for £500 highlighting the fact of no return
- Refer to their decision to purchase a property as it made more financial sense to own than rent because, not only are they are building equity in their property, they can also continue to enjoy living in their home once it is paid for
- Ask: "if it cost a little more to own rather than rent would they be happy to pay the extra to own?" *(increase amount of owning and continue to do this for a couple of times until they don't agree.*

CLOSE: So what you are telling me is that, as long as it's comfortably affordable, you would always choose to own rather than rent, is that correct?

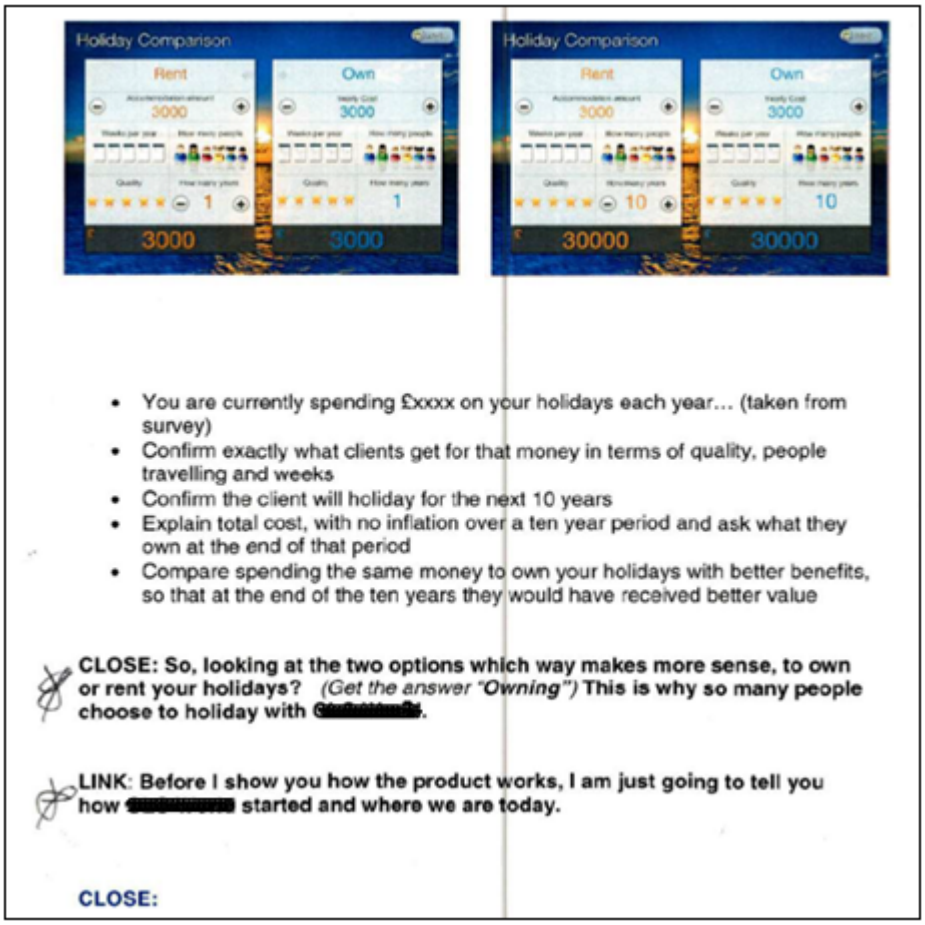
LINK: Now let me show you the relevance this has when it comes to your holidays because what you are currently doing is …

CLOSE:

Indeed, one of the advantages of ownership referred to in the slide above is that it makes more financial sense than renting because owners "are building equity in their property". And as an owner's equity in their property is built over time as the value of the asset increases relative to the size of the mortgage secured against it, one of the advantages of ownership over renting was portrayed in terms that played on the opportunity ownership gave prospective members of the FPOC2 to accumulate wealth over time.

I acknowledge that the slides don't include express reference to the "investment" benefit of ownership. But the description alludes to much the same concept. It was simply rephrased in the language of "building equity". And with that being the case, it seems to me that the approach to marketing FPOC2 was to strongly imply that 'owning' fractional points was a way of building wealth over time, similar to home ownership.

Page 33 of the FPOC2 Training Manual then moved the Supplier's sales representatives onto a cost comparison between "renting" holidays and "owning" them. Sales representatives were told to ask prospective members to tell them what they'd own if they just paid for holidays every year in contrast to spending the same amount of money to "own" their holidays – thus laying the groundwork necessary to demonstrating the advantages of FPOC2 membership:



With the groundwork laid, sales representatives were then taken to the part of the ESA that explained how FPOC2 worked. And, on pages 41 and 42 of the FPOC2 Training Manual, this is what sales representatives were told to say to prospective members when explaining what a 'fraction' was:

> *"FPOC = small piece of […] World apartment which equals* ***ownership of bricks and mortar*** *[…]*
>
> *Major benefit is the property is sold in nineteen years* ***(optimum period to cover peaks and troughs in the market)*** *when sold you will get your share of the proceeds of the sale*
>
> *SUMMARISE LAST SLIDE:*
>
> *FPOC equals a passport to fantastic holidays for 19 years* ***with a return at the end of that period.*** *When was the last time you went on holiday and* ***got some money back? How would you feel if there was an opportunity of doing that?***
>
> *[…]*
>
> *LINK: Many people join us every day and one of the main questions they have is* ***"how can we be sure our interests are taken care of for the full 19 years?*** *As it is very*

important you understand how we ensure that, I am going to ask Paul to come over and explain this in more details for you.

[…]

*"Handover: (Manager's name) John and Mary love FPOC and have told me the best for them is……...**Would you mind explaining to them how their interest will be protected over the next 19 year[s]**?" (My emphasis added)*

The FPOC2 Training Manual doesn't give any immediate context to what the manager would have said to prospective members in answer to the question posed by the sales representative at the handover. Page 43 of the manual has the word "script" on it but otherwise it's blank. However, after the Manual covered areas like the types of holiday and accommodation on offer to members, it went onto "resort management", at which point page 61 said this:

"T/O will explain slides emphasising that they only pay a fraction of maintaining the entire property. It also ensures property is kept in peak condition to maximise the return in 19 years['] time.

[…]

*CLOSE: **I am sure you will agree with us that this management fee is an extremely important part of the equation as it ensures the property is maintained in pristine condition so at the end of the 19 year period, when the property is sold, you can get the maximum return.** So I take it, like our owners, there is nothing about the management fee that would stop you taking your holidays with us in the future?..." (My emphasis added)*

By page 68 of the Fractional Training Manual, sales representatives were moved on to the holiday budget of prospective members. Included in the ESA were a number of holiday comparisons. It isn't entirely clear to me what the relevant parts of the ESA were designed to show prospective members. But it seems that prospective members would have been shown that there was the prospect of a "return".

For example, on page 69 of the FPOC2 Induction Training Manual, it included the following screenshots of the ESA along with the context the Supplier's sales representatives were told to give to them:

[…]

> *"We also agreed that you would get nothing back from the travel agent at the end of this holiday period. Remember with your fraction at the end of the 19 year period, you will get some money back from the sale, so even if you only got a small part of your initial outlay, say £5,000 it would still be more than you would get renting your holidays from a travel agent, wouldn't it?"*

I acknowledge that the slides above set out a "return" that is less than the total cost of the holidays and the "initial outlay". But that was just an example and, given the way in which it was positioned in the Training Manual, the language did leave open the possibility that the return could be equal to if not more than the initial outlay. Furthermore, the slides above represent FPOC2 as:

(1) *The right to receive holiday rights for 19 years whose market value significantly exceeds the costs to a FPOC2 member; plus*

(2) *A significant financial return at the end of the membership term.*

And to consumers (like Mr and Mrs S) who were looking to buy holidays anyway, the comparison the slides make between the costs of FPOC2 and the higher cost of buying holidays on the open market was likely to have suggested to them that the financial return was in fact an overall profit.

I acknowledge that there may not have been a comparison between the expected level of financial return and the purchase price of FPOC2 membership. However, if I were to only concern myself with express efforts to quantify to Mr and Mrs S the financial value of the proprietary interest they were offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3).

When the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that '[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3)).'"[4] *And in my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.*

So, if a supplier implied to consumers that future financial returns (in the sense of possible profits) from a timeshare were a good reason to purchase it, I think its conduct was likely to have fallen foul of the prohibition against marketing or selling the product as an investment.

Given what I've already said about the Supplier's training material and the way in which I think it was likely to have framed the sale of Fractional membership to prospective members (including Mr and Mrs S), I think it is more likely than not that the Supplier did, at the very least, imply that future financial returns (in the sense of possible profits) from a Fractional Membership were a good reason to purchase it – which, broadly speaking, is consistent with Mr and Mrs S's recollections of the sale. After all, Mr S has said that the sales representative reminded them that FPOC2 wasn't just a membership, it was a property. And given the way it was framed as 'building equity in a property' the Supplier is, in my view, implying that the future financial return was a strong reason to buy the membership. The Supplier has also suggested that the 'upgraded' property would be easier to sell, which again is an implication of an increased return.

But in addition to what they were told at the Time of Sale, it is important to note that this was Mr and Mrs S's second 'fractional' membership purchase. Their first, FPOC1, was made in October 2011. But the presentation they would likely have been shown at their first fractional

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[4] The Department for Business Innovation & Skills *"Consultation on Implementation of EU Directive 2008/122/EC on Timeshare, Long-Term Holiday Products, Resale and Exchange Contracts (July 2010)".* https://assets.publishing.service.gov.uk/media/5a78d54ded915d0422065b2a/10-500-consultation-directive-timeshare-holiday.pdf

purchase would have been different to that which they were shown at the Time of Sale. This is because their FPOC1 membership was the Supplier's first version of the Fractional Property Owners Club, and it was presented in a different way.

Although I am not considering a complaint about the FPOC1 membership and how it was sold, when looking at the circumstances as a whole I think it is fair to consider what Mr and Mrs S were probably told about fractional memberships in 2011, as it is likely that this would have set the tone for that, and their subsequent FPOC2 purchase. Although there were subtle differences in the products and how they were sold, they were after all, both fractional memberships which were asset-backed with an Allocated Property designed to provide members with the net proceeds of its sale value.

And, as I go on to explain below, when their FPOC1 membership was marketed to Mr and Mrs S in 2011, it was likely to have given them the impression that the fractional membership was an investment.

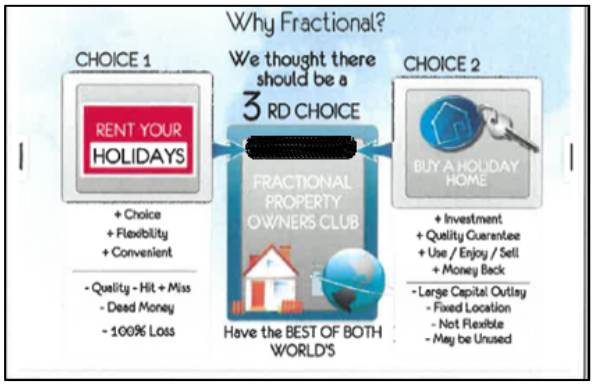
Alongside the information this Service has been given about the training and sales presentations that were associated with the selling of the FPOC2 membership I am considering here, we have also been provided training material used to prepare its sales representatives for their earlier version of the fractional membership – including a document called "2011 Spain PTM FPOC 1 Practice Slides Manual" (the '2011 Fractional Training Manual').

As I understand it, the 2011 Fractional Training Manual was used throughout the sale of the Supplier's first version of the Fractional Property Owners Club, which was what FPOC1 was. It isn't entirely clear whether Mr and Mrs S would have been shown the slides included in the Manual as part of their sales presentations in 2011, but it seems to me to be reasonably indicative of:

(1) *The training the Supplier's sales representatives would have got before selling Mr and Mrs S's FPOC1 membership; and*

(2) *how the sales representatives would have framed the sales to Mr and Mrs S in 2011.*

Having looked through the manual, my attention is drawn to page 6 (of 41) – which includes the following slide on it:



This slide titled "Why Fractional?" indicates that sales representatives would have taken Mr and Mrs S through three holidaying options along with their positives and negatives:

(1) *"Rent Your Holidays"*

(2) *"Buy a Holiday Home"*

(3) *The "Best of Both Worlds"*

It was the first slide in the 2011 Fractional Training Manual to set out any information about fractional membership, and I think it suggests that sales representatives were likely to have made the point to Mr and Mrs S that membership combined the best of (1) and (2) – which included choice, flexibility, convenience and, significantly, an investment they could use, enjoy and sell before getting money back.

Having looked through the 2011 Fractional Training Manual, it seems to me that there were 10 slides on how fractional membership worked before the slides moved onto sections titled "Peace of Mind", "Resort Management" and "Which Fractional". And as 5 of the 10 slides look like they focused on holidays, there seems to me to have been a fairly even split during the Supplier's sales presentations between marketing the fractional membership as a way of buying an interest in property and as a way of taking holidays.

However, even if more time was spent on marketing the FPOC1 membership as a way of taking holidays rather than buying an interest in property, as the slides above suggest, in my view, that the Supplier's sales representatives would have probably led prospective members to believe that a share in an allocated property was an investment (after all, that's what the slide titled "Why Fractional" expressly described it as), I think the Supplier's sales representative was likely to have led Mr and Mrs S to believe that FPOC1 (and subsequently their FPOC2) membership was an investment that may lead to a financial gain (i.e., a profit) in the future.

So, as I've said, Mr and Mrs S were presented with the opportunity to purchase the FPOC1 membership in 2011 in a way that was most likely to have suggested, either explicitly or implicitly, that it could lead to a financial gain (i.e. a profit) on the sale of the allocated property. And I can't see that anything they were told in the 2014 presentation would have dissuaded them from that idea.

When thinking about what was likely to have happened at the Time of Sale in 2014 it is important to consider what Mr and Mrs S gained when they traded in their FPOC1 for the FPOC2 membership. They had 1,290 fractional points, and only got an additional 330 from the purchase, with a new Allocated Property, and paid over £6,000 for this. So, the Allocated Property was plainly a major part of the product's features and, in this instance, is a justification for the price of Mr and Mrs S's FPOC2 membership.

The investment element of membership was plainly a major part of its rationale and justification for its cost. And as it was designed to offer its members a way of making a financial return from the money they invested – whether or not, like every investment, the return was more, less or the same as the sum invested - it would not have made much sense if the Supplier included the features in the product without relying on them to promote sales, especially when the reality was that the principal benefit of the move to FPOC2 was, in addition to the holidays it could provide, its investment element i.e., the share in the net sale proceeds of the Allocated Property, which Mr S says the Supplier positioned as having 'better rooms with more facilities' and that it would be 'much easier to sell in the future'.

The Lender may say, in response to this provisional decision, that the Supplier included specific disclaimers in the contractual documentation to show that it didn't present FPOC2 membership as an investment. But these disclaimers were contained in documents which were given to Mr and Mrs S to sign after they had been through the sales presentation, and after they had agreed to make the purchase on the basis of the presentation and what they had been told by the Supplier. And as I've said, that presentation was likely to have at least implied that the membership was an investment that could lead to a profit. And in any case, it's ultimately difficult to explain why it was necessary to include such disclaimers if there wasn't a very real risk of the Supplier marketing and selling membership as an investment,

given the difficulty of articulating the benefit of fractional ownership in a way that distinguishes it from other timeshares from the viewpoint of prospective members.

So, when bearing this in mind, and given what I've said about the way I think the FPOC1 was sold and/or marketed to them in 2011, I think it is likely that, on the balance of probabilities, the Supplier's sales representative led Mr and Mrs S to believe that the FPOC2 membership, which was an upgrade of their FPOC1, was also an investment that may lead to a financial gain (i.e., a profit) in the future.

And with that being the case, I do not find them either implausible or hard to believe when they say that they were told that they were buying shares in property. And there is, in my view, a clear implication in what they have said that they believed it would provide them with a profit. Given everything I have seen so far, I think that is likely to be what Mr and Mrs S were led to believe by the Supplier at the relevant time. And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.

Was the credit relationship between the Lender and the Consumer rendered unfair?

Having found that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr and Mrs S and the Lender under the Credit Agreement and related Purchase Agreement, as the case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

Indeed, it seems to me that if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs S and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

One advantage of the change from FPOC1 to FPOC2 that I am aware of was that members would no longer have to pay a booking fee each time they booked a holiday with their points. But while I accept that would have saved them some money, I cannot see that the savings would have been anywhere near the £6,246 they ended up paying for the new membership. And in any case, this has not been mentioned at all by Mr and Mrs S so I can't see that it was likely to have been a motivation for them.

On my reading of Mr S's testimony, the prospect of a financial gain from FPOC2 membership was an important and motivating factor when they decided to go ahead with their purchase. It seems likely that, from a combination of what they would likely have been told, what they have said happened, and what they actually did, that both of their fractional membership purchases were following the same pattern and overall aim, and were all linked to the investment potential of the Allocated Property. That doesn't mean they were not interested in holidays – they had, after all, initially bought a trial membership which only provided holidays, but this interest in holidays is not surprising given the nature of the product at the centre of this complaint.

But as Mr and Mrs S say (plausibly in my view) that the FPOC2 membership was marketed and sold to them at the Time of Sale as something that offered them more than just holiday rights, on the balance of probabilities, I think their purchase was motivated by their share in the Allocated Property and the possibility of an increased profit, as that change in Allocated Property was one of the defining features of the membership that marked it apart from their existing fractional membership.

Mr and Mrs S have not said or suggested, for example, that they would have pressed ahead with the purchase in question had the Supplier not led them to believe that FPOC2 membership was an appealing investment opportunity. And as they faced the prospect of borrowing and repaying a substantial sum of money while subjecting themselves to long-term financial commitments, had they not been encouraged by the prospect of a financial gain from membership of the FPOC2, I'm not persuaded that they would have pressed ahead with their purchase regardless.

And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made, and it rendered their associated credit relationship with the Lender unfair to them.

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr and Mrs S under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A. And with that being the case, taking everything into account, I think it is fair and reasonable that I uphold this complaint."

I then set out what I thought was a fair and reasonable way for the Lender to calculate and pay fair compensation to Mr and Mrs S.

The responses to the provisional decision

Mr and Mrs S, via the PR, accepted the provisional decision with no further comment.

The Lender replied and said that it would not challenge the provisional findings but had some observations on some points that it did not agree with.

As both sides have responded, the complaint has come back to me for a final decision.

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

The legal and regulatory context that I think is relevant to this complaint is, in many ways, no different to that shared in several hundred published ombudsman decisions on very similar complaints – which can be found on the Financial Ombudsman Service's website. And with that being the case, it is not necessary to set out that context in detail here.

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.

And having done so, and having considered everything again in light of both sides' responses to the PD, I see no reason to depart from the outcome reached in the provisional decision. I remain satisfied that this complaint ought to be upheld, but I will address the concerns raised by the Lender in its response to the PD.

The Lender thought that the PD was premised on a material error of law in its approach to the prohibition under Regulation 14(3) of the Timeshare Regulations. It said the PD had said

that the mere existence of the *'prospect of a financial return'* constituted an *'investment',* and in doing so falls into error by conflating two meanings of the word 'return': (i) a 'return on investment', which is normally understood to mean the measure of profit (the return) on the original investment; and (ii) a customer being told that some money will be 'returned' upon sale, which carries no connotation of financial gain/profit. The Lender said that the former is what must not be marketed under the Timeshare Regulations; and the latter is an inherent feature of fractional products and does not breach Regulation 14(3).

But I don't think the Lender has understood the point that was being made here. In the PD I set out what Regulation 14(3) said:

> *"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."*

And then I set out the definition of the word 'investment' I was using:

> *"The term "investment" is not defined in the Timeshare Regulations. But for the purposes of this provisional decision, and by reference to the decided authorities, an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit."*

But the Fractional Club was asset-backed by an Allocated Property, and the share in this property clearly constituted an investment as it offered the member the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But there was no conflation of the word 'return' because I made it clear that the fact that the fractional membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the *marketing and selling* of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*. So, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold.

The Lender also thought that the PD had dismissed the disclaimers contained in the contractual paperwork with no proper basis or explanation, despite observing that they emphasised that the product should not be seen as an investment, and had been signed by Mr and Mrs S. It said that the disclaimers had been found to evidence compliance with Regulation 14(3).

And I agree with the Lender to the extent that the disclaimers did set out that the membership should *not* be looked at as a financial investment, and Mr and Mrs S signed to say they had read and understood that. But these disclaimers were contained in documents which were given to Mr and Mrs S to sign *after* they had been through the sales presentation, and *after* they had agreed to make the purchase on the basis of the presentation and what they had been told by the Supplier. And as I set out, that presentation suggested that the membership could lead to a financial gain (i.e. a profit) from the sale of the associated Allocated Property. So, I think it unlikely that, having made a decision to purchase on the basis of what they had seen and heard, the disclaimers would have done much to dissuade Mr and Mrs S from thinking that the membership was an investment. It is also ultimately difficult to explain why it was necessary to include such disclaimers if there wasn't a very real risk of the Supplier marketing and selling membership as an investment, given the difficulty of articulating the benefit of fractional ownership in a way that distinguishes it from other timeshares from the viewpoint of prospective members.

The Lender said that the wrong test had been applied to determine whether the credit relationship between it and Mr and Mrs S was unfair. It then quoted the following:

> *"In the PD, at page 15, the Ombudsman appears to have adopted a different test [sic] then that of cited in Carney, he states "I think their purchase was motivated by their share in the Allocated Property and the possibility of an increased profit... And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decisions they ultimately made"".*

It said that this appears to reverse the burden of proof, in that I had appeared to start from the position that the prospect of a financial gain existed, but this was not insignificant enough for it not to render the relationship unfair. It said the starting point is to assess whether there is sufficient evidence of a material impact on the decision to enter the agreement. The Lender thought that in the absence of this evidence, the relationship ought not to be found unfair.

But the Lender appears to have misunderstood what I had said. The burden of proof has not been reversed here. It is clear that it was on the basis that the Supplier's breach of Regulation 14(3) at the Time of Sale was material to their purchasing decisions that I decided that the associated credit relationships had been rendered unfair.

So, I am satisfied, as I set out in the PD, that Mr and Mrs S were motivated to make their Fractional Club purchase because of the associated share in the Allocated Property and the possibility of an increased profit over their existing membership. And because of that, the breach of Regulation 14(3) by the Supplier was material to the purchasing decision they ultimately made.

The Lender then concluded by saying that the reliance on the witness testimony was unsafe. It thought this because the testimony contained vague and brief allegations, as well as being inconsistent and generic. It said it would have expected there to have been information about what Mr and Mrs S were told about the likely return or mechanisms of how the agreement works, which has not been mentioned. The allegation's credibility, that the product was sold as an investment, has not been challenged.

But the PD considered, in some detail, both the provenance and contents of the statement, and I was satisfied that what had been recorded was Mr S's recollections of their purchase. And I was satisfied, being cognisant of the fact that memories can fade over time, that Mr S's testimony could be relied on. Having reconsidered everything again, I remain satisfied that it is safe to place weight on Mr S's testimony when considering what most likely happened at the Time of Sale. And I find that his testimony, when considered alongside all of the evidence and circumstances, persuades me that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, and that breach was material to Mr and Mrs S's purchasing decision.

Conclusion

So, although the Lender has said it would not challenge my provisional decision that this complaint ought to be upheld, I have considered everything that it has said in response. And having done so, I remain satisfied that this complaint ought to be upheld. I think the Lender participated in and perpetuated an unfair credit relationship with Mr and Mrs S under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A.

Putting things right

In the PD I set out what I considered to be a fair and reasonable way for the Lender to calculate and pay fair compensation to Mr and Mrs S. Neither side has made any comment on my proposed redress, so I see no reason to depart from my provisional thoughts on this issue.

For the avoidance of doubt, I shall set out my directions below.

Fair Compensation

Having found that Mr and Mrs S would not have agreed to purchase FPOC2 membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under Section 140A of the CCA, I think it would be fair and reasonable to put them back in the position they would have been in had they not purchased the FPOC2 membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement.

I'm conscious that putting Mr and Mrs S back in the position they would have been in had they not purchased FPOC2, means that their fractional points holding should be reduced to 1,290 points to accurately reflect the FPOC1 membership, and the previous Allocated Property ought to be reassigned if possible. However, as I've said, a settlement was offered by Business A and accepted by Mr and Mrs S in relation to the FPOC1 purchase and its associated credit agreement, so I do not need to consider it further.

The settlement I am proposing here is on the proviso that Mr and Mrs S both agree to assign to the Lender their fractional points or hold them on trust for the Lender if that can be achieved.

As I've said, Mr and Mrs S were existing fractional members (FPOC1) and their membership was traded in against the purchase price of the FPOC2 membership in question. Under FPOC1 they had 1,290 fractional points, and like FPOC2 they had to pay management charges under FPOC1. So had Mr and Mrs S not purchased FPOC2, they would always have been responsible for paying an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr and Mrs S from the Time of Sale as part of FPOC2 should amount only to the difference between those charges and the annual management charges they would have paid as part of FPOC1.

So, here's what I direct the Lender to do to compensate Mr and Mrs S with all of that being the case – whether or not a court would award such compensation:

(1) The Lender should refund Mr and Mrs S's repayments to it under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.

(2) In addition to (1), the Lender should also refund the difference between the annual management charges Mr and Mrs S paid after the Time of Sale under FPOC2, and what their annual management charges would have been under FPOC1.

(3) The Lender can deduct:

   i. The value of any promotional giveaways that Mr and Mrs S used or took advantage of as a result of their FPOC2 purchase; and

   ii. The market value of the holidays* Mr and Mrs S took using FPOC2 if the points value of the holiday(s) taken amounted to more than the total number of fractional

points they would have been entitled to use at the time of the holiday(s) as ongoing FPOC1 members. However, this deduction should be proportionate and relate only to the additional fractional points that were required to take the holiday(s) in question.

For example, if Mr and Mrs S took a holiday worth 2,550 fractional points after the Time of Sale and they would have been entitled to use a total of 2,500 fractional points under FPOC1 at the relevant time, any deduction for the market value of that holiday should relate only to the 50 additional fractional points that were required to take it. But if they would have been entitled to use 2,600 fractional points under FPOC1, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

(I'll refer to the output of steps 1 to 3 as the 'Net Repayments' hereafter)

(4) Simple interest** at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.

(5) The Lender should remove any adverse information recorded on Mr and Mrs S's credit files in connection with the Credit Agreement reported within six years of this decision.

(6) If Mr and Mrs S's FPOC2 membership is still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their FPOC2 membership.

*I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holidays Mr and Mrs S took using their fractional points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.

**HM Revenue & Customs may require the Lender to take off tax from this interest. If that's the case, the Lender must give the consumer a certificate showing how much tax it's taken off if they ask for one.

My final decision

I uphold this complaint, and direct Shawbrook Bank Limited to calculate and pay fair compensation to Mr and Mrs S as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S and Mrs S to accept or reject my decision before 13 March 2026.

Chris Riggs
Ombudsman