DRN-4976650

The complaint

1. Mrs T says that Mitsubishi HC Capital UK PLC, trading as Novuna Personal Finance ("Novuna"), did not act fairly or reasonably when considering its obligations under the Consumer Credit Act 1974 ("CCA") in relation to a loan taken to pay for a timeshare.

What happened

2. In April 2016 ("the Time of Sale"), Mrs T, alongside another, took out a timeshare membership from a timeshare supplier ("the Supplier").[1] This was membership of the Fractional Property Owners Club ("FPOC Membership"). FPOC Membership provided Mrs T with a number of 'points' every year that she could spend to stay at properties provided by the Supplier. But this was also 'asset backed', so that her membership was linked to a specified property ("the Property"). Mrs T had no preferential right to stay at the Property, but after nineteen years, the Property would be placed for sale and the proceeds of sale would be divided amongst the people whose memberships were linked to the Property. FPOC Membership cost £12,524 and it was paid for by Mrs T by paying £2,521 to the Suppler by bank transfer and using a five-year loan from Novuna for the remainder.

3. In June 2017, Mrs T complained to Novuna using the assistance of a professional representative ("PR"). The complaint was set out at length in a fifteen-page letter ("the Letter of Complaint"). In summary it was said:

    - Novuna was liable to pay Mrs T compensation in relation to the sale of the FPOC Membership due to the operation of ss.75 and 140A CCA.
    - In particular, it was alleged that Novuna was jointly liable for the Supplier's misrepresentations made at the time of sale. It was argued that Novuna ought to have accepted, and paid, Mrs T's claim under s.75 CCA. Further, it was said that Novuna was a party to an unfair debtor-creditor relationship due to failings in the way FPOC Membership was sold and operated.
    - PR explained that Mrs T had taken a 'free' holiday with the Supplier after it was offered to her having bought something from a window company. Mrs T was not aware at the time that she took the holiday that it was a promotional holiday for the Supplier. When she went on the holiday to Spain, she attended a meeting which turned out to be a sales event.
    - PR described a sales presentation where Mrs T was shown a show apartment described as '*top notch*' and only available to the Supplier's members. After that she attended a sales event in a busy and hot room.
    - PR said that Mrs T asked a sales representative whether what was being presented was a timeshare, but she was told on several occasions that it was a '*fractional interest*' and not a timeshare. It was said that after four hours, Mrs T asked to leave the meeting when her husband's back hurt, but she was told it would not last much longer.
    - PR say Mrs T was told that there would be annual maintenance fees and was told

[1] Although the timeshare was in the names of Mrs T and another, as the loan agreement was Mrs T's alone, only she is able to bring this complaint. So I have referred to her throughout.

the cost of membership. After being told this was not a timeshare, Mrs T became open to the idea of FPOC Membership as it would provide somewhere nice to holiday with her family. PR said Mrs T decided to go ahead because of what she had been shown and told by the Supplier's sales representative. There was a further incentive to purchase, being bonus fractional points, an additional free holiday and a tablet computer.

- PR said that one of the main reasons Mrs T took out FPOC Membership was because the Supplier had a resort in the USA, near to where a family member lived. But she later realised that she could only stay there if she exchanged her annual points with a third-party exchange company who could offer accommodation there, as the Suppler in fact did not have the desired destination within its accommodation inventory. Mrs T said that the Supplier did not fully explain how the exchange company worked when she made her purchase.
- In October 2016, Mrs T used her additional holiday and decided that FPOC Membership was not right for her circumstances as she was in financial difficulty. So she asked the Supplier to cancel her membership, however the Supplier said as the paperwork had been signed, it could not be cancelled.
- PR also set out a number of statements it said Mrs T relied on when taking out FPOC Membership. In particular that FPOC Membership had a guaranteed end date after nineteen years, that FPOC Membership meant Mrs T was buying an interest in real property, that it was an investment and that if she did not take out FPOC Membership her children would inherit the ongoing liability to pay management charges. The things said were not true and amounted to misrepresentations by the Supplier. In particular, there was no guaranteed end date of FPOC Membership, the sale of the Property could be postponed and Mrs T never gained an interest in real property.
- PR argued that the terms of FPOC Membership and the way in which it was sold breached The Unfair Terms in Consumer Contracts Regulations 1999 ("the UTCCR") and The Consumer Protection from Unfair Trading Regulations 2008 ("the CPUTR"), both of these leading to an unfair debtor-creditor relationship.

4. Novuna responded in October 2017. It did not accept any of Mrs T's complaint and said that if she disagreed, she could refer her complaint to our service. In particular, it said it was clear Mrs T was buying a timeshare, not least as she was invited to attend a promotional holiday with the purpose of deciding whether a timeshare was something that she was interested in purchasing. It said that the Supplier's business model was selling timeshares and at no point did it hide that fact. Novuna disagreed that the sale process was pressured and said the Supplier had recorded during the sale that Mrs T herself said she'd been given enough time to consider FPOC Membership before agreeing to take it out and, in any event, she had a fourteen-day cooling off period in which it could be cancelled.

5. Novuna also said that Mrs T stayed at a resort in Spain with the same name as the destination in the USA that she said she was interested in using, but the Supplier did not have its own accommodation in the USA. Instead, Mrs T would need to use a third-party exchange company to book holidays there. Novuna also said that the Supplier had recorded that Mrs T wished to cancel her FPOC Membership in October 2016 due to financial difficulties and this was arranged for her. Finally, it said that under the FPOC Membership, the Property would be placed for sale at the agreed time and it needed a unanimous agreement of all FPOC Members, whose membership was associated with that Property, to agree to suspend the sale, so what PR alleged was incorrect. It also said that Mrs T was not told she was buying a specific parcel of real property or that the sales staff purported to be investment advisors.

6. Unhappy with Novuna's response, PR referred a complaint to our service on Mrs T's behalf in October 2017. When doing so, it sent a fourteen-page letter to our then Chief

Ombudsman, setting out in general terms problems PR said there were with timeshares sold by the Supplier.[2] It said it had seen a pattern in the sales of memberships like Mrs T's, in that the Supplier presented FPOC Membership as the purchase of an interest in real property, as an opportunity to make a profit or return on what was paid for membership, and as a solution to perpetual memberships as it had a defined end date to membership.

7. In November 2023, one of our investigators considered the complaint, but did not think Novuna needed to do anything further. He concluded that there was not enough to say Mrs T was subjected to undue pressure to take out FPOC Membership and that, on balance, he did not think there was an unfair debtor-creditor relationship. He also said there was not enough to show there was an actionable misrepresentation.

8. PR disagreed and asked for an ombudsman to review to the complaint. In doing so, it reiterated what was said in the Letter of Complaint, stating that it was prepared on Mrs T's instructions. PR also asked an ombudsman to consider all the evidence available of the Supplier's sales practices that been considered in other ombudsmen's decisions. Finally, in February 2024, PR provided a statement from Mrs T, setting out in more detail her memories of the sale.

9. As the parties did not agree with our investigator's view, the complaint was passed to me for a decision.

10. Having considered everything, I issued a provisional decision ("PD") on Mrs T's complaint. I explained that I did not think the complaint should have been upheld and I invited both parties to comment on what I had said in my PD.

11. In my provisional findings, I considered The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Timeshare Regulations"), in particular Reg.14(3) that prohibited the sale or marketing of timeshares as investments. I concluded that FPOC Membership had not been sold to Mrs T in breach of Reg.14(3), but even if it had been, I did not find it led to the credit relationship between Novuna and Mrs T being unfair (or lead to an unfairness that required a remedy in this case) as I could not see that FPOC Membership being presented as an investment was something important to Mrs T or something that led her to purchase it. Further, I did not think there was an unfair debtor-creditor relationship caused by any of the other allegations originally raised in the Letter of Complaint.

12. Novuna did not respond to my PD with any further evidence or arguments it wanted me to consider.

13. PR, on Mrs T's behalf, replied with a twenty-six page response disagreeing with my PD. Given the length of the response, I will not set it out in detail, but for the avoidance of doubt I have read and considered everything that was said. In summary, PR said:

    - I had failed to properly consider the judgment in *R (on the application of Shawbrook Bank Ltd) v. Financial Ombudsman Service Ltd; R. (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ("*Shawbrook & BPF v. FOS*") and other decisions issued by ombudsmen at our service.

[2] This letter is generic to all complaints made by PR in respect of the Supplier's sales, so I have not set out the contents of the letter in detail. However, I have read it and, in so far as it relates to Mrs T's sale, have taken it into account.

- I was wrong in law to say that a breach of Reg.14(3) did not give rise to an unfair debtor-creditor relationship.
- I failed to consider the wider circumstances surrounding Mrs T's sale, in particular that it was likely that the Supplier used the prospect of a financial return as way to sell FPOC Membership.
- The Supplier was not properly authorised to sell investments and therefore the loan agreement with Novuna was unenforceable and this gave rise to an unfair debtor-creditor relationship. This was a new argument, not raised before with Novuna.

14. I also shared with PR sets of slides, provided by the Supplier, that had been used when selling timeshare memberships similar to Mrs T's over a number of years and I invited PR to provide submissions on this material.

15. PR responded with substantial commentary on the slides, arguing that they demonstrated that the Supplier sold FPOC Membership to Mrs T as an investment and that this led to an unfair debtor-creditor relationship.

16. As my PD was not agreed by the parties, I have reconsidered the complaint before issuing a final decision. So I have set out below what I provisionally decided, PR's responses and my final decision on this complaint.

What I have 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.

17. When deciding complaints, I am required by DISP 3.6.4 R of the Financial Conduct Authority's ("FCA") Handbook to take into account:

> *"(1) relevant:*
>
> > *(a) law and regulations;*
> > *(b) regulators' rules, guidance and standards;*
> > *(c) codes of practice; and*
>
> *(2) (where appropriate) what [the ombudsman] considers to have been good industry practice at the relevant time."*

18. Where I need to make a finding of fact based on the evidence, I make my decision on the balance of probabilities. In other words, when I make a finding that something happened, that is because I think it is more likely than not that that thing did happen.

19. In response to my PD, PR provided substantial submissions. I have not dealt with every matter raised, rather I have focused on what I consider material to reach a fair and reasonable decision on this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

The evidence in this compliant

20. I will start by setting out the evidence I have been provided by both of the parties.

<u>Mrs T's evidence</u>

21. In PR's Letter of Complaint to the Supplier it set out some specific words that Mrs T alleged were said to her. Those words were:

"Its [meaning the Fractional Ownership Scheme] has a fixed term"

"There is a time limit on membership"

"At the end of 17 years the property will be sold"

"17-year limit"

"The property will be sold and you will get something back"

"The advantage of a fixed period of ownership and not having to pass liability on to children"

"You will have share in a specific unit in a specific resort"

"Attached to a property"

"This is a good investment"

"Having points for holidays was a good investment"

22. As noted above, PR said that Mrs T approved this letter, so I have taken from that that these statements were her evidence in June 2017 of what she was told at the Time of Sale, which took place fourteen months earlier.

23. Mrs T also provided a statement signed in February 2024, which said it was drafted in response to our investigator's view. In my PD, I noted that part of the statement refers to complaints made against a different respondent business not involved in Mrs T's sale and it is not clear whether this drafting error was down to Mrs T or PR. Parts of that statement read as follows:

"4. On the 7th April 2016, we purchased membership of [the Supplier's FPOC]. We purchased 1,040. Fractional Points Rights, equating to one biannual week (fraction) in [the Property].

5. The purchase price was £12,521.00 less a £2,521,00 deposit. The balance of £10,000.00 was paid by way of a Fixed-Sum Loan with the Respondents, arranged by [the Supplier]'s representatives, acting as their agents.

6. During a lengthy sales presentation, we were told that Fractional Property Ownership involved buying shares in a property for 19 years. It was explained that, at the end of the 19-year period, the property would be sold, and the proceeds would be split between all the fractional shareholders.

7. We were told that we would be likely to get back all of the money we were investing, when the property was sold.

8. When we went to the sales suite, after lunch, our grandchildren […] stayed in the apartment. That was we thought that the presentation would not take long. It did.

9. The whole procedure was high pressure, and the presentation was held in a large open plan room. It was very hot and noisy, with many other clients like us, and sales reps coming back and forth, encouraging us to buy.

10. By the time approximately four hours had passed, [Mrs T's husband]'s back had started to hurt, so he asked to leave the meeting. However, they persuaded us to stay, assuring us that the meeting would not take too much longer. At this point, we were tired and bamboozled, feeling that we could not take in any more information.

11. By the end, we felt overwhelmed, by the whole experience. So, and also based on what we had been told and shown, we agreed to purchase the fractional product.

12. We were then taken to another office, to sign the documents. No detailed explanations were given, and the documents were just put in front of us, to sign."

The FPOC Membership sale documents

24. A number of documents were provided from the time of sale. Those included:

- Mrs T's FPOC Membership purchase agreement and associated terms and conditions
- Mrs T's signed FPOC Membership information sheet
- Mrs T's signed Member's declaration

PR's post-provisional decision submissions

25. In my PD, I set out the legal framework, however given the substantial submissions I have received, I think it is helpful to set out the relevant law in more detail.

26. Mrs T said that Novuna was liable to pay compensation due to the operation of the CCA. Specifically it was said that Novuna was party to an unfair debtor-creditor relationship, as defined by s.140A CCA, caused by the sale of the FPOC Membership and that Novuna was jointly liable for the Supplier's misrepresentations under s.75 CCA. I explained that as those provisions are relevant law, I have to think about them when coming to what I think is a fair and reasonable outcome to this complaint (DISP 3.6.4 R).

27. The CCA introduced a regime of connected lender liability under s.75 CCA that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there is an actionable misrepresentation and/or breach of contract by the supplier.

28. In short, a claim against Novuna under s.75 CCA essentially mirrors the claim Mrs T could make against the Supplier.

29. Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. Novuna did not dispute that the relevant conditions were met in this complaint. As I was satisfied that s.75 CCA applied, if I found that the Supplier was liable for having misrepresented something to Mrs T at the Time of Sale, Novuna was also liable and had a duty to pay the appropriate compensation.

30. PR did not comment on the assessment in my PD of Mrs T's s.75 CCA claim and confined its comments to whether there was an unfair debtor-creditor relationship between Mrs T and Novuna as defined by s.140A CCA, so I will not comment further on the law surrounding s.75 CCA.

31. Under s.140A CCA, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement

itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA). Such a finding may also be based on the terms of any related agreement (which here, includes the FPOC Membership agreement) and, when combined with s.56 CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

32. S.56 CCA plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator". As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while s.56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

33. A debtor-creditor-supplier agreement is defined by s.12(b) CCA as "*a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]*". And s.11(1)(b) CCA says that a restricted-use credit agreement is a regulated credit agreement used to "f*inance a transaction between the debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly.*"

34. Novuna does not dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mrs T's FPOC Membership were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by s.12(b). That made them antecedent negotiations under s.56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for Novuna as per s.56(2). And such antecedent negotiations were "*any other thing done (or not done) by, or on behalf of, the creditor*" under s.140(1)(c) CCA.

35. Antecedent negotiations under s.56 CCA cover both the acts and omissions of the Supplier, as Lord Sumption made clear in *Plevin v. Paragon Personal Finance Limited [2014] UKSC 61 ("Plevin")* at para 31:

> *"[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor's agent.' […] Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. […] These provisions are there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents."*

36. This was recognised by Mrs Justice Collins Rice in *Shawbrook & BPF v. FOS* at para 135:

> *"By virtue of the deemed agency provision of s.56, therefore, acts or omissions 'by or on behalf of' the bank within s.140A(1)(c) may include acts or omissions of the timeshare company in 'antecedent negotiations' with the consumer".*

37. In the case of *Scotland & Reast v. British Credit Trust* [2014] EWCA Civ 790 ("*Scotland & Reast*"), the Court of Appeal said, at para 56, that the effect of s.56(2) CCA meant that "*negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law*", before going on to say the following at para 74:

> *"[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."*[3]

38. So, the Supplier is deemed to be Novuna's statutory agent for the purposes of the pre-contractual negotiations.

39. Furthermore, the scope of that responsibility extends to both acts and omissions by the Supplier as the Supreme Court in *Plevin* made clear when it referred to 'acts or omissions' when discussing s.56. And, as s.56(3)(b) says that an applicable agreement cannot try to relieve a person from liability for 'acts or omissions' of any person acting as, or on behalf of, a negotiator, it must follow that the reference to 'omissions' would only be necessary because they can be attributed to the creditor under s.56.

40. However, an assessment of unfairness under s.140A is not limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in *Patel v. Patel* [2009] EWHC 3264 (QB) ("*Patel*")[4], that determining whether or not the relationship complained of was unfair had to be made "*having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination*", which was the date of the trial in the case of an existing credit relationship or, otherwise, the date the credit relationship ended.

41. The breadth of the unfair relationship test under s.140A, therefore, is stark. But it is not a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in *Plevin* at para 17:

> "*Section 140A […] does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with […] whether the creditor's relationship with the debtor was unfair.*"

42. Instead, it was said by the Supreme Court in *Plevin* that the protection afforded to debtors by s.140A is the consequence of all of the relevant facts. The impact of this on Mrs T's complaint is discussed more fully below.

43. I explained in my PD that I thought the following judgments, amongst others, helped to set out the approach to take when thinking about unfair debtor-creditor relationships in the context of this complaint:

    i. *Plevin*

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[3] The Court of Appeal's decision was recently followed in *Smith v. The Royal Bank of Scotland plc* [2023] UKSC 34 ("Smith").
[4] This was also recently approved by the Supreme Court in *Smith.*

ii. *Carney v. NM Rothschild & Sons Ltd* [2018] EWHC 958 *("Carney")*
iii. *Kerrigan v. Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) *("Kerrigan")*
iv. *Shawbrook & BPF v. FOS*
v. *Patel*
vi. *Smith*
vii. *Scotland & Reast*

44. Having considered those judgments, I thought the following principles could be drawn:

i. the question of whether the relationship between Mrs T and Novuna is or was unfair is the central issue to determine in this complaint. The standard of commercial conduct is relevant, as is the difference in knowledge and understanding between the parties if sufficiently extreme.

ii. the breach of a legal duty, such as the breach of the Timeshare Regulations by a supplier acting on a creditor's behalf (due to s.56 CCA), is neither necessary for a finding of an unfair debtor-creditor relationship, nor does it automatically lead to such a finding.

iii. for a breach of Reg.14(3) of the Timeshare Regulations to lead to an unfair debtor-creditor relationship that requires relief from that unfairness, it is a relevant consideration whether the breach caused the debtor to enter into the timeshare and/or loan agreement. I thought that accorded with common sense: if events would have unfolded in the same way whether or not such a pre-contractual breach had occurred, it may be hard to attribute great importance to the breach when deciding whether an unfair debtor-creditor relationship ensued, or whether a remedy is appropriate.

45. In addition to the CCA, the regulatory requirements of particular importance to this complaint include the Timeshare Regulations, the UTCCR and the CPUTR.

46. As set out in my PD, the sale of timeshares like Ms T's was regulated by the Timeshare Regulations. The regulation most relevant to this complaint was Reg.14(3), which read:

> *"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."*

47. The Timeshare Regulations provided a regulatory framework. But they represented a minimum standard. And as the parties to this complaint already know, I am also required to take into account, when appropriate, what I consider to have been good industry practice at the relevant time. In this complaint, that includes the Resort Development Organisation's Code of Conduct dated 1 January 2010.

48. PR disagreed with what I said about the law in my PD. It said that I failed to follow a separate decision that I had issued previously (referred to in PR's submissions as 'the Second Precedent'), which was one of the two decisions that were challenged by way of judicial review in *Shawbrook & BPF v. FOS*. It also said I failed to properly apply the judgment in *Shawbrook & BPF v. FOS*. In particular, it was said:

> "*It has, therefore, already been decided by the FOS in the Second Precedent that the sale of the FPOC Membership was a breach of regulation 14(3) of the [Timeshare Regulations]."* (page 9 of the submissions)

and

"*It is our opinion that Mrs Justice Collins* [sic] *has made clear that it is almost an impossibility that the sale of an FPOC Membership would not be caught by regulation 14(3) of the Timeshare Regulations. The investment element, as found by the Second Precedent and [Shawbrook & BPF v. FOS], is intrinsic to the product. Indeed, it is its only defining feature from similar timeshare products.*

However, the Second Precedent and [Shawbrook & BPF v. FOS] found that a breach of regulation 14(3) of the Timeshare Regulations made the relationship between the consumer and the finance provider unfair, pursuant to section 140A CCA 1974" (page 9 of the submissions)

49. Further, PR argued (page 8 of the submissions):

"*[…]The Ombudsman has failed to take into account the Precedents and [Shawbrook & BPF v. FOS].*

Firstly, it has been said that a fractional membership is an investment, as is accepted by the Ombudsman, but it can be "marketed" as not an investment.

How is that possible?

The answer is that it cannot. Once the "investment" is described as what it is, which is accepted here, it MUST have been "marketed" as an investment, given it is an "investment".

That is the only logical conclusion to reach."

50. For the avoidance of doubt, a finding in a separate decision that a sale of a timeshare membership breached Reg.14(3) does not mean any ombudsman looking at the sale of a similar product must come to the same finding. Each complaint turns on its own facts: an ombudsman's decision on how one timeshare sale occurred does not determine his, or another ombudsman's, decisions about the facts of other sales at different times to different purchasers. So my previous decision that PR has referred to as the Second Precedent is not determinative of the facts of Mrs T's complaint. The Financial Ombudsman Service is not a court, and its decisions do not have precedent value (as certain court judgments do). I must determine Mrs T's complaint on its individual facts and make a decision as to what is fair and reasonable in all the circumstances of *this* case.

51. Further, a finding that a sale has breached Reg.14(3) is not determinative of the issue of whether or not there is an unfair debtor-creditor relationship arising out of that sale. In so far as this is being alleged by PR, I disagree, and I will explain why the judgments referred to in my PD do not lead to that conclusion.

S.140A CCA – relevant unfair relationship case law

52. The judgment in the case of *Plevin* provides the leading judgment on unfair debtor-creditor relationships, in which it was held that the level of commission paid in respect of an insurance policy, paid for by a loan, was so high it created an unfair relationship due to the extreme inequality of knowledge and understanding between the creditor and the debtor, Mrs Plevin. In *Plevin*, the Court held that the standard of commercial conduct was something to consider when determining the fairness of any debtor-creditor relationship, and relevant rules can be evidence of what that standard was. But whether a creditor (or someone acting on their behalf) had broken a rule is not determinative to the question asked by s.140A CCA. Lord Sumption held at para 17:

"…Section 140A, by comparison, does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with the question whether the creditor's relationship with the debtor was unfair. It may be unfair for a variety of reasons, which do not have to involve a breach of duty..."

53. The *Plevin* case concerned the duty to disclose certain information under the Financial Services Authority's (as it was then) rules for financial firms conducting certain business, in particular the Insurance Conduct of Business ("ICOB") rules. It was further held at para 17:

"…The ICOB rules impose a minimum standard of conduct applicable in a wide range of situations, enforceable by action and sounding in damages. ***Section 140A introduces a broader test of fairness applied to the particular debtor- creditor relationship, which may lead to the transaction being reopened as a matter of judicial discretion.*** *The standard of conduct required of practitioners by the ICOB rules is laid down in advance by the Financial Services Authority (now the Financial Conduct Authority), whereas the standard of fairness in a debtor-creditor relationship is a matter for the court, on which it must make its own assessment. Most of the ICOB rules, including those relating to the disclosure of commission, impose hard-edged requirements, whereas the question of fairness involves a large element of forensic judgment.* ***It follows that the question whether the debtor-creditor relationship is fair cannot be the same as the question whether the creditor has complied with the ICOB rules, and the facts which may be relevant to answer it are manifestly different. An altogether wider range of considerations may be relevant to the fairness of the relationship, most of which would not be relevant to the application of the rules.*** *They include the characteristics of the borrower, her sophistication or vulnerability, the facts which she could reasonably be expected to know or assume, the range of choices available to her, and the degree to which the creditor was or should have been aware of these matters." (emphasis my own)*

54. It is apparent that the question of 'fairness' in s.140A CCA is broader than simply considering whether the supplier or the lender (or its agent) has breached a rule or other obligation during the course of relevant dealings. And Lord Sumption went on to explain at para 18:

"…A sufficiently extreme inequality of knowledge and understanding is a classic source of unfairness in any relationship between a creditor and a non-commercial debtor. It is a question of degree…"

55. Paragraph 10 of the judgment made clear that there will normally be large differences of financial knowledge and expertise between a debtor and a creditor, and this unequal relationship is not necessarily unfair. Rather it was when the inequality of knowledge and understanding was "*sufficiently extreme*".

56. Finally, it was held at para 20:

"On that footing, I think it clear that the unfairness which arose from the nondisclosure of the amount of the commissions was the responsibility of Paragon [the lender]. Paragon were the only party who must necessarily have known the size of both commissions. They could have disclosed them to Mrs Plevin. Given its significance for her decision, I consider that in the interests of fairness it would have been reasonable to expect them to do so. Had they done so this particular source of unfairness would have been removed because Mrs Plevin would then have been able to make a properly informed judgment about the value of the PPI policy. This is

sufficiently demonstrated by her evidence that she would have questioned the commissions if she had known about them, even if the evidence does not establish what decision she would ultimately have made."

57. Here, the Court found that it was enough that Mrs Plevin would have questioned whether the insurance provided good value for money when considering the question of the fairness of the relationship. It was the non-disclosure that caused the unfairness. The Court made no finding whether Mrs Plevin would have made a different purchasing decision had she known more, but that did not prevent it finding unfairness.

58. So the breach of a legal duty does not automatically mean a credit relationship is unfair. It is necessary to consider the impact of any breach on the debtor – would they have entered into the agreement in any event?

59. I am mindful of the judgment in *Carney* where HHJ Waksman QC (as he then was) held, in relation to s.140A CCA, at para 51:

"Causation is perhaps less straightforward. In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. And thus in Plevin, while the unfairness was said to be the failure to disclose the commission, there was at least a finding that the debtor would have "certainly questioned this" the size of the commission being of "critical relevance" – see paragraph 18 of the judgment. However, the Supreme Court then remitted the case back to the Manchester County Court to decide what relief, if any, under s140B should be awarded. But in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. See also the case of Graves v CHL [2014] EWCA Civ 1297 at paragraph 22 of the judgment of Patten LJ where it was held (among other things) that the impugned conduct of the LPA receivers was not causally related to the loss complained of by Mr Graves."

60. And of the judgment in *Kerrigan*, where HHJ Worster held, at paras 213 and 214:

"Having considered which relationships are likely to be unfair, I turn to the question of relief. The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court may make an order if it determines that the relationship is unfair to the debtor. The order must be from the menu of orders provided for under section 140B in connection with the credit agreement, but otherwise there is very little in the way of guidance in the section. As Mr Justice Hildyard put it in his judgment in McMullon v Secure the Bridge Limited [2015] EWCA Civ 884 @ [13]:

> *'Suffice it to say as to the powers of the court that considerable discretionary latitude is supplied.'*

That is not to say that the court is free to do anything. Having determined that the relationship is unfair to the debtor, the court will look to relieve that unfairness by making an order or orders under section 140B(1). Whilst HHJ Platts emphasised that his decision as to remedy in Plevin turned on the particular facts of that case and was no precedent, it is a helpful illustration of how the jurisdiction works on well known facts. There is a link between (i) the failings of the creditor which lead to the

unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. If the court decides to make an order, then it "should reflect and be proportionate to the nature and degree of unfairness which the court has found": Patel v Patel [2009] EWHC 3264 (QB) George Leggatt QC at [79]-[80]. It should not give the Claimant a windfall, but should approximate, as closely as possible, to the overall position which would have applied had the matters giving rise to the perceived unfairness not taken place…"

The timeshares judicial review - *Shawbrook & BPF v. FOS*

61. Two decisions of the Financial Ombudsman Service, upholding complaints, were recently challenged by way of judicial review in the High Court in *Shawbrook & BPF v. FOS*. The Court considered two decisions, issued by me and another ombudsman, concerning the sale of fractional timeshares similar to Mrs T's, paid for with loans provided by Shawbrook Bank Ltd and Barclays Partner Finance. In each case, the ombudsman decided the timeshare package had been mis-sold and the contractual arrangement, including the associated loan, should be unwound. Broadly, Shawbrook Bank Ltd and Barclays Partner Finance argued that the ombudsman had erred in law in each of the two decisions.

62. Mrs Justice Collins Rice held:

    (1) The ombudsman in the first case did not err in law in his construction of, or approach to, Reg.14(3) of the Timeshare Regulations.

    (2) Both ombudsmen did not err in law in concluding that the deemed agency provisions of s.56 CCA, read together with s.140A(1)(c) CCA, meant that the acts and omissions of the timeshare companies in conducting negotiations with consumers antecedent to forming timeshare contracts fell to be regarded by a court as things done or not done by or on behalf of the lenders, for the purposes of considering whether they caused the debtor/creditor loan relationship between lenders and consumers to be unfair.

    (3) In these circumstances, both ombudsmen did not err in law in holding that an unfair relationship had been created for the purposes of s.140A CCA or in providing remedies having regard to the provisions of s.140B.

63. Overall, the claims were dismissed. The judge highlighted that the ombudsman's task was a "*fundamental case-by-case evaluative*" one, with a "*high degree of fact-sensitivity*" (at para 189). In finding there was a breach of Reg.14(3) the first ombudsman made an "*entirely fact-sensitive and evaluative decision. The ombudsman did not make a blanket or 'in principle' decision, referable to the inherent qualities and properties of fractional ownership timeshare contracts. It was a decision directed to finding, interpreting and evaluating the material facts and the communications which took place in this particular case*" (at para 73).

64. In *Shawbrook & BPF v. FOS*, Mrs Justice Collins Rice considered the effect of a breach of Reg.14(3) on the question of assessing the fairness of the debtor-creditor relationship. It was held at para 185:

    "Challenges are made in these proceedings to the adequacy of the evaluation by which the ombudsmen reached their final conclusions of unfairness – in particular to

whether they had regard to all relevant matters within the terms of s.140A(2). But the ombudsmen had the full facts and circumstances, as they had found them, firmly in mind. Breaching Reg.14(3) by selling a timeshare as an investment – whether doing so explicitly or implicitly, whether in a slideshow or in a to-and-fro conversation with individual consumers – is conduct that knocks away the central consumer protection safeguard the law provides for consumers buying timeshares. The ombudsmen held the breach in each case to be serious/substantial and the constituent conduct causative of the legal relations entered into: timeshare and loan. As such, it is hard to fault, or discern error of law in, a conclusion that the relationship could scarcely have been more unfair. It was constituted by the acts/omissions of the timeshare companies in the antecedent negotiations leading up to the contractual commitments. Those are acts/omissions for which the banks are 'responsible' by operation of law. The timeshare companies and lenders clearly benefited overall thereby and the consumers, as the ombudsmen found as a matter of fact, were disproportionately burdened. No error of law appears from the ombudsmen's conclusions in any of these respects. I am satisfied their findings of unfairness were properly open to them on this basis alone."

65. To summarise, the passages in the judgment in *Plevin* set out above made plain that the breach of a legal duty, such as either the breach of the FCA's rules by a creditor or the breach of the Timeshare Regulations by a supplier on a creditor's behalf, is neither a prerequisite for a finding of an unfair debtor-creditor relationship, nor is it an automatic gateway to such a finding.

66. Further, the judgment in *Plevin*, read alongside that in *Carney* and *Kerrigan*, makes clear that in a case such at Mrs T's, an important consideration is whether the relevant misconduct impacted the debtor's decision to enter into the agreements. Further, in *Shawbrook & BPF v. FOS*, in dismissing the judicial review claims, including that each ombudsman had not erred in law in their approach to ss.56 and 140A CCA, the judge said at para 185:

"The ombudsmen held the breach [of Reg.14(3)] in each case to be serious/substantial ***and the constituent conduct causative of the legal relations entered into****: timeshare and loan." (emphasis my own)*

67. For those reasons, in my PD, I said that for a breach of Reg.14(3) to lead to an unfair debtor-creditor relationship that requires relief from that unfairness, it was a relevant consideration whether the breach caused the debtor to enter into the timeshare and/or loan agreement. I said this accorded with common sense: if events would have unfolded in the same way whether or not such a pre-contractual breach had occurred, it may be hard to attribute great importance to the breach when deciding whether an unfair debtor-creditor relationship ensued, or whether a remedy is appropriate.

68. Finally, in relation to any findings in *Shawbrook & BPF v. FOS* judgment on whether the sale of FPOC Memberships, per se, would have almost certainly breached Reg.14(3), the following passages are important. First, Mrs Justice Collins Rice held that it was not the nature of the membership that breached the Reg.14(3), rather it was the way in which it was sold, at para 66:

"My necessary starting point is the ombudsman's explicit acceptance that a fractional ownership timeshare does not inevitably or inherently – purely by virtue of its fractional ownership component – transgress the prohibition in Reg.14(3). That is a point of some importance. Reg.14(3) prohibits the marketing or selling of a timeshare contract as an investment. It does not prohibit the existence of an investment component in a timeshare contract or the marketing or selling of such a product per

se. The ombudsman accepted it was at least in principle possible to sell a fractional ownership timeshare without infringing Reg.14(3).”

69. In its submissions (at page 9), PR quotes paragraph 67 of the *Shawbrook & BPF v. FOS* judgment, arguing that this made clear Mrs Justice Collins Rice found it was “*almost an impossibility that the sale of an FPOC Membership would not be caught by regulation 14(3) of the Timeshare Regulations.*” That paragraph reads:

> “*His dilemma is, however, apparent as to how, and how far, that 'in principle' possibility is realisable in practice, at least in a case like the Hargreaves'. As Mr Strachan KC put it, what is the point – from any consumer's perspective, but particularly in a like-for-like accommodation rights 'upgrade' – of the fractional ownership dimension if it is not by way of an investment? The consumer gets no use or benefit from the property during the term of the agreement; their interest is in the proceeds of a deferred sale alone. Why would anyone buy that interest if not in the hope of getting more back than they put it in? Why would anyone lay out money only to get less back? What attraction could a fractional ownership timeshare possibly have if not the attraction of a collateral investment? Or – it might be asked – why is it that the marketing and sale of fractional ownership timeshare does not inevitably breach Reg.14(3)?*”

70. However, this paragraph is not the judge’s findings on whether all sales of memberships such as Mrs T’s necessarily breached Reg.14(3). Rather it is the judge’s summary of the submissions of counsel for the Defendant (Mr Strachan KC). This is demonstrated by the first sentence of the subsequent paragraph – “*Mr Herberg's answer to this invites the following analysis.*”

71. In finding that the ombudsman in the first case did not err in law in his construction of, or approach to, Reg.14(3) of the Timeshare Regulations, the judge held:

> *“I did hesitate over some of the ombudsman's analysis. In the passages set out at [180]-[188] above there are some indications suggestive of a view that, notwithstanding his express declaration to the contrary, it was the intrinsic design of fractional ownership timeshares, or the simple fact that the consumers were exchanging like-for-like accommodation rights, that led with a degree of inevitability to a breach of Reg.14(3). That would, at least potentially, have indicated an error of law.*
>
> *But I remind myself that I am not to make the mistake of reading an ombudsman's decision as if it were a legal judgment. Looking at what the ombudsman said fairly, and as a whole, I can see that he set out the correct test, accepted that it was at least possible for this contract to have been marketed compliantly with Reg.14(3), and, in my view, applied the correct test to the evaluation of the facts as he found them before concluding that it had not been so marketed/sold in this case. I do not see that he lost sight of the 'profit' meaning of investment, made the legal mistake of confusing profit with 'something back', or made an 'in principle' decision about the sale of fractional ownership timeshares where no new accommodation rights are obtained.*
>
> *Instead, he looked at all the circumstances, including the contemporaneous evidence, and concluded that this timeshare contract had in fact been sold as an investment. He found the pure fractional ownership component was given importance by Diamond for the Hargreaves' purposes and portrayed as a significant benefit, quite apart from the reduction in the overall term. He found it was at least implicit in the selling that that benefit was a prospect of financial gain.* ***That was an entirely***

fact-sensitive and evaluative decision. The ombudsman did not make a blanket or 'in principle' decision, referable to the inherent qualities and properties of fractional ownership timeshare contracts. It was a decision directed to finding, interpreting and evaluating the material facts and the communications which took place in this particular case." (paras 71-73) (emphasis my own)

"*My conclusion in these circumstances is that the ombudsman did not make an error of law, but simply made a fact-specific, inferential, evaluation on an application of the Reg.14(3) test to the circumstances of the complaint before him. I am not persuaded he was compelled by law to have taken a different approach or reach a different conclusion. Having said that, however, I endorse the observation made by Mr Jaffey KC, Counsel for BPF, that, whatever the position in principle, it is apparently a major challenge in practice for timeshare companies to market fractional ownership timeshares consistently with Reg.14(3). It is a particularly acute challenge to do so by way of an 'upgrade' which does not confer new accommodation rights, when the fractional ownership component inevitably assumes more prominent proportions in the bargain. Getting the governance principles and paperwork right may not be quite enough.*" (para 77)

72. It is clear from those paragraphs that an ombudsman must determine, on the material facts and circumstances of a particular complaint, whether a consumer's sale breached Reg.14(3). When considering Mrs T's complaint, I am mindful of the judge's comments where she endorsed the observation that "*it is apparently a major challenge in practice for timeshare companies to market fractional ownership timeshares consistently with Reg.14(3).*" Plainly, it is inherently more probable that a Supplier could breach Reg.14(3) selling a timeshare with an investment element than one without such an element. However, I do not agree with PR that the judgment in *Shawbrook & BPF v. FOS* made a finding that "*it is almost an impossibility that the sale of an FPOC Membership would not be caught by regulation 14(3) of the Timeshare Regulations.*" Each case must be assessed on its own facts and evidence.

My assessment of the evidence and Mrs T's points of complaint

73. In my PD I first dealt with the claim Mrs T had made under s.75 CCA, before looking at whether I thought Novuna was a party to an unfair debtor-creditor relationship. PR has not responded to my findings on s.75 CCA at all, so I do not think they are in dispute. But, for the avoidance of doubt, as I have no further representations on those provisional findings I see no reason to depart from them. So I will start by set out my findings on s.75 CCA, before considering the relationship between Novuna and Mrs T.

<u>s.75 CCA – the Supplier's alleged misrepresentations at the Time of Sale</u>

74. This part of the complaint was made for several reasons, namely:

- That FPOC Membership had a guaranteed end date, after which Mrs T would have no further legal liability to the Supplier arising out of membership. ("the First Misrepresentation")
- That FPOC Membership meant Mrs T was buying an interest in a specific parcel of "real property." ("the Second Misrepresentation")
- That FPOC Membership was an "investment". ("the Third Misrepresentation")
- That if Mrs T did not take out FPOC Membership "*[her] children would inherit the ongoing liability to pay management charges in respect of the Fractional Product until 2033.*" (the Fourth Misrepresentation)

75. On balance, I was not satisfied that any of these allegations led to a misrepresentation for which Novuna could be liable. I will explain my findings on each allegation in turn.

The First Misrepresentation

76. In the Letter of Complaint, PR referred to six representations that it said were untrue:

> *"Its [meaning the Fractional Ownership Scheme] has a fixed term"*
>
> *"There is a time limit on membership"*
>
> *"At the end of 17 years the property will be sold"*[5]
>
> *"17-year limit"*
>
> *"The property will be sold and you will get something back"*
>
> *"The advantage of a fixed period of ownership and not having to pass liability on to children"*

77. Explaining the effect of these phrases, PR said it was only the sales process that started after nineteen years, under which there was no guarantee the Property would be sold and Mrs T would have still been responsible for maintenance fees until the Property was finally sold. Further, PR alleged that the Supplier retained control of the sales process by being able to vote not to sell the Property, therefore obtaining ongoing maintenance fees.

78. The phrases set out above appeared in precisely that way in the Letter of Complaint. Listing a sequence of words or phrases was not, in my view, a helpful way of setting out the alleged misrepresentations as I simply did not know in what context Mrs T alleged these phrases were used. I also found it unlikely that Mrs T would have been able to remember a list of specific words and phrases used, even though the Letter of Complaint was only drafted a year after the sale, so again the lack of context around how Mrs T said she was told these things made it difficult to understand what she alleged she was told. I noted that her most recent statement touched on the First Misrepresentation at paragraph six, but it simply said that after nineteen years the property would be sold and the proceeds split amongst all fractional shareholders. On the face of it, those representations appeared to be a factual description of how the scheme worked – that after nineteen years, the Property was placed for sale and the proceeds divided amongst FPOC Members whose memberships were linked to that property.

79. I considered the documentation provided to Mrs T at the time of sale to see whether they help determine how the end of FPOC Membership was presented. She was provided with a ten-page document titled "*FRACTIONAL PROPERTY OWNERS CLUB INFORMATION STATEMENT*". This document contained information that the Supplier provided under its obligations in the Timeshare Regulations. On page three of the document it was written:

> *"Each Allocated Property is or will be legally owned or controlled by a UK company (Owning Company) which will be controlled either directly or indirectly by the Trustee, operating in accordance with the Deed of Trust…The Owning Company will retain*

[5] Although the alleged representations refer to seventeen years, other parts of the Letter of Complaint referred to nineteen years. Having considered everything, I did not think anything turns on this discrepancy.

such Allocated Properly until the automatic sale date in 19 years time or such later date as is specified in the Rules or the Fractional Rights Certificate.

The Trustee will manage the sales process of the Allocated Property and following a sale distribute the net proceeds among the Owners and the Vendor. Each Owner will be entitled to a distribution as set out on the Fractional Rights Certificate for each Weekly Period held under a Fractional Rights Certificate subject to being in good standing and up to date with Management Charges. The Vendor is entitled to use up to 4 weeks for maintenance (and Week 53 when it occurs) during the term of the Project and a similar fractional share for anything else held as if an Owner for any other Fractional Rights which are unsold or have been acquired by the Vendor. The Rules provide for mechanisms to postpone the sale date in certain circumstances…

…

Exact period within which the right which is the subject of the contract may be exercised and, if necessary, its duration:

…

Your Fractional Rights will start on the date shown on the Purchase Agreement and expires automatically when the Properties are sold."

80. I thought this document made it sufficiently clear that the membership ended when the Property was sold and not on the date the Property was put up for sale, however I could not be certain that Mrs T read the Information Statement before she took out FPOC Membership. So I also considered the sales presentation materials that the Supplier used around the time of Mrs T's sale to see if they set out anything differently, meaning that Mrs T might have been told that there was a guaranteed end date to FPOC Membership.

81. I saw a set of slides that were used around two years before Mrs T's sale. In those slides, it was said:

    "19 years later the property is sold. You receive your share of the sale of the property"

82. Although I could not say Mrs T would have been shown that specific slide, I thought I was likely she would have been shown something similar, as that was how similar memberships had been presented previously by the Supplier. Given that, I thought it likely Mrs T was told something along the lines that after a set period of time the Property would be sold and then the proceeds divided amongst the members. I could not see any evidence that the Supplier routinely told its prospective customers that there was a guaranteed end date to membership when liabilities would cease.

83. It seemed to me that the statements set out in the Letter of Complaint were simply factual descriptions of how FPOC Membership worked and I could not see how they could be misrepresentations, given that they appeared to be true. PR said that there was no guarantee that the Property would be sold and maintenance fees would continue to be charged. But, having considered everything, I did not find that the Supplier made a representation that there would be a guaranteed date of sale. I did not think saying that there was a guaranteed end date to FPOC Membership would be consistent with the information set out in the Information Statement and I had not seen anything to suggest the Supplier would have made a different representation orally. I also noted that it is common sense that there cannot be a guarantee that a specific property could be sold on a specific day, some nineteen years in the future, so I thought it inherently unlikely such a representation was made. On balance, I simply did not think it was likely Mrs T was told her membership was guaranteed to end on the date the Property was placed for sale as set out in the membership documentation. Rather I thought it was more likely the

Supplier was either silent on the matter or told her how the sales process worked in practice – namely that after a set period, the Property was placed for sale and the membership ended when it was sold.

84. PR also said that the FPOC Membership Rules ("the Rules") meant that the Supplier had an interest in not selling the Property as it could then continue to charge maintenance fees on the unsold property. However, I disagreed that was the right reading of the Rules. Part 9 of the Rules dealt with how the Property would be sold. A key provision is Rule 9.1:

> *"Each Allocated Property shall be sold on its respective Sale Date[6] which occurs on the date specified in the Fractional Rights Certificate for the Allocated Property, save that the Vendor may, in its absolute discretion, postpone the date of sale from the date proposed as the Sale Date for up to two years. By unanimous consent of the Owners in that Allocated Property given in writing, the sale may be postponed for such period as is agreed in such consent."*

85. In my PD, I said that PR was right that, until the Property is sold, members have to pay ongoing maintenance fees, however I could not see that Mrs T alleged in either the statements referred to in the Letter of Complaint, nor in her witness statement, that she was told on a set future date her liabilities to the Supplier to pay maintenance fees would end. So I could not say this was misrepresented to her.

86. Finally, I could not see that Mrs T alleged that she was told anything about the Supplier being able to stop or delay the sale, so I could not see that this was misrepresented to her either. But, in any event, I thought PR's reading of the Rules was wrong.[7] I said that because, although there is a clause that if the Property is not sold after eighteen months, a meeting would be called where "*all Owners shall decide whether or not to continue using the Property and under what terms*", Rule 9.1 makes clear that any decision to postpone the sale must be unanimous. So I could not see how the Supplier could unilaterally postpone a sale indefinitely. I noted that the Vendor (a company associated with the Supplier) could postpone a sale for up to two years, but again, I failed to see how the inclusion of this term meant Mrs T was misled about the sale, based on her own recollections.

<u>The Second Misrepresentation</u>

87. In the Letter of Complaint, PR said Mrs T was told:

> *"You will have share in a specific unit in a specific resort"*
>
> *"Attached to a property"*

88. This is not expanded on in Mrs T's recent witness statement, but PR argued that such phrases were untrue as she did not acquire an interest in a specific property. However, I said that telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Further, I could not see that Mrs T was told anything other than at the end of his membership term, the Property would be placed on the market and sold, after which she would get a proportion of the sale proceeds. So I thought Mrs T did buy an 'interest in real property', namely an interest in the sale proceeds. I simply could not see she was misled about this.

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[6] This is defined as the date on which the sale process for an Allocated Property begins.

[7] This also meant I did not make any finding as to whether these terms breached the UTCCRs or the CPUTRs, as I disagreed with PR's understanding of these terms.

The Third Representation

89. In the Letter of Complaint, PR said Mrs T was told:

> *"This is a good investment"*
>
> *"Having points for holidays was a good investment"*

90. Again, I did not know what the context of these words or phrases being used were, and again I found it unlikely Mrs T could remember the exact words used at the Time of Sale. Further, beyond listing the two phrases, PR did not expand this further to say why Mrs T thought being told this was an investment was untrue. However, Mrs T did expand on this in her witness statement as set out above.

91. FPOC Membership clearly had an investment element to it (the interest in the sale proceeds of the Property). It followed that if Mrs T was told that FPOC Membership was an investment – and I made no finding on that in this section of my decision – that would not have been untrue, so it could not have amounted to a misrepresentation.

The Fourth Representation

92. PR did not set out much detail of this alleged representation in the Letter of Complaint. For completeness, this is the allegation in full:

> *"That if our clients did not enter into the Agreement their children would inherit the ongoing liability to pay management charges in respect of the Fractional Product until 2033.*
>
> *This statement was made using [the words set out above and the following words or phrases on their own or in combination:*
>
> *This statement was untrue in that as a matter of law our clients were free to leave their liability in respect of the Full Points Membership (if any) to whomsoever the they wished under their testamentary instrument and even if the disposition if their estates was such as to pass liabilities under the Points Membership onto their children, their children would have been entitled to disclaim such liabilities."*

93. Having read this allegation, I did not understand what is being alleged. I invited PR to explain in more detail what it is that Mrs T said went wrong in response to my PD, but PR did not respond to this point. I said that, based on my reading of the allegation, Mrs T did not have another membership with any ongoing liability to pay management fees before she took out FPOC Membership. So I could not see how taking out FPOC Membership affected any existing liability she had to the Supplier as she did not have any. It follows, I did not think this alleged representation could have been made or, if it was, that Mrs T could have relied upon it when taking out FPOC Membership.

Other representations

94. Having considered the Letter of Complaint, I thought there were two other matters that were not set out explicitly as alleged misrepresentations, but they were allegations that the Supplier told Mrs T something that turned out not to be true, so I considered them alongside the four particularised misrepresentations.

95. First, PR said in the Letter of Complaint that Mrs T had been told FPOC Membership was not a timeshare, but this was incorrect. I noted this allegation was not repeated in her witness statement.

96. In Mrs T's signed Member's Declaration, which ran for one page, there was an initial next to the statement:

> "*15. We have received a copy of our Agreement together with the notices and Information Statement (which we have had adequate time to review before signing) required under* ***EU Timeshare Directive*** *2008/122/EC.*" (emphasis my own)

97. On the face of the Credit Agreement, it was said:

> "***Your Rights***
>
> *…This agreement finances the supply of specific timeshare rights…"*

98. I accepted that Mrs T may not have read these documents or necessarily appreciated their contents, but what was telling was that I could not see the Supplier was actively trying to conceal that FPOC Membership was a timeshare (I was satisfied it met the definition of a 'timeshare contract' as set out in the Timeshare Regulations). But even if I accepted that Mrs T was told by the Supplier that this was not a timeshare, I did not think such a statement induced her to take out the agreement. I said that because this was not something Mrs T mentioned in her witness statement, which was something I would have expected her to do if it had been important to her. Further, I could not see that she was misled about the nature of FPOC Membership or how it worked in practice, so I failed to see how the legal description of the membership would have made a difference as I thought she broadly understood what she was buying.

99. The second potential misrepresentation was that the Supplier had holiday accommodation available in a specific location in the USA. Again, this was something mentioned in the Letter of Complaint, but not Mrs T's witness statement, so it was not apparent that it was important to her or that it led to her taking out FPOC Membership. However, based on what I had seen, I did not find that such a representation was made. The Letter of Complaint said that Mrs T was aware at the time of the complaint that she would have to go through a third-party exchange company to get accommodation in the USA. But it was not clear to me whether Mrs T alleged that during the sale she was told that the Supplier itself had accommodation or that it could arrange accommodation there through the third party. Further, I thought it inherently unlikely that the Supplier would have said it had accommodation at a destination when it did not, as that was something easily verified by looking at the information available at the Time of Sale of where it had resorts. On balance, I did not find this representation was made.

100. For these reasons, therefore, I did not think Novuna was liable to pay Mrs T any compensation for the alleged misrepresentations of the Supplier. And with that being the case, I did not think Novuna acted unfairly or unreasonably when it dealt with the s.75 CCA claim in question.

101. Having reconsidered the evidence and in light of PR not making any submissions on these issues, I do not depart from my provisional findings on Mrs T's complaint about Novuna's assessment of its liability under s.75 CCA.

<u>s.140A CCA – did Novuna participate in an unfair debtor-creditor relationship?</u>

102. I have explained why I am not persuaded that the contract entered into by Mrs T was misrepresented by the Supplier in a way that makes for a successful claim under s.75 CCA. But PR also alleged that the credit relationship between Novuna and Mrs T was unfair under s.140A CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale. In my PD, I explained why I disagreed with PR.

103. After setting out the law, I explained that I had considered the entirety of the credit relationship between Novuna and Mrs T along with all of the circumstances of the complaint. Having done so, I did not think the credit relationship between them was likely to have been rendered unfair for the purposes of s.140A CCA. When coming to that conclusion, and in carrying out my analysis, I looked at all the evidence provided to me from both parties, including the Supplier's sales process at the Time of Sale. I then considered the impact of that on the fairness of the credit relationship between Novuna and Mrs T.

The Supplier's sales & marketing practices at the Time of Sale

104. PR, on behalf of Mrs T, argued for a number of reasons why the relationship between Novuna and Mrs T was unfair as defined by s.140A CCA, including that there was a pressured sale by the Supplier.

105. PR pointed to the CPUTR, which applied to Mrs T's sale. Those regulations prohibited specified unfair commercial practices, which included aggressive commercial practices (Reg.7). In short, a commercial practice was aggressive if it significantly impaired (or was likely to significantly impair) an average consumer's freedom of choice or conduct in relation to a product through the use of harassment, coercion or undue influence and caused them to take a transactional decision they otherwise would not have taken. As noted above, to cause an unfair debtor-creditor relationship, there need not be a breach of a specific regulation, so it may be that a pressured sale that did not go so far as to breach this regulation could still give rise to an unfair relationship.

106. In my PD, I noted that in both Mrs T's witness statement and PR's Letter of Complaint, the sales environment was described as highly pressured and long lasting, in an uncomfortable and warm room. Mrs T said she felt pressured to take out FPOC Membership and was persuaded to stay in the sales room when her husband complained of a bad back. I thought it was possible that these allegations could amount to a breach of the CPUTRs and/or a pressured sale. But I did not make any formal finding on that point for the reasons I explained.

107. I said that finding that pressure was applied during a sale is not the same as finding that there was an unfair debtor-creditor relationship caused by that pressure. So I thought about whether the alleged level of pressure applied was such to cause Mrs T to buy something she otherwise would not have done or was such to have caused an unfair debtor-creditor relationship.

108. In PR's Letter of Complaint, it was said that Mrs T was shown accommodation that was '*top notch*', that was '*well appointed*' and '*fully equipped*'. Further, it was said that Mrs T become more open to the idea of FPOC Membership once she heard more about it as it was somewhere she could holiday with family and other incentives to purchase were set out. And, in Mrs T's witness statement, she said "*based on what we had been told and shown, we agreed to purchase the fractional product"*. So I said there were significant reasons why Mrs T was interested in FPOC Membership, other than the level of pressure applied by the Supplier.

109. It seemed to me that Mrs T was interested in taking holidays with the Supplier. Further, Mrs T was given a fourteen-day cooling off period and she had not provided any explanation for why she did not cancel FPOC Membership during that time. So, even if I were to find the Supplier applied pressure in the way Mrs T alleged (and I made no such finding), I did not think that was so strong to have caused her to take out a membership she otherwise would not have done. Nor did I find that the level of pressure caused an unfairness in the credit relationship between Novuna and Mrs T that warranted relief.

110. PR responded to my findings. It said:

> *"Again, this demonstrates a lack of understanding as to how timeshare sales operate. Once signed up, a consumer will be pressured on all holidays to "upgrade". To say the environment was "relaxed" is quite an assumption, considering the Ombudsman was not present and that the average member of the public will tell you that timeshare sales presentation are intense. The client has confirmed he was pressured to attend presentations that lasted a whole day to persuade him to part with more money for a "better" time share product. The Supplier does not appear to have denied this as being the case.*
>
> *In addition, the all-day presentation was described as an "update". If there was no pressure, why was it not described to the consumers as an "all-day presentation"?"*

111. However, this is not what I said in my PD. I did not say the sales environment was relaxed, nor did I make a finding that I disbelieved Mrs T when she said the sale was intense or that there was no pressure. I understand that Mrs T says the sale was pressured and she was persuaded to stay in the sale even when her husband was unwell. But for the reasons set out above, I found that there were other reasons, in addition to any pressure, that Mrs T chose to take out FPOC Membership. And I did not find that the level of pressure itself led to an unfair debtor-creditor relationship between Mrs T and Novuna. Further, the submissions made by PR on Mrs T's behalf do not appear to relate to her sale. In addition to referring to her with a male pronoun, PR has said she was pressured into upgrading her membership, but she was not an existing timeshare member at the time she took out FPOC Membership, so she was not upgrading anything. Having considered what PR has said on this issue, I have not changed my mind from my provisional findings.

<u>Was FPOC Membership marketed and sold at the Time of Sale as an investment in breach of Reg.14(3) of the Timeshare Regulations?</u>

112. In my PD, I then went on to consider what appeared to me to be the central issue in this complaint – whether FPOC Membership had been sold to Mrs T in breach of Reg.14(3) of the Timeshare Regulations.

113. PR asked me to consider whether Mrs T's sale of FPOC Membership breached the Timeshare Regulations and RDO Code by being sold to her as an investment. Given that request, I took it to mean that PR were alleging that the sale breached Reg.14(3) of the Timeshare Regulations, thus leading to an unfair debtor-creditor relationship. Having reconsidered everything, those are still my conclusions.

114. I said that it was not in dispute that FPOC Membership met the definition of a "timeshare contract" for the purposes of the Timeshare Regulations, and therefore Reg.14(3) applied to the sale. PR said that the Supplier breached Reg.14(3) by selling FPOC Membership to Mrs T as an investment.

115. The term "investment" is not defined in the Timeshare Regulations. In *Shawbrook & BPF v. FOS*, the parties agreed that, 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*" (para 56). I said I would use the same definition.

116. When considering whether the sale breached Reg.14(3), it is important to consider the way in which the FPOC Membership was positioned by the Supplier when it was sold. As set out above, the FPOC Membership had an investment element to it – the interest in the sale proceeds of the Property that offered the potential of a financial gain. I explained that merely selling such a membership did not breach the prohibition in Reg.14(3). Rather, that provision was only breached if the Supplier sold or marketed FPOC Membership as an investment. In other words, I thought that for me to say there was a breach of Reg.14(3), I would need to be satisfied that it was more likely than not that the Supplier used the prospect of a financial gain as a way to sell or market FPOC Membership to Mrs T, given the facts and circumstances of *this* complaint. Therefore, the Timeshare Regulations did not ban the sale of products such as FPOC Membership. They just regulated how such products were marketed and sold.

117. In response to my PD, PR said:

> *"Our view is that the word "investment" incorporates other advantages of a product, such as a shorter term, more points, etc.*
>
> *Where has the definition of "investment" been taken from?*
>
> *The same is also true of the use of the term "marketed".*
>
> *What definition has the Ombudsman used? No evidence is provided.*
>
> *Our view is that "marketed" should include anything said or used by the sales staff.*
>
> *Does the Ombudsman agree?*
>
> *If so, given that it has been agreed that the FPOC product was an "investment", as soon as the product is described, it must be "marketed" as an "investment" mustn't it?"*

118. But, as set out above, I explained that I took the definition of "investment" from the judgment in *Shawbrook & BPF v. FOS* and I had set out what I had in mind when considering whether FPOC Membership was marketed or sold as an investment.

119. It follows from this that I disagree that merely describing the features of FPOC Membership to Mrs T inevitably led to a breach of Reg.14(3) of the Timeshare Regulations, rather it was only a breach if the Supplier told her or led her to believe that FPOC Membership offered her the prospect of a financial gain.

120. Here, when determining what happened, I have to make findings on the balance of probabilities. In doing so, I have to consider what both parties said happened and weigh that up against the other available evidence. So the starting point is to consider what complaints were made and then consider the evidence to determine whether I find those complaints are made out.

121. When Mrs T first complained to Novuna, PR set out her concerns and problems she said there were with FPOC Membership. On page two of the Letter of Complaint, there was a section titled "*The circumstances in which our client entered into the Fractional*

Property Ownership Scheme". Set out in that section was a narrative description of the sale process, including the allegations of pressure and being shown the Supplier's sales material that enticed Mrs T into membership. In this section, PR did not allege that anything said about the investment potential of FPOC Membership was something that caused her to take it out.

122. PR did set out at page eight of the Letter of Complaint some statements Mrs T said were made by the Supplier's sales agents, which I have already considered above. In my PD, I said that of those statements, I thought that "*at the end of 17 years the property will be sold*" and "*the property will be sold and you will get something back*" were factual statements setting out how FPOC Membership worked, and did not state that Mrs T was told she would make a profit or other financial gain when the Property was sold and the proceeds of sale distributed amongst the relevant FPOC Members.

123. I did note that PR said Mrs T was told *"this is a good investment"* and *"having points for holidays was a good investment"*, but it was not set out in any wider context why Mrs T was led to believe that was the case. And it appeared to me that the second statement was not an allegation that Mrs T would make a profit or financial gain from FPOC Membership. I also looked at Mrs T's witness statement where she set out her recollections of the sale. Again, I thought that much of what was said was a factual description of how FPOC Membership worked in practice, but at paragraphs six and seven, she said:

> "*During a lengthy sales presentation, we were told that Fractional Property Ownership involved buying shares in a property for 19 years. It was explained that, at the end of the 19-year period, the property would be sold, and the proceeds would be split between all the fractional shareholders.*
>
> *We were told that we would be likely to get back all of the money we were investing, when the property was sold."*

I could not see that this goes beyond a factual description of how FPOC Membership worked and there was no allegation that Mrs T expected to make a financial gain or profit from FPOC Membership. But she had said she would likely get back the money she was 'investing' and that, coupled with savings on the holidays taken over the duration of membership, could be seen as a possible financial gain. So in my PD I considered that further.

124. I said that I was conscious that Mrs T's only written testimony was given to us after the outcome of the Judicial Review in February 2024, where it was held that in some circumstances a breach of Reg.14(3) could lead to an unfair debtor-creditor relationship. That statement was drafted around eight years after the Time of Sale, so I found it hard to place significant weight on Mrs T's recollections given that memories naturally fade over the passage of time. Further, there seemed to me to be a very real risk that Mrs T's recollections were now coloured by the Judicial Review judgment. In saying that, I was conscious of what was said by Mrs Justice Thornton in the judgment in *Smith v. Secretary of State for Transport* [2020] EWHC 1954 (QB), where it was held, at para 40:

> *"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 they 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."

So I thought more widely about what Mrs T said when the complaint was first made, that being closer in time to the Time of Sale.

125. I noted that at the time PR referred Mrs T's complaint to our service, that it also sent a letter to our then Chief Ombudsman. In that letter it set out that it thought there was a pattern of sales issues it had seen over a number of complaints. In particular it said:

"The sale of [FPOC Membership] is characterised by a consistent pattern of statements made by [the Supplier]'s sales representatives to this effect:

…

(2) That [FPOC Membership] represents the opportunity for a return or even profit and that the purchase represents some sort or "investment" or as likely to allow the client to recoup money spent on the points based scheme. Statements used to suggest this include statements to the effect that the scheme represents a purchase of "an investment" in "bricks and mortar" and that "as we all know property always goes up" and that there is considerable investor interest in the resort or resorts at which the property referred to is situated, in short, great play is made of a supposedly buoyant property market at that resort."

126. But despite PR alleging that this was a common problem it had identified, it did not raise any specific allegation in Mrs T's case that the Supplier had positioned the fractional element of FPOC Membership as a way of generating a profit. It was only after the judgment in the Judicial Review was handed down, that PR suggested FPOC Membership had been sold to Mrs T in breach of the Timeshare Regulations. I found it difficult to understand why, if FPOC Membership had been sold as an investment and PR was aware that was a common problem in the way the Supplier sold memberships, this was not set out in any detail in Mrs T's original Letter of Complaint.

127. Instead, I thought it was specifically set out in the Letter of Complaint why Mrs T went on to buy FPOC Membership. Those reasons included the quality of the accommodation she was shown, because it was somewhere she could take her family on holiday, because she could book holidays in the destination she wanted and the alleged pressured sale. But tellingly in my view, it was not said Mrs T took out FPOC Membership to make a profit or financial gain. On balance, I thought that Mrs T's evidence described being told by the Supplier that she would receive the net sale proceeds of her share in the Property once it was sold, rather than suggesting that the Supplier led her to believe FPOC Membership would lead to a financial gain (i.e. a profit).

128. I looked at the FPOC Membership agreement and other documents from the Time of Sale, but I did not think they are conclusive on whether FPOC Membership was to be seen as an investment. For example, the Information Statement used in Mrs T's sale said:

"The purchase of Fractional Rights is for the primary purpose of holidays and is neither specifically for direct purposes of a trade in nor as an investment in real estate."

So I thought the Supplier did attempt to say that FPOC Membership was not an investment. But I thought that had to be read in conjunction with the section of the same document titled "*Investment advice*", where the Supplier explained that neither it nor the

sales staff were licenced to provide investment advice and customers were advised to get their own investment advice. I accepted that the disclaimer was aimed at ensuring that prospective members did not take and rely on what they were told by the Supplier as investment advice or an assurance as to the future value of the Property. However, having said that, the disclaimer suggested that (1) the "Vendor's" and "Manager's" experience as investors had fed into the information provided during the sales presentations and (2) prospective members might be wise to consult an investment advisor. And, in my view, both of those suggestions, particularly the latter, ran the risk of giving a prospective FPOC member the impression that there was investment potential to what was being sold.

129. Taken as a whole, in my view the documentation Mrs T was given was ambiguous as to whether FPOC Membership was to be seen as an investment. I said that fit with the inherent nature of FPOC Membership, having an investment element contained within. In my view, the documentation used at the Time of Sale was not sufficient to conclude, one way or the other, whether the sale breached Reg.14(3).

130. I also considered whether the Supplier could have breached Reg.14(3) orally during Mrs T's sale. I was aware that the Supplier used slides during the sales process around the time of Mrs T's sale, and it was said in the Letter of Complaint that Mrs T was shown a slideshow by the Supplier. However, in neither the Letter of Complaint nor the witness statement did Mrs T point to any slides or other sales aids that she recalled gave her the impression that FPOC Membership was an investment. Having looked at slides that the Supplier used when selling memberships like Mrs T's, I thought they showed a deliberate choice to highlight the potential monetary return available from fractional membership when selling it, leaving open the real possibility that fractional memberships were presented to customers as investments.

131. However, in coming to a determination on whether Mrs T's actual sale breached Reg.14(3), I had to weigh up all of the evidence, including both what I knew about how the Supplier sold timeshares at the Time of Sale, the documentary evidence available and Mrs T's own evidence. I said that the assessment of that evidence was something I must do in the round, so considering what Mrs T remembered of the sale and then comparing it with the available documentary evidence. Having done so, I was not persuaded, on the balance of probabilities, that the Supplier sold FPOC Membership to Mrs T as an investment. It followed that, I did not think that there was a breach of Reg.14(3) that could have led to an unfair debtor-creditor relationship. I explained though, that if I was wrong about that and the Supplier did breach Reg.14(3) in the way it sold Mrs T FPOC Membership, for the reasons I went on to explain, I did not think that made a difference to the outcome of this complaint.

132. PR did not agree with my provisional findings. It argued that I had, in an earlier decision PR referred to as the Second Precedent, found that a membership similar to Mrs T's FPOC Membership had been presented as an investment due to the use of a particular set of slides. Further, that it was immaterial whether a consumer alleged that they had seen that set of slides as it had been said that the Supplier had, in that earlier decision, accepted that those slides would have been used in sales at the time.

133. However, as noted above, the decision an ombudsman reaches in one complaint does not bind another ombudsman in a different complaint. So, just because I found the Supplier had breached Reg.14(3) in the sale of a timeshare similar to Mrs T's, it does not follow I must make the same finding again in another complaint. Rather, my role is to make a finding based on the evidence in Mrs T's complaint and that evaluation will be fact-specific to this complaint.

134. In one of the decisions that was the subject of *Shawbrook & BPF v. FOS* (the one PR referred to as the Second Precedent), I considered a set of slides that were used in that sale. I found that those slides had the word 'investment' within them and, in the circumstances of that complaint, all of the evidence persuaded me that there was a breach of Reg.14(3). However, in this complaint the evidence is different. First, I do not think the Supplier used the same set of slides when selling FPOC Membership to Mrs T. That is because the slides I referred to in that other decision referred to a product the Supplier sold that it called 'FPOC1', whereas Mrs T bought a product referred to as 'FPOC2'. Secondly, Mrs T has not referred to being shown any slides that included the word 'investment' in them at the Time of Sale.

135. PR has also pointed to a training manual from the Supplier that it says makes reference to a '*return*', indicating that memberships were sold as investments – PR's full submission reads:

> *"Moreover, the guidance provided to [the Supplier's] sales staff (a copy of which is attached) makes reference to a "return". The suggestion that this was not the primary driver for any sale of a fractional product is, quite frankly, perverse."*

136. PR did not actually provide a copy of any guidance along with its submissions, but I do not agree the inclusion of the word '*return'*, in isolation, is suggestive of memberships being sold as investments.

137. After PR first responded to my PD, I sent it three documents and asked for any further comments on them before I issued my final decision. Those documents were:

- a document called "*2011 Spain FPOC1*", which was a set of slides used by the Supplier when marking FPOC1 and which were considered in the decision that was subject of *Shawbrook & BPF v. FOS*. As noted above, these slides were not used in Mrs T's sale.
- A document titled "*FPOC ESA 2014(1)*", which was a set of slides that were used to sell memberships similar to Mrs T's (FPOC2) and they were in use from around two years before her sale. These were the slides that I have seen that were used closest in time to Mrs T's sale to sell the same product.
- A document called "*FPOC2 Training Handout*", which was guidance the Supplier gave to its sales staff on how to sell FPOC2 products. I explained that I was not aware of precisely when this was in use.

138. PR provided ten-pages of submissions in response that say, in summary, that the Supplier would have sold FPOC Membership to Mrs T as an investment.[8] PR highlighted parts of the *FPOC2 Training Handout* that it said encouraged customers to consider the difference between renting something and buying it and the ides of building equity in a property. It said that the way FPOC Membership was marketed was positioned as a way of building wealth over time. After analysing a number of slides, PR makes the point that:

> *"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, we think its conduct was likely to have fallen foul of the prohibition against marketing or selling the product as an investment."*

139. In conclusion, PR said:

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[8] These submissions have been taken, almost word for word, from a decision issued by a different ombudsman.

"We think the Supplier's sales representatives were encouraged to make prospective Fractional Club members consider the advantages of owning something and view membership as an opportunity to build equity in an allocated property rather than simply paying for holidays in the usual way. That was likely to have been reinforced throughout the Supplier's sales presentations by the use of phrases such as "bricks and mortar" and notions that prospective members were building equity in something tangible that could make them some money at the end and, as the Fractional Club Training Manual suggests, that much would have been made of the possibility of prospective members maximising their returns (e.g., by pointing out that one of the major benefits of a 19-year membership term was that it was an optimum period of time to see out peaks and troughs in the market), we think the language used during the Supplier's sales presentations was likely to have been consistent with the idea that Fractional Club membership was an investment.

Overall, therefore, as the slides referred to above seem to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the Fractional Club to prospective members. They indicate that the Supplier's sales representative was likely to have led our clients to believe that membership of the Fractional Club was an investment that may lead to a financial gain (i.e., a profit) in the future. With that being the case, we don't find them either implausible or hard to believe when they say they were told they could get money back and that it was like owning a house rather than renting (which appears to be a direct reference to some of the renting vs owning aspects of the sales materials detailed above). And, that it was a good investment for their future, and they would make a profit on the sale. On the contrary, in the absence of evidence to persuade you otherwise, we think that's likely to be what our clients were led by the Supplier to believe at the relevant time. And for that reason, we think the Supplier breached Regulation 14(3) of the Timeshare Regulations.[9]"

140. I cannot be sure that Mrs T was shown slides as set out in the *FPOC ESA 2014(1)* or the *FPOC2 Training Handout*, as it is not clear that these were being used at the Time of Sale. However, Mrs T recalls being shown some slides and, as these two documents show how memberships similar to Mrs T's were sold at a similar time to the Time of Sale, I think it is likely these documents set out how the Supplier's sales staff were trained to sell FPOC Memberships and, therefore, are likely to show how it was positioned to Mrs T.

141. I noted in my PD, I think it is likely that the Supplier deliberately chose to highlight the nature of FPOC Membership, including the monetary returns available at the end of the membership term, when selling it. It means that, as PR noted in the first paragraph of its conclusions I set out above, the language used in Mrs T's sale was likely consistent with the idea that FPOC Membership was an investment. But using language consistent with that is not the same as concluding that the Supplier marketed or sold FPOC Membership

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[9] I do not think much of this paragraph applies to Mrs T's complaint. For example, she has not alleged that she was told that FPOC Membership was like owning a house. Instead, it appears to relate a different consumer's allegations. Similarly, PR goes on to say:

> *"From the information available, our clients had already been members with the Supplier for many years. They then purchased the Fractional Club membership and the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with their purchase. That doesn't mean they weren't interested in holidays. Their own testimony demonstrates that they quite clearly were."*

But Mrs T had not held a membership with the Supplier prior to taking out FPOC Membership.

to Mrs T *as an* investment, or that the Supplier used the prospect of a financial gain or profit (as opposed to simply highlighting the potential to get some money back at the end of membership) as a way to market or sell to her in this case. In other words, the documents referred to are evidence that could be used to support an allegation that a sale breached Reg.14(3) and are part of the factual matrix that includes all of the other documentation from the Time of Sale and Mrs T's own memories.

142. As noted in my PD, the assessment of the evidence is something I must do in the round, so considering what Mrs T remembered of the sale and then comparing it with the available documentary evidence. And, as set out above, I did not find that Mrs T complained about the Supplier selling or marketing FPOC Membership to her as an investment when she first complained and, had this been something that had happened to her, that was something I would have expected to have been set out in detail in the Letter of Complaint. Further, even with Mrs T's more recent Witness Statement, I do not have particularly detailed memories from her as to why she believes FPOC Membership was sold to her as an investment. So when I consider all of the facts in this case, even though I accept that it is likely the proceeds of the sale of the Property were likely to be highlighted to Mrs T, I do not find they were put in such a way that positioned FPOC Membership to her as an investment, nor that this particular sale breached Reg.14(3) of the Timeshare Regulations.

143. However, as I said in my PD, if I am wrong about that I do not think it makes a difference to the outcome in Mrs T's complaint as, even if the sale did breach Reg.14(3), I do not think it led to an unfair debtor-creditor relationship that requires a remedy.

<u>If there was a breach of Regulation 14(3), was the credit relationship between Novuna and Mrs T rendered unfair?</u>

144. Even if the Supplier had breached Reg.14(3), that is not an end of the matter. In my PD, I set out the law on s.140A CCA and why, in my view, even if the sale in Mrs T's case had breached Reg.14(3), it did not automatically lead to an unfair debtor-creditor relationship that required a remedy, nor did it do so in this case. Having considered everything again, I have come to the same conclusion.

145. As noted above, to find there was an unfair debtor-creditor relationship that requires relief from the unfairness, it is relevant to consider whether the breach led the debtor to enter into the timeshare and/or the loan agreement. As I set out above, this accords with common sense: if events would have unfolded in the same way whether or not such a pre-contractual breach had occurred, it may be hard to attribute great importance to the breach when deciding whether an unfair debtor-creditor relationship ensued, or whether a remedy is appropriate.

146. Here, Mrs T simply did not allege in the Letter of Complaint that the Supplier sold FPOC Membership as a way to make a financial gain or profit, which is something I would have expected to have been included if it was important to her or caused her to enter into the timeshare and/or the loan agreement. But what was included in Mrs T's Letter of Complaint was a list of reasons she agreed to take out FPOC Membership, including the quality of the accommodation she was shown, because it was somewhere she could take her family on holiday, because she could book holidays in the destination she wanted and the alleged pressured sale. Given that Mrs T did not suggest FPOC Membership being sold or marketed as an investment was one of the reasons she chose to take it out, it follows, I cannot say that even if it was sold in that way, it had a causative effect on her decision to take it out. It follows, even if the alleged breach of Reg.14(3) was true, I cannot say it caused the debtor-creditor relationship to be unfair to her, nor that it was something that warranted relief in the circumstances of this case.

147. On balance, therefore, even if the Supplier had marketed or sold FPOC Membership as an investment in breach of Reg.14(3), I am not persuaded that Mrs T's decision to purchase it at the Time of Sale was motivated by the prospect of a financial gain (i.e. a profit). On the contrary, I think the evidence suggests there were other, specific reasons why Mrs T wanted to purchase FPOC Membership. It follows, I think she would have bought the FPOC Membership irrespective of whether there had been a breach of Reg.14(3). And for that reason, I do not think the credit relationship between Novuna and Mrs T was unfair to her even if the Supplier had breached Reg.14(3).

148. So, for this reason, given all the circumstances of this complaint, I am not persuaded, on the balance of probabilities, that (a) the Supplier did breach of Reg.14(3) in Mrs T's sale; or (b) if there was such a breach, that led to a credit relationship that was unfair to Mrs T for the purposes of s.140A CCA.

Other matters

149. In response to my PD, PR also raised a new argument, that the Supplier was not authorised or permitted to sell investments by the Office of Fair Trading ("OFT") or the FCA. PR has argued that meant the Supplier acted outside the scope of its regulation and has breached the general prohibition and, as such, the agreement is unenforceable – I have taken this to mean s.19 of the Financial Services and Markets Act 2000 ("FSMA"). PR also said this led to an unfair relationship between Mrs T and Novuna. Although Novuna has not had the opportunity to deal with this new allegation, I will deal with it briefly as I think it is misconceived.

150. Buying an interest in the sale proceeds of real property, such as was provided by Mrs T's FPOC Membership, would amount to a collective investment scheme ("CIS"), unless it fell into a particular, defined category of arrangement (s.235 FSMA). But Mrs T's FPOC Membership did not amount to a CIS as timeshare contracts were specifically excluded as being treated as a CIS (Paragraph 13 of the Schedule to The Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, as inserted by the Timeshare Regulations). So the regulation of Mrs T's FPOC Membership was governed by the Timeshare Regulations and not FSMA. It follows, the Supplier did not need the authorisation or permission PR argues it needed.[10]

Conclusion

151. In conclusion, therefore, given all of the facts and circumstances of this complaint, I do not think the credit relationship between Novuna and Mrs T was unfair to her for the purposes of s.140A CCA. And taking everything into account, I think it is fair and reasonable to reject this aspect of the complaint on that basis.

152. Having found that Novuna are not a party to an unfair debtor-creditor relationship as defined by s.140A CCA, nor that it was jointly liable for any misrepresentation under s.75 CCA, and seeing no other reason why it would be fair to direct Novuna to pay anything to Mrs T arising out of the sale of FPOC Membership, I do not uphold this complaint.

My final decision

153. I do not uphold Mrs T's complaint against Mitsubishi HC Capital UK PLC, trading as Novuna Personal Finance.

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[10] I am surprised this argument is being raised by PR as Mrs Justice Collins Rice dealt with this in her judgment in *Shawbrook & BPF v. FOS.*

154. Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs T to accept or reject my decision before 15 October 2024.

Mark Hutchings
Ombudsman