DRN-5022369

The complaint

1. Mrs R's complaint is, in essence, that Mitsubishi HC Capital UK Plc, trading as Novuna Consumer Finance ("Novuna") acted unfairly and unreasonably by (1) being party to an unfair credit relationship with her under s.140A of the Consumer Credit Act 1974 ("CCA") and (2) deciding against paying a claim under s.75 CCA.

What happened

2. Mrs R, in 2015, along with her husband, took out a timeshare membership from a timeshare provider ("the Supplier")[1]. This was membership of the Fractional Property Owners Club ("FPOC Membership"), which provided Mrs R with a number of 'points' every other 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 R had no preferential right to stay at the Property, but after seventeen 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.

3. Whilst Mrs R's FPOC Membership was in place, she had to pay maintenance fees every other year for the running of the membership programme, including the upkeep of the Property. In the first year, this charge was set at €995. The FPOC Membership cost £12,494 and Mrs R paid for this by taking a ten-year loan for the full purchase price from Novuna ("the Credit Agreement").[2] The loan was repaid in March 2017.

4. In April 2019, Mrs R made a claim to Novuna using the assistance of a professional representative ("PR"). This followed a letter sent the year before by PR to the Suppler purporting to terminate the timeshare membership. The claim was set out in detail in an eleven-page letter of claim.

5. In July 2019, Mrs R referred a complaint to the Financial Ombudsman Service that Novuna had not dealt with her claims fairly or reasonably (or at all). PR set out Mrs R's complaint again in a thirteen-page document titled 'Particulars of Complaint'.[3] It is not necessary to set out the full details of the complaint but, in summary, it was said:

    - Mrs R was raising complaints in relation to the FPOC Membership under ss.75 and 140A CCA.
    - PR set out a number of representations made about the FPOC Membership. In

[1] The timeshare benefits were supplied by a business linked to the Supplier. In this decision I have used the term "the Supplier" to refer to both the business that sold the timeshare and the business that provided the benefits as they were part of the same group of companies.
[2] As the Credit Agreement that forms the subject of this complaint is in Mrs R's name, only she is eligible to bring this complaint. So I will refer to her throughout, even though the membership was in the names of her and her husband.
[3] This document is broadly similar to the letter of claim and, in effect, referred to our service a complaint about the claims made to Novuna.

particular, Mrs R was told this was a great investment to make due to the large resale value of the Property and that it would appreciate in price. It was also alleged that Mrs R was told FPOC Membership was different to a timeshare as she would own a share in a property and would possess an interest in real estate.

- PR say that the representations made were false, in that there was no guarantee that Mrs R would receive a return on the sale of the Property or that the Property would ever be sold. It was also said that it was not made clear to Mrs R how much she was likely to receive on the sale of the Property, in particular it was not made clear that there would be significant deductions made before the remainder of the proceeds of sale were dissipated amongst the owners.
- The complaint made under s.75 CCA was that Novuna was jointly liable for the Supplier's misrepresentations made at the time of the sale, but it had failed to accept the claim made.
- The complaint made under s.140A CCA was that there was an unfair debtor-creditor relationship between Mrs R and Novuna arising out of sale. In particular, it was said that a provision in the FPOC Membership terms meant the Supplier could end
  Mrs R's membership on the failure to pay management fees. PR argued that this was an unfair term following the case of *Link Financial Ltd. v. Wilson* [2014] EWHC 252 (Ch).
- It was alleged that Novuna lent irresponsibly by not properly assessing Mrs R's ability to repay the loans.
- PR said Mrs R was entitled to a refund of what she had paid toward the loan and in maintenance fees, plus interest.

6. In addition, PR provided a witness statement Mrs R had signed that set out her memories of the sale.

7. After the complaint was received, Novuna provided its answer to the claim in December 2020. The response ran to nine pages and, in summary, Novuna did not accept any of the complaints made by Mrs R. With respect to the allegation that the FPOC Membership was sold as an investment, Novuna pointed to the documentation provided by the Supplier at the time of sale. It said that went some way to overcoming Mrs R's concerns as she signed a declaration saying she understood that FPOC Membership was "*for the primary purpose of holidays and is not specifically for direct purposes of trade in and that CLC makes no representation as to the future price or value of the Fraction.*"

8. One of our investigators considered the complaint and thought it was one that should be upheld. He thought it was more likely than not that the Supplier marketed and sold FPOC Membership as an investment, which was contrary to Reg.14(3) of The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Timeshare Regulations"). He then thought this rendered the relationship between Mrs R and Novuna unfair as a result.

9. Our investigator recommended that Novuna put Mrs R, so far as was possible, in the position she was before she took out the FPOC Membership and set out a method to work out compensation.

10. Novuna responded to say it agreed to uphold Mrs R's complaint, but then it wrote again to say it disagreed with our investigator. In summary, Novuna said:

    - The investigator was wrong to say the evidence from Mrs R was clear and consistent and he failed to address the contractual documentation, which

emphasised in express terms that FPOC Membership was not an investment.
- The Supplier had told Novuna that the witness statement supplied by Mrs R was on the same template as others provided by PR. The Supplier was of the view that it had been put together after being asked very leading questions by PR.
- Mrs R worked in a bank, so it was fair to assume she had a deeper understanding of financial matters than other consumers.
- The Supplier confirmed that, in its sales process, it did not say to Mrs R that FPOC Membership was an investment – the Supplier said the slides "ESA 4 2014" were used when presenting membership to Mrs R.
- The ombudsman considering this complaint should arrange an oral hearing, so Novuna had the opportunity to challenge Mrs R's evidence.
- The investigator had not properly applied the reasoning of Mrs Justice Collins Rice in 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*").
- The evidence did not suggest that any finding that the Supplier breached Reg.14(3) of the Timeshare Regulations was causative on Mrs R taking out FPOC Membership, or that there was an unfairness caused in any other way. This does not fit with the way a court would approach this issue, as set out in *Smith v. The Royal Bank of Scotland plc* [2023] UKSC 34 ("*Smith*"), at para 40.
- Although fractional timeshares may have investment elements, and whilst there might be a technical breach of Reg.14(3) of the Timeshare Regulations, it does not follow that unfairness arises as a result. But our investigator failed to say how the unfairness arose and why the remedy recommended was tailored to fit that unfairness.
- The evidence suggested that FPOC Membership did not cause an unfairness as the Supplier's evidence suggested that:

    - Mrs R and her husband wished to use the membership primarily for holidays;
    - Mrs R was aware of her right to cancel the agreement, but did not exercise it;
    - Mrs R upgraded her membership in 2016 to annual membership, but then cancelled the upgrade within fourteen days;
    - Mrs R used the membership up until 2016 when a holiday was cancelled due to family poor health, so she was able to make booking despite allegations otherwise; and,
    - the management fees have not increased severely as was suggested.

11. Having considered everything, I issued a provisional decision ("PD1") explaining that I planned to uphold Mrs R's complaint. I set out the evidence provided by both parties, as well as setting out the legal and regulatory background that applied to this complaint. Having considered everything, I was satisfied that the Supplier's particular sale to Mrs R breached Reg.14(3) of the Timeshare Regulations and FPOC Membership was sold to her as an investment. I then went on to say that, in this case, I thought that led to an unfair debtor-creditor relationship and I set out what I thought Novuna needed to do to put right that unfairness.

12. Novuna responded to say it disagreed with my PD1. With respect to the issue of Mrs R's evidence, it had the following to say:

    - There were several areas in which Mrs R's evidence was not reliable – allegations about the availability of holidays, lack of affordability checks, increases in

maintenance charges and a claim that she did not understand the concept of an APR on loans.

- These inconsistences were such that I ought to treat Mrs R's evidence with extreme caution.
- Mrs R's evidence indicated that she was interested in taking holidays with the Supplier and there was not enough for me to conclude that any breach of Reg.14(3) was causative of Mrs R entering into the loan and/or FPOC Membership.
- Mrs R's assertion that she would not have taken out FPOC Membership if she knew the "*true nature of the product*" was based on an incorrect understanding given to her by PR.
- PR had used questionnaires in other complaints that asked leading questions to its clients. This risked the evidence provided by Mrs R being influenced by the information gathering process of PR and it was suggested that the questionnaire provided issues or versions of events a client could adopt in their evidence.
- Novuna invited me to hold an oral hearing to address what it said were important gaps in the evidence.
- The sales process during Mrs R's purchase of FPOC Membership was not suggestive of it being sold or marketed as an investment.

13. PR provided a copy of the questionnaire Mrs R completed prior to her witness statement being prepared, which was shared with Novuna. The questionnaire was completed on 21 July 2018, which was nine months before her witness statement was signed.

14. In response, Novuna supplied two witness statements drafted by PR for other clients. It said that one witness statement appeared to be drafted on a template basis and it shared some similarities in the language used in Mrs R's statement. Novuna also pointed out where words suggested by PR in the questionnaire she completed, such as 'pushy', appeared in her subsequent witness statement. In conclusion, Novuna said that the use of templated witness statements and questionnaires was not, itself, a problem. But it was concerned that such a process lent itself to a consumer being led to provide information that would support a successful complaint, which ran the risk of the evidence being unreliable.

15. I spoke to Mrs R in June 2024 so that I could hear directly from her as to her memories of, amongst other things, how FPOC Membership was sold to her and why she chose to take it out. I shared a copy of the call recording with both Novuna and PR and invited both parties to provide further submissions on the contents of the call.

16. PR said, amongst other things, that notwithstanding Mrs R saying that the events discussed happened a long time ago, she was credible and consistent in saying that she was told she was investing in property with a future financial return. It was argued that nothing said in the call undermined the evidence that had been given before in writing.

17. PR also made submissions on the status of the entity that it said brokered Mrs R's loan with Novuna. PR said that entity was not authorised to do so, breaching s.19 of the Financial Services and Markets Act 2000 and entitling Mrs R to recover what was paid under the loan pursuant to s.27 of that Act.[4]

[4] This is a new complaint that Novuna has not had the opportunity to consider, so I will not comment further on it in this decision.

18. Novuna sent in its own submissions on what Mrs R had said. It said that Mrs R did not indicate what sales material was shown to her that caused her to think FPOC Membership was an investment. She was not clear about the content of any sales presentation nor did she feel the need to ask more questions about it. And, in Novuna's view, her recollections lacked context in relation to what was said by whom and why those conversations led her to believe FPOC Membership was an investment. Novuna pointed out that, at points in the call, Mrs R said she could not remember things, such as when I asked her if she was told there would be a guaranteed return.

19. When weighing up Mrs R's evidence, Novuna pointed out that there were parts of the contractual documentation that clearly stated FPOC Membership was not a monetary investment. Further, Mrs R had initialed next to each point of the member's declaration, which shows she was taken through the documents on the day, which was contrary to what she said on the call and in her witness statement.

20. Novuna pointed out that when I asked Mrs R why the word 'profit' appeared in the witness statement, but not the questionnaire, she said that after she contacted her solicitors she completed the questionnaire. This was then turned into a witness statement on her behalf, the contents of which were then confirmed in a telephone call. Novuna suggested that this raised doubts on the accuracy of the claims made and that her incorrect understanding of FPOC Membership was formed after she consulted her solicitors. It was argued that, had Mrs R's primary motivation been to buy FPOC Membership as an investment, she would have remembered specifics about the sale and what she was told about the investment. Finally, Novuna said it no longer sought an oral hearing in this complaint.

21. As the parties did not agree with my PD1, I decided to issue a second provisional decision ("PD2"), setting out my further findings on Mrs R's complaint in light of the new evidence and arguments. In summary, I did not change my mind from what I said in PD1 and I set out what I proposed to direct Novuna to do to resolve Mrs R's complaint. I have included the relevant parts of PD2 here.

My second provisional decision

What I have provisionally decided – and why

22. I have again considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

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

24. I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I recognise that there are a number of aspects to Mrs R's complaint, it is not necessary to make formal findings on all of them because, for reasons I will go on to explain, I think the Supplier breached Reg.14(3) of the Timeshare Regulations at the time of sale by marketing and selling FPOC Membership to her as an investment. And, as a result, I think her credit relationship with Novuna under the Credit Agreement was unfair to her given all of the circumstances of this complaint. But, having read all of the submissions from both sides in full, I will continue to keep in mind all of the points that have been made, insofar as they relate to

this complaint, when doing that.

25. 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.

26. In this complaint, I will start by setting out the evidence of the parties, my findings on how FPOC Membership came to be sold to Mrs R, whether that sale breached Reg.14(3) of the Timeshare Regulations and, if so, whether that led to an unfair debtor-creditor relationship and what I propose to direct Novuna to do to remedy any unfairness.

Mrs R's evidence

27. Mrs R has also provided an eleven-page witness statement, signed and dated in April 2019. This was provided to Novuna alongside her original claim and deals with her memories of the sale and financial circumstances at that time.

28. Mrs R explained that, at the time of the sale, she worked in a bank, and set out her family income and some outgoings.

29. Mrs R explained that she attended a meeting in London in the Summer of 2014 with the Supplier. She said this was after she was promised a free holiday if she attended the meeting. When she attended, she said it was a pressured sales meeting during which the Supplier tried to sell timeshare membership to her. She did not make a purchase there and then, but took up an offer of a free holiday on the understanding that there would be a further sales meeting when overseas.

30. The holiday took place in February 2015 and the sales meeting was on the 15th. Mrs R described the sales process, explaining that the sales representative took her through the benefits of owning a fractional membership. She said, at para 24:

> *"The Product would provide us with ownership in a property in Tenerife; we would purchase a share equal to a specific number of weeks in a specific property. The contract would last for a maximum of 19 years and at the at the end of the contract, the property would be sold, and we would receive a lump sum from the sale of the property. In this way, the Product could be distinguished from a timeshare, as we would be the owners of a property."*

31. And, at para 27:

> *"We were told that we should view the purchase as an investment; that the purchase would provide us with a lump sum in the future that would be greater than the sum originally invested."*

32. And, at paras 30 to 32:

> *"The Representatives further told us that purchasing the Product should be viewed as an investment not only for ourselves, but one that could be passed on to our children; it would be a great investment to provide them with and would allow them to take advantage of the luxury holidays. They told us that we should take advantage of this great offer that would enable us to own part of a property without having to worry about the maintenance of the same.*
>
> *We were led to believe that we were purchasing an exclusive membership with an investment in a property that would provide a guaranteed return upon the sale of the Product.*
>
> *We therefore agreed to purchase the Product…"*

33. In addition to what Mrs R said about the product being presented as an investment, she also set out some of the other benefits of FPOC Membership, including being shown luxurious accommodation and being told it was an 'exclusive' membership. Mrs R also explained that she was offered a bonus holiday in Tenerife, travel vouchers, a tablet computer and membership to a third-party exchange programme if she signed up for membership. Mrs R also described how the Supplier arranged the loan with Novuna to pay for FPOC Membership.

34. In her statement, Mrs R went on to set out some of the problems she says she had with the membership. She said that the actual availability and destinations offered under the FPOC Membership were limited and she was unable to secure a holiday at the time she wanted. She thought the sales process was pressured and she did not have the time to read through the documentation properly, relying on what she was told when she came to sign it.

35. Mrs R said that the cost of the loan was high and this was made worse by the cost of the annual maintenance fees, which 'increased severely'. So, in 2017, Mrs R refinanced the loan by borrowing from another lender and repaying the outstanding balance. She went on to say, at para 54:

> *"We have not been able to make use of our Membership due to the lack of availability whenever we have tried booking. The Representatives continuously told us that this was an asset for us and the family to use, with great availability and cheaper luxury holidays all year round. We have not experienced this whatsoever. Also, we are paying for something which we are receiving no benefits from. We had never previously owned a timeshare product and believed, following the statements made by the Representatives, this to be an investment opportunity where purchase of the Product would provide us with an asset. We now realise that we have purchased a timeshare following advice from our solicitors."*

36. And, at paras 56 and 57:

> *"Since instructing our Solicitors, we have been made aware that we have purchased nothing more than an ordinary, worthless timeshare, which is neither an investment or an asset. Timeshares have no resale value and they are not in high demand like we were told.*
>
> *If we knew the implications and the true nature of the Product at the time of the meeting, we would never have entered into the Agreement in the first place."*

37. I have also been provided a copy of the questionnaire Mrs R completed when she first instructed PR and which was used to draft her witness statement. This was completed on 21 July 2018, nine months before her witness statement was signed. Extracts of that questionnaire read:

> *"**41. What were you told about "Fractional Ownership"?***
>
> *We were told that by agreeing to the fractional ownership, we will have exclusive membership to properties all over the world. Available for us to holiday at anytime no restrictions on the number of weeks we wanted to spend. We are getting a fractional ownership in a property in Tenerife and the property will be sold at the end of the contract period and we would get a lump sum amount from the sale of the property. They also promised that at any point during the contract we could sell our ownership back to them. We were lead to believe that this was a great offer and we would have all the facilities without having to worry about the maintenance of the property and this was an investment not only for us but we could leave it for our children.*
>
> ***42. What were your impressions of "Fractional Ownership"?***

An exclusive holiday club membership with investment in a property owned by the members to be sold at the end of the contract period sharing the proceeds with members.

43. What appealed to you most about "Fractional Ownership"?

Ownership in a holiday home with exclusive right to have choice of destinations for holiday throughout the year with a return at the end of the contract. The accommodation that was shown to us was luxurious, well kept and maintained and that was what was promised wherever we would decide to go.

44. Did you feel like this was different from Timeshare? If so how?

We never had time share so we did not realise this was a time share. We were told that we could use holiday homes any where in the world at any time.

45. What were your initial thoughts on this?

We were investing in a property and due to the membership we could use the facilities worldwide where CLC or its associates had them.

…

***106. Describe in your own words how you feel you were mis-sold fractional* ownership**

We were under the impression that we were obtaining a fractional ownership in a property., also we would be able to book accommodation anywhere in the world at any time with either CLC or Interval International. We believed we would receive a reasonable return from the sales of the property at the end of the contract…"

38. I also spoke with Mrs R and heard some of her memories of the sale. Given the length of the conversation, I will not set out here what was said, but I will refer to parts of it in this decision.[5]

The Supplier's evidence

39. In May 2018, the Supplier sent a response to PR, setting out its position on Mrs R's complaint. In particular in response to the allegation FPOC Membership was sold as an investment, it said:

"The contractual documentation of Fractional Property Owners Club, signed by your clients at point of sale clearly explains that the purchase of is not a financial investment. Although there are numerous references to this within the documentation. In particular the Member's Declaration stales explicitly that the purchase of membership is for the primary purpose of holidays. The Member's Declaration also clearly indicates that CLC makes no representation as to the future price or value of the Fraction(s)…"

"No verbal or written representations are made or implied in the sales process that would indicate to a prospective client either a guaranteed return or a potential financial gain in the short, or the long term. The sales process is entirely transparent and contractual documents provided at point of sale, and before the fourteen-day rescission period, are precise and easily understood."

40. In May 2019, the Supplier wrote to Novuna to provide further information. It explained

[5] I provided both parties with a copy of the call recording and invited them to let me know if they thought there were relevant parts of the call that I had not referred to in PD2. Neither party asked me to revisit this call.

that Mrs R would have seen a multi-media presentation during the sales process and it said:

> *"The membership is not a financial asset. It is clearly confirmed both in the Member's Declaration and the Information Statement that the 'Purchase of Fractional Rights is for the primary purpose of holidays and it neither specifically for direct purposes of a trade in, nor as an investment in Real Estate."*
>
> *"Again, the Fractional Rights are not sold as an investment. We also reiterate that the product **is** a Timeshare. The contractual documentation signed on the day of purchase clearly confirms this. More specifically the Member's Declaration states '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 the UE Timeshare Directive 2008/122/EC (sic)."*

41. The Supplier also provided details of its records about Mrs R's purchase, including her booking history and notes from the sale.

The FPOC Membership sale documents

42. A large number of documents were provided from the time of sale. I do not need to set them out in detail, but I have highlighted some of the relevant parts.

43. There was a "MEMBER'S DECLARATION" that Mrs R signed when she bought FPOC Membership. The document was one page long, so I think Mrs R had the opportunity to read it at the time it was signed. That declaration includes the following:

> *"5. We understand that the purchase of our Fraction is for the primary purpose of holidays and is not specifically for direct purposes of a trade in and that CLC makes no representation as to the future price or value of the Fraction.*
> *…*
> *14. 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 the EU Timeshare Directive 2008/122/EC."*

44. There was also an "INFORMATION STATEMENT" provided that set out the standard information required to be provided under the Timeshare Regulations. This document ran to nine pages and described details about the FPOC Membership, including a description of the product, as well as information about how it worked, for example, by setting out some of the maintenance costs payable by members. Extracts of that read:

> *"Your Fractional Rights will start on the date shown on the Purchase Agreement and expires automatically when your Allocated Property is sold. There is a provision for distribution of funds or assets to Owners at a future Sale Date after the payment of any taxes and all costs related to that Allocated Property as described in the Rules. Fractional rights have been designed to be used and enjoyed and not bought with the expectation or necessity of future financial gain."*
>
> *"[…] The Vendor, Manager and the Trustee are unable to give any guarantees on the ultimate sales price as this depends on many factors including the state of the property market and supply and demand at the time of sale."*
>
> *"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. CLC makes no representation as to the future price or value of the Allocated Property or any Fractional rights"*

"Investment advice

The Vendor, any sales or marketing agent and the Manager and their related businesses (a) are not licensed investment advisors authorized by the Financial Services Authority to provide investment or financial advice; (b) all information has been obtained solely from their own experiences as investors and is provided as general information only and as such it is not intended for use as a source of investment advice and (c) all purchasers are advised to obtain competent advice from legal, accounting and investment advisors to determine their own specific investment needs; (d) no warranty is given as to any future values or returns in respect of then Allocated Property."

The law

45. Mrs R has made claims and complaints under the CCA, specifically that there was a misrepresentation that Novuna was responsible to answer under s.75 CCA and that Novuna participated in an unfair debtor-creditor relationship, arising out the FPOC Membership, as defined by s.140A CCA. And, as s.140A CCA is relevant law, I do have to consider it when determining what is fair and reasonable in all the circumstances of the complaint, specifically whether the credit relationship between Novuna and Mrs R was unfair. Here, as I think Novuna did participate in an unfair debtor-creditor relationship, I will focus on that element of the legal framework.

46. 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.

47. 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.

48. 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 *"finance a transaction between the debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly."*

49. 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 R'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.

50. 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."*

51. 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*".

52. In the case of *Scotland & Reast v. British Credit Trust* [2014] EWCA Civ 790, 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."*

The Court of Appeal's decision was recently followed in *Smith*.

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

54. 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.

55. 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) (which was recently approved by the Supreme Court in *Smith),* 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.

56. 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."

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 R's complaint is discussed more fully below.

57. In addition to the CCA, the regulatory requirements of particular importance to this complaint include:

(i) The Timeshare Regulations
(ii) The Unfair Terms in Consumer Contracts Regulations 1999
(iii) The Consumer Protection from Unfair Trading Regulations 2008

58. The Timeshare Regulations provided a regulatory framework. But 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.

Regulation 14(3) of the Timeshare Regulations

59. The sale of timeshares like Mrs R's was regulated by the Timeshare Regulations. Novuna does not dispute, and I am satisfied that, Mrs R's FPOC Membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

60. The regulation most important to this decision is Reg.14(3), which read (at the time of sale):

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

61. The interaction between these provisions was recently clarified in the High Court judgment in *Shawbrook & BPF v. FOS*. The judgment is familiar to both Novuna and PR, so I do not need to set out the background at length. Here the Court considered two decisions, issued by me and another ombudsman, concerning the sale of fractional timeshares similar to Mrs R's, paid for with loans provided by Shawbrook Bank Ltd and Barclays Partner Finance. The judgment sets out a lot of the relevant law and I will not repeat it in detail. But, in summary, it was held if a timeshare was sold as an investment, in breach of Reg.14(3) of the Timeshare Regulations, that was something that could properly be considered when determining whether there was an unfair debtor-creditor relationship between the purchaser of the timeshare and the lender who provided credit for the purchase. In the two decisions considered, the Judge held that the breaches of Reg.14(3) were sufficient to conclude there were unfair debtor- creditor relationships and the remedies to unwind the agreements set out in the decisions were within the range of remedies a court might properly have made.

62. 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*" (at para 56). I will use the same definition.

63. Mrs R's share in the Property clearly, in my view, constituted an investment as it offered her the prospect of a financial return, whether or not, like all investments, that was more than what she first put into it. But the fact that FPOC Membership included an investment element did not, itself, transgress the prohibition in Reg.14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It does not prohibit the

mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*.

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

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

66. I have carefully considered the evidence available when coming to my finding on whether FPOC Membership was sold as an investment. In doing so, I have considered what Mrs R and the Supplier have said, what the available sales documentation shows, what I know about the Supplier's sales processes and the inherent difficulty in selling fractional timeshares without breaching Reg.14(3), which was recognised by the High Court during *Shawbrook & BPF v. FOS*.

My assessment of the parties' evidence and sales documents

67. In considering the weight to place on Mrs R's recollections and evidence I have considered the judgment in *Smith v. Secretary of State for Transport* [2020] EWHC 1954 (QB), where it was held at para 40:

> *"At the start of the hearing, I raised with Counsel the issue of how the Court should assess his oral evidence in light of his communication difficulties. Overnight, Counsel agreed a helpful note setting out relevant case law, in particular the commercial case of Gestmin SPGS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm) (Leggatt J as he then was at paragraphs 16-22) placed in context by the Court of Appeal in Kogan v Martin [2019] EWCA Civ 1645 (per Floyd LJ at paragraphs 88-89). In the context of language difficulties, Counsel pointed me to the observations of Stuart-Smith J in Arroyo v Equion Energia Ltd (formerly BP Exploration Co (Colombia) Ltd) [2016] EWHC 1699 (TCC) (paragraphs 250-251). Counsel were agreed that I should approach Mr Smith's evidence with the following in mind:*
>
> > *a. In assessing oral evidence based on recollection of events which occurred many years ago, the Court must be alive to the unreliability of human memory. Research has shown that memories are fluid and malleable, being constantly rewritten whenever 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. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts (Gestin and Kogan).*
> >
> > *b. A proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence (Kogan).*
> >
> > *c. The task of the Court is always to go on looking for a kernel of truth even if a witness is in some respects unreliable (Arroyo).*

d. Exaggeration or even fabrication of parts of a witness' testimony does not exclude the possibility that there is a hard core of acceptable evidence within the body of the testimony (Arroyo).

e. The mere fact that there are inconsistencies or unreliability in parts of a witness' evidence is normal in the Court's experience, which must be taken into account when assessing the evidence as a whole and whether some parts can be accepted as reliable (Arroyo).

f. Wading through a mass of evidence, much of it usually uncorroborated and often coming from witnesses who, for whatever reasons, may be neither reliable nor even truthful, the difficulty of discerning where the truth actually lies, what findings he can properly make, is often one of almost excruciating difficulty yet it is a task which judges are paid to perform to the best of their ability (Arroyo , citing Re A (a child) [2011] EWCA Civ 12 at para 20)."

68. Although this judgment relates to assessing oral evidence, I think it is also important guidance to consider when undertaking an assessment of written evidence, as I must do in Mrs R's case.

69. In PD1, I said that I thought Mrs R had been clear in her witness statement that she was told FPOC Membership was an investment. She had set out that she understood the Property would be sold in the future and the proceeds of sale divided amongst the people whose memberships were associated with the Property. Mrs R said she was told when that happened she would get a lump sum that would be more than what she paid for FPOC Membership and that it would be a 'guaranteed return'. She also said she was told it was something she could pass onto her children.

70. I thought Mrs R described how the FPOC Membership would have worked and I thought it was likely that was explained to her by the Supplier. Mrs R also she appeared to have understood the mechanism by which there was the potential to make a return on what she paid for FPOC Membership, again something I thought was likely explained during the sales process. It appeared to me that what was in dispute was that Mrs R said she was specifically told FPOC Membership was an investment (i.e. a way to make a financial gain or profit).

71. The Supplier did not agree Mrs R was told FPOC Membership was an investment. I had not seen any statements or evidence from the actual sales staff, but the Supplier and Novuna pointed to inconsistencies in what Mrs R had said and to some of the documented sales processes to show there was no breach of Reg.14(3).

72. I agreed that there were some discrepancies between Mrs R's memories and what the other evidence showed. The Supplier pointed out that Mrs R said the cost of her maintenance fees had '*increased severely since we entered into the Agreement*' (Mrs R's statement, at para 51). But the Supplier said that in 2015 they were €995 and in 2017 and 2019 they were €999, which it argued was not a severe increase. I agreed with what the Supplier has said that the increase was not 'severe'.

73. Mrs R said, at para 46:

"When trying to use the Product we have found that the destinations and the availability for the same are actually incredibly limited and we have never been able to secure a holiday at the required time of year throughout the Product."

74. In response, the Supplier said:

"For the records, in May 2015, [Mrs R] contacted our CLC World Travel department to request a quotation for a holiday in Florida, USA, for October 2015 […]. A quotation

was sent to them by return, however, [Mrs R] never came back regarding this offer. In July 2016, [Mrs R] contacted our Central Reservations team regarding availability for either Portugal or Lanzarote for the 24 December 2016 (school holiday). A week at the Monet Carvoeiro Clube in Portugal was offered for the requested date and [Mrs R] confirmed their reservation. However, in October 2016, they decided to cancel the reservation due to members of her family having health issues…These are the only requests we have received from [Mrs R] to date as they have not made any further attempts to use their membership."

75. I thought it was clear that the Supplier's evidence did not fit with what Mrs R said happened as it appeared that she was offered accommodation for periods she requested. So it appeared that, for some matters, Mrs R's evidence was not reliable. However, noting the guidance in *Smith v. Secretary of State for Transport*, I said that does not mean that Mrs R's evidence, as a whole, must be unreliable or unbelievable (points c, d and e above).

76. From experience, I am aware that memories are imperfect and do change over time. I said I would be surprised if Mrs R, or any person, could recall precise details of events that took place several years beforehand, so I was not surprised that there are some differences between what Mrs R said happened and what the other evidence shows. What I thought was important was whether the general tenor of the evidence given was plausible and to than assess that in light of the other available evidence (point a above). I thought it was important that Mrs R recalled the Supplier presenting FPOC Membership as an investment and had provided memories of the things she was told. It may well be that the precise words and descriptions that were used in practice were different, but what I considered was whether the Supplier presented FPOC Membership to Mrs R as an investment.

77. Novuna had initially requested that I hold an oral hearing under DISP 3.5.6 R so that Mrs R could give oral evidence and for that evidence to be tested, pointing to a passage in the judgment in *R (Heather Moor & Edgecomb) v Financial Ombudsman Service* [2008] EWCA Civ 642 (at para 58). Having considered that request, I did not think I needed to hold an oral hearing to fairly determine this complaint. It appeared to me that Novuna's main concerns appeared to be about claims brought by representatives in general and did not appear to be specific to Mrs R's actual complaint.

78. I had the benefits of statements and recollections from Mrs R, was well as the Supplier's submissions and a number of documents relevant to the sale and Mrs R's usage of her FPOC Membership. Novuna had access to all of this evidence, had the opportunity to scrutinise it and had provided significant submissions on it for me to consider. So I thought Novuna had the opportunity to fairly put its case.

79. I also explained that the Financial Ombudsman Service is set up to decide complaints informally and we do not have an adversarial approach, so we do not normally hear oral or sworn evidence from complainants, nor do parties normally cross-examine each other. I was mindful that the findings I reached were not simply based on Mrs R's recollections, but I looked at all of the evidence available, including the documents that relate to the sale, to decide what I think was most likely to have happened. And I had submissions and witness evidence from Novuna and the Supplier to explain those documents and how I should assess them. It followed that I thought I was able to fairly determine this complaint without the need for an oral hearing.

80. I also considered the point raised by Novuna that the Supplier thought Mrs R's witness statement was similar to others prepared by PR or may had been prepared following PR asking Mr R leading questions. But I had not been provided any evidence that showed that was the case by Novuna, so I did not think this was something I needed consider further.

81. The Supplier also pointed to the documentation that it said shows FPOC Membership was not presented as an investment – which I set out in detail above.

82. As noted above, by its very nature, the FPOC Membership had an investment element to it – the share of the proceeds of sale of the Property. So I looked at the sales documentation to see what, if anything, the Supplier said about that element constituting an investment.

83. It was clear to me that the Supplier was not holding itself out as guaranteeing any future value of the amount Mrs R would receive when the Property was sold. And it had said that the focus of the product was on the supply of holidays, rather than the possible money received when the Property was sold. For example, in the Information Statement it 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."*

84. So I thought the Supplier was attempting to say that FPOC Membership was not an investment. But I thought that had to be read in conjunction with the section of that document titled "Investment advice", where the Supplier explained that neither it nor the sales staff were licensed to provide investment advice and customers were advised to get their own investment advice. I failed to see why this was included in the Information Statement unless the Supplier was either selling FPOC Membership as an investment, or recognised there was a real risk of it being sold in that way.

85. In my view there was nothing in the sales documentation, taken on its own, that went so far as to conclude that the FPOC Membership was or was not sold as an investment. Rather, the documentation was contradictory on this point and did not say that FPOC Membership had no investment element. And I did not think the documentation could have gone that far as Mrs R was buying an interest in a property she could not use, but an interest on which she would get some return on later when the Property was sold.

86. FPOC Membership did provide a mechanism to make a return and therefore there was an investment element to it. It was plausible that element was highlighted to Mrs R in the sales process and, having considered the evidence from the time of sale, it is also plausible she was told it was an investment – that is to say Mrs R's memories were not, in my view, fanciful or improbable. So I went on to consider the way in which the Supplier presented memberships, like Mrs R's, before making a finding on whether Mrs R's particular sale breached Reg.14(3).

87. Since I made those provisional findings, I have seen a copy of the questionnaire Mrs R first completed when she approached PR and I have had the opportunity to speak directly with her. So, I have thought again about her evidence in light of this new evidence. It seems to me the questionnaire is of particular importance, as it sets out her memories closer in time to the date of sale than any of the other evidence and is in her own words. So, I have considered again the weight I put on her evidence, before considering what she had said in conjunction with the other available evidence.

88. Novuna pointed to parts of the questionnaire that suggested words that could be ticked to describe the sales techniques used by the Supplier. Here Mrs R had ticked words including 'pushy' that were then put into the witness statement, but there were other options that were not negative that could have been selected. So, for example, Mrs R ticked to say the sale was 'friendly', 'welcoming' and 'polite', as well as 'pushy', 'forceful' and 'pressuring'. But in the sections of the questionnaire asking for her memories of the sale, the questions were open and allowed her to express things in her own words – some of the relevant passages are set out above. Overall, I do not think this questionnaire could be criticised for leading Mrs R into saying something that she did not remember. Further, I do not think that using this questionnaire as a basis for her witness statement (alongside a further telephone call) makes me question the evidence presented. And in so far as there could be any legitimate criticism that conversations with her solicitors affected the evidence Mrs R gave in the witness statement, I cannot see how that affected what was contained in the questionnaire.

89. It is clear to me that in this questionnaire, Mrs R remembers FPOC Membership being presented to her as an investment. She recalls being told that "*the property will be sold at the end of the contract period and we would get a lump sum amount from the sale of the property",* that *"this was an investment not only for us but we could leave it for our children",* that *"we were investing in a property*", and that "*we believed we would receive a reasonable return from the sales of the property at the end of the contract*". In other words, that she recalled being sold something that had an intrinsic value that would generate a return, that could be left to her children and was what she described as an 'investment'.[6]

90. There is nothing in Mrs R's statement that undermines what is in the questionnaire, nor was there anything said by her in her conversation with me that made me doubt what had been previously said. The conversation I had with her was some nine years after the sale, so I was not surprised that she did not recall specific parts of it, but I think she attempted to provide her honest recollections. In light of the guidance in *Smith v. Secretary of State for Transport*, I place less weight on her oral memories, and prefer what she said in her own words in the questionnaire she completed nearer to the time of sale.

91. When balancing the evidence in this complaint, PR has asked me to take into account the fact that I do not have any evidence from the people who sold FROC Membership to Mrs R. But I place little weight on that as, even if such evidence could be obtained, I think it would be likely to have little evidential value. I say that as I think it highly unlikely that a salesperson could provide me detailed memories of Mrs R's individual sale given that it took place so long ago and would likely be one of many sales with which that salesperson was involved.

92. I have also considered what Novuna has said in response to PD1, suggesting that the inconsistencies in Mrs R's written evidence detract from the overall credibility of the evidence she has given. As noted above, I have seen those inconsistencies and they are something I have considered when weighing up her evidence. But Mrs R's evidence is not the only evidence available to me. In determining the outcome of this complaint, I have considered Mrs R's evidence alongside everything else available to reach a fair and reasonable determination.

93. Having reconsidered all of the available evidence, I still find that Mrs R's evidence of the sale was plausible. Given that I will now consider evidence of how the Supplier presented FPOC Membership to customers and how it trained its sales staff, to determine whether I thought it was more likely than not that FPOC Membership was sold to her as an investment and the effect of doing so on her complaint.

<u>The Supplier's sale process</u>

94. DF, a director of the Supplier, provided a witness statement in another complaint (one of the two considered in *Shawbrook & BPF v. FOS* referred to above. In this statement, he set out the background to how the Supplier sold memberships such as Mrs R's.

95. DF explained that fractional timeshares were sold by the Supplier between 12 September 2011 and 27 November 2019, during which there were different types of membership sold. The first type of membership was called Fractional Property Owners Club 1 ("FPOC1"). FPOC1 was sold initially with a sixteen-year term, before moving to a nineteen-year term in December 2011. FPOC2 was the second type of membership and was similar, but it differed in the way members paid maintenance fees and booked holidays.

[6] I noted that in the questionnaire, Mrs R did not use the word 'profit', but I did not find that was determinative of how this was presented to her as she thought it was an 'investment', so the possibility to make a profit was, in my view, implied.

96. DF explained that the sales process was in three stages. First, there was a tour of the resort and a meeting to discuss holidays a customer might want to take. This included the use of an electronic sales presentation. Secondly, the price of the membership was discussed and, thirdly, the paperwork was generated and customers were taken through it.

97. DF said, when talking about the sale of a FPOC1 membership:

> *"…It is correct to say that receiving the net proceeds of sale is presented as an important feature of the club. It is plainly one of the distinguishing features of the product. However, reaching the conclusion that because it is an important feature must mean the sales team members would have speculated on the amount of potential residual value or suggested that the same would be an investment is a significant leap…"*

DF has made a similar statement in respect of FPOC2 membership.

98. The Supplier also provided materials to our service that consisted of slides that were presented to customers and training materials used to prepare sales staff. It appears that FPOC1 was sold between 2011 and late 2013, FPOC 2 between early 2013 and 2019 and a third type of membership, 'Signature' membership, was sold from 2015 to 2019. It follows, there were periods of time that two different types of membership were sold by the Supplier at the same time.

99. In Mrs R's case, the Supplier has identified the set of slides that it says were used in the sale. Mrs R's FPOC Membership was taken out in 2015, and so it was a FPOC2 product. But before I look at the specific set of slides used, I think it is helpful to look at how fractional memberships were sold by the Supplier over a period of time.

100. I have considered a set of slides used to sell FPOC1 – from what I understand these slides, or very similar ones, were used throughout the sale of FPOC1 memberships. The first slide showed that 'trial members' can upgrade to two other of the Supplier's products, "Destinations Club" and FPOC1.[7] The second slide it titled "Why Fractional?" and presents three choices. Choice 1 is "*RENT YOUR HOLIDAYS*" and presents three positives and three negatives. The positives are ""*Choice, Flexibility and Convenient*", the negatives are "*Quality – hit and miss, Dead Money and 100% Loss*". Choice 2 is "*BUY A HOLIDAY HOME*" and the positives are "*Investment, Quality Guarantee, Use/Enjoy/Sell and Money Back*", the negatives are "*Large Capital Outlay, Fixed Location, Not Flexible and May be Unused*". Choice 3 is FPOC1 and it says, "*Have the BEST OF BOTH WORLD'S"*.

101. This slide is the first one that presents any information about FPOC1 and it clearly said that FPOC1 combines the best of choices 1 and 2, i.e. it gives both choice, flexibility and is convenient, but also is an investment you can use, sell or enjoy and you get money back.

102. The following two slides were titled "*How It Works*" and have a series of pictures. The first one says "*YOU BUY A FRACTION OF A CLC PROPERTY*" and the next one says "*16 YEARS LATER the property is sold YOU RECEIVE YOUR SHARE OF THE SALE*
OF THE PROPERTY". The following slides go on to say the Supplier provided points to use to book holidays for sixteen years. After the first slide, the next three are about how a customer buys an interest in a property and the following five are about actually taking holidays. So there was a fairly even split at the start of the presentation between marketing FPOC1 membership as a way to buy an interest in property and as a way of joining a club to take holidays.

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[7] This was a form of membership where customers could pay a set amount to get a number of weeks holiday entitlement to 'try out' the Supplier's facilities and membership benefits.

103. From those slides, I think that buying a fraction of a property and having an interest in a sum of money at the end was central to the way the product was sold. And as DF said "*it is correct to say that receiving the net proceeds of sale is presented as an important feature of the club. It is plainly one of the distinguishing features of the product.*"

104. Moving to the slides shown to Mrs R, The Supplier explained that she was shown a set of slides called "ESA 4 2014" ("the ESA"). I take it these were a set of slides provided to our service by the Supplier titled "FPOC ESA 2014 (1)".[8] This document ran to 110 pages and shows a set of slides that were shown to potential customers when being told about FPOC2 membership. In the document provided, only the slides are visible and none of the commentary that went alongside them.

105. I have also seen a document titled "Induction Training Manual FPOC2 FLY BUY" ("the Manual"). DF has confirmed that this document (or something similar) was in use when selling FPOC2 until October 2016. This appears to be a training manual used to help sales staff present the FPOC2 product, in particular it sets out a number of slides that would be shown to prospective customers as well as commentary to help explain them.

106. The Manual sets out details of the multimedia presentation that would be shown to customers after they were met by sales staff and taken through a survey. The first two to five minutes were about the '*World of Resorts*', giving examples of dream holidays, but the next two to four minutes was on '*Rent vs Own*'. There was then two to four minutes on '*Corporate Credibility*' before six to twelve minutes on FPOC2 (p.23 Manual). This shows that the nature and structure of the membership was one of the first things mentioned to potential customers.

107. I have compared the content of the two documents (the ESA and Manual) and I think they were related.[9] Although there were some differences in the content of the slides shown in the two documents, most of the slides did correspond and were identical. I therefore think that the Manual, which DF accepted would have been used at the time of Mrs R's sale, was likely to be a good explanation of how the slides she would have seen were presented to her.

108. There are two slides (p.32 Manual, p.14 ESA) that showed a comparison of the total amount spent over 10 years of renting a property compared to owning it. The commentary says:

> *"• Re-visit the idea of renting a house and talk them through the example of renting a home for £500 highlighting the fact of no return*
>
> *•Refer to their decision to purchase a property as it made more financial sense to own than rent because, not only are they building equity in their property, they can also continue to enjoy living in their home once it is paid for*
>
> *•Ask: "if it cost a little more to own rather than rent would they be happy to pay the extra to own?" (Increase the amount of owning and continue to do this for a couple of times until they don't agree)*
>
> ***CLOSE: So what you are telling me is that, as long as it's comfortably* affordable, you would always choose to own rather than rent, is that correct?**
>
> ***LINK: Now let me show you the relevance this has when it comes to your holidays because what you are currently doing is…"***

[8] These were the only set of slides from 2014 that I have seen, so I assumed these were the slides in question. Novuna did not say this was wrong when responding to either of my provisional decisions.

[9] I invited Novuna to let me know if they disputed this finding, but they did not

109. The slides then go on to show the cost of 'renting' a holiday over ten years compared to the cost of 'owning'. The sales staff are told to ask customers what they 'own' after ten years if they just pay for holidays every year and compare that to spending the same amount to 'own' their holidays. The sales staff are then told to say that before they explain how the product works, they would explain how the Supplier started.

110. After a section dealing with the corporate structure of the Supplier, a section of the Manual deals with the fractional membership (p.41 Manual, p.28-32 ESA). Under a set of slides that explain what a 'fraction' was, it says:

> *"• FPOC = small piece of [the Supplier's] apartment which equals ownership of bricks and mortar*
> *…*
> *• Major benefit is the property is sold in nineteen years (optimum period to cover peaks and troughs in the market) when sold you will get your share of the proceeds of the sale*

SUMMARISE LAST SLIDE:

> ***FPOC equals a passport to fantastic holidays for 19 years with a return at the end of that period. When was the last time you went on holiday and got some money back? How would you feel if there was an opportunity of doing that?***
> ***…***

LINK: Many people join us every day and one of the main questions they have* is "how can we be sure our interests are taken care of for the full 19 years? As it is very important you understand how we ensure that, I am going to ask Paul to come over and explain this in more detail for you."*

111. There are then a number of slides that demonstrate the types of accommodation and holidays that the Supplier could offer, either by itself of through an exchange programme. Then the presentation moves to a section titled "Resort Management" (p.60 Manual, p.83 ESA). Some slides state that managing the costs of a holiday home are expensive, but members only pay a fraction of that. The accompanying guidance says:

> "• T/O will explain slides emphasizing that they only pay a fraction of maintaining the entire property. It also ensures property is kept in peak condition to maximise the return in 19 years time
> …
> **CLOSE: I am sure you will agree with us that this management fee is an extremely important part of the equation as it ensures the property is maintained in pristine condition so at the end of the 19 year period, when the property is sold, you can get the maximum return. So I take it, like our owners, there is nothing about the management fee that would stop you taking you holidays with us in the future?..."**

112. There are then more slides setting out how to book holidays before the presentation moves to 'Holiday Budget'. These slides appear in the Manual (p.69), but not in the ESA. Here there are some slides showing example of costs over ten and nineteen years on an annual holiday budget of £2,500. It is not clear to me exactly what these slides are designed to show, but it appears to state that the total cost for nineteen years of holidays booked through a travel agent was £47,500, but the total cost through the Supplier was £25,000 with a return of £5,000.[10] But the last slide is titled 'Real benefit' and reads:

> *"Rent* *[FPOC2]*
>
> *Photos* *Own it*

[10] I noted that this slide does not mention the annual maintenance fees members paid to access their holidays with the Supplier, so it appeared somewhat misleading.

Memories	*Rent it*
Nothing to pass on	*Will it*
No return	*Get money back for it*
£47,500	*£25,000"*

The accompanying narrative said:

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

113. Taken as a whole, I think these slides were designed to show the advantages of taking out FPOC2 membership. They were suggesting to prospective members that they would be building equity in something by paying every year for fractional membership over simply paying for a traditional holiday. It is plain to me that sales staff were encouraged to make customers think about the advantages of 'owning' something. I think this was reinforced throughout the presentation by the use of words such as '*bricks and mortar*', that they would be '*building equity*' in something tangible that could be passed on and that they would get money back at the end. Normally the idea of '*building equity*' is when a mortgagee repays a loan, therefore increasing the value of their share in an asset that normally increases in value. It appears to me that the Supplier was implying that members of FPOC2 could buy into a product that accumulated value over time, similar to buying a home.

114. The slides used during Mrs R's sale do not use the word 'investment', as was used in the slides used when selling FPOC1. But in my view, the description given of the benefits of FPOC2, especially that of '*building equity*', has the potential to give a similar impression to a customer. In my view, the approach to marking FPOC2 was a continuation of the way FPOC1 was marketed, implying that purchasing was a way to build an interest in a tangible asset over time.

115. Much was made about the possibility of maximising returns, for example it is said that the nineteen-year period is the '*optimum period to cover peaks and troughs in the market*' and the management fees were used to make sure the maximum return could be achieved. I think the language used describing the possibility of returns and how to maximise them was the sort of language used when describing an investment.

116. I do accept that in the Manual the Supplier told its sales staff to mention returns of £5,000, which was less than Mrs R paid for her FPOC Membership. But in my view, that was simply an example given and the Manual left open the possibility that the return could be higher than the initial outlay for FPOC Membership. Additionally, the slides in the Manual appear to show FPOC2 membership as both the right to receive holiday rights at less than the market value for nineteen years, plus a significant financial return at the end. So there is a real possibility that a consumer could see the higher cost of buying holidays on the open market plus the financial return led to an overall profit.

117. Furthermore, at no point in the presentation was it explicitly said that a customer should not expect to get back more than they paid for fractional membership. In other words, I do not think the Manual or ESA went so far as to say FPOC2 Membership was not, or ought not to be treated as, an investment.

118. So I will now consider whether I think Mrs R's actual sale breached Reg.14(3).

<u>My assessment on whether the sale breached Reg.14(3)</u>

119. Having considered everything, I think that the Supplier did sell FPOC membership

to Mrs R as an investment in breach of Reg.14(3).

120. FPOC Membership had many of the characteristics of an investment. Mrs R bought an interest in an underlying asset, here the Property. The nature of that interest was financial: a right to receive an agreed share of its net proceeds of sale. There was a risk associated with it as she would not know what the sale proceeds would be when the property was sold in the future. And she did not have instant access to the money she had put in as she was not able to just take it out when she wanted. So it was a real possibility that potential customers would see an investment element to ownership.

121. When considering the scope of Reg.14(3), I think some helpful guidance was provided during the Government's consultation on the implementation of the Timeshare Regulations. The Department for Business, Innovation and Skills ("BIS") started a consultation in July 2010 on determining the best approach to take when implementing the 2008 Timeshare Directive into to the Timeshare Regulations. In July 2010, BIS published a consultation document and, in December 2010, BIS published its response to the consultation.

122. In BIS's July 2010 consultation, it was said that "*[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3)).*" The substance of this statement was not departed from in BIS's December 2010 response. It follows that the intention was that if a timeshare provider *implied* to consumers that a future profits were a possibility during the sale, that would likely have breached the prohibition in Reg.14(3). So, in my view, the consumer- protection purpose of Reg.14(3) requires the concepts of marketing and selling a timeshare as an investment not to be interpreted too restrictively.

123. This was reflected in the judgment of Mrs Justice Collins Rice in *Shawbrook & BPF v. FOS* where she held (at para 55) that *"[one] of the most important special regulatory controls on the operation of the timeshare sector – perhaps its central distinctive feature – is the absolute prohibition imposed by Reg.14(3) of the Timeshare Regulations*".

124. The Judge went on to say, when considering how it was proper to assess the sales process, the ombudsman properly found that the fractional ownership component was given importance in the sales process and he was entitled to find "*it was at least implicit in the selling that that benefit was a prospect of financial gain*" (at para 73). In other words, that any breach of Reg.14(3) did not require an explicit assertion that a timeshare was an investment opportunity.

125. Further, it was held at para 76:

> *"[The ombudsman] was entitled in other words to be highly sensitive to the overt and covert messaging – that is, the fine calibration of the encouragement given – by the seller in a case like this. There was nothing wrong with an approach which had the absolute prohibition in Reg.14(3) within the ombudsman's field of vision from the outset as he looked at the evidence for the true nature of the transaction that was done here. Indeed he was required as a matter of law to do so."*

126. So the Judge highlighted that it is right to look at both the unambiguous wording used in sale documentation and presentations, but also to think about the way in which a sale actually takes place in practice. She went on to say at paras 77 and 78:

> *"[…]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). [...] Getting the governance principles and paperwork right may not be quite enough.*

*The problem comes back to the difficulty in articulating the **intrinsic benefit** of fractional ownership over any other timeshare **from an individual consumer perspective**. […] If it is not a prospect of getting more back from the ultimate proceeds of sale than the fractional ownership cost in the first place, what exactly is the benefit? On the decided authorities, of course, not every purchase of a property interest is an investment decision. If you buy a flat or a car and sell it some years later it may have increased in value or (more likely in the latter case) depreciated, and in neither case is a view to profit a necessary or obvious starting point. But meanwhile you can live in the flat and drive the car. What the interim use or value to a consumer is of a prospective share in the proceeds of a postponed sale of a property owned by a timeshare company – one they have no right to stay in meanwhile – is persistently elusive."* (emphasis Judge's own)

127. Here, the Judge highlighted that there is a real challenge to sell a fractional timeshare in a way that was not as an investment, especially when the benefit of buying an interest in future sale proceeds does not give any extra value or use prior to the sale, such as the case with Mrs R's FPOC Membership.

128. Finally, it was said at paras 99 and 100:

"There is no dispute that while the Timeshare Regulations prohibit the marketing or sale of timeshares as investments, they do not prohibit the potential of timeshares to be or to be thought of as investments in the widest sense – that is, to be capable of, or to contain elements capable of, increasing in value. The distinction is acknowledged in each ombudsman's decision and is particularly clear in the second decision: 'if a timeshare provider designs a product that has as one of its important or key features an investment element, the provider is prohibited from using that feature to encourage a consumer to purchase – it does not ban the sale of that product, it just regulates the method of sale'. As Mr Kirk KC, Counsel for the timeshare companies, pithily put it – if a timeshare were not capable of being sold as an investment, there would be no need for the prohibition. At the same time, however, if a timeshare has not been sold as an investment, how, if at all, are consumers protected in relation to its potential attractiveness as an investment nevertheless?

I put it that way because, although the point is more latent in the first decision than in the second, it is clear that both ombudsmen viewed fractional ownership timeshares – simply by virtue of the interest they confer in the sale proceeds of real property unattached to any right to stay in it, and the prospect they undoubtedly hold out of at least 'something back' – as products which are inherently dangerous for consumers. It is a concern that, however scrupulously a fractional ownership timeshare is marketed otherwise, its offer of a 'bonus' property right and a 'return' of (if not on) cash at the end of a moderate term of years may well taste and feel like an investment to consumers who are putting money, loyalty, hope and desire into their purchase anyway. Any timeshare contract is a promise, or at the very least a prospect, of long-term delight. It is exactly that beguiling and distinctive quality, inimical to caution and calculation, which may help explain the densely woven consumer safety-net that has been placed underneath the sector by the Timeshare Regulations. A timeshare-plus contract suggests a prospect of happiness-plus. And a timeshare plus 'property rights' and 'money back' suggests adding the gold of solidity and lasting value to the silver of transient holiday joy."

129. When taken together, I think the Judge's observations demonstrate the difficulty the Supplier had in selling FPOC Membership without breaching Reg.14(3). In my view, the problem the Supplier had is that FPOC Membership inherently has an investment element to it – its customers purchase an interest in the proceeds of sale of a property that they have no preferential right to use – so it seemed that aspect of the membership, if used to persuade customers to purchase, created the risk that membership will be marketed or sold as an investment, contrary to Reg.14(3).

130. However, I am also mindful that it is not simply the act of selling any membership

with those features that leads to a breach of Reg.14(3). There is a difference between, on the one hand, providing information about the property ownership rights being offered (which enables an objective appraisal of the contract) and, on the other, using the existence of such rights, and the potential for generating a profit, as a selling point. It is only in the latter case that a supplier would be "marketing or selling" the contract "as an investment".

131. Further, in the process of determining whether Mrs R's sale breached Reg.14(3), I have set out above my analysis of her evidence, which I found to be a plausible description of the sales process. I have also set out my findings on the difficulty the Supplier would have in selling FPOC Membership to Mrs R in a way that did not breach Reg.14(3). Without specific evidence from the Supplier on how Mrs R's FPOC Membership came to be sold, I have considered the history of the Supplier's sales processes to determine how it sold fractional memberships over a period of time.

132. Finally, when assessing whether Mrs R's actual sale breached Reg.14(3), I think it is also right to consider the inherent probability of an allegation when assessing whether I find that thing did or did not happen. In *Onassis v. Vergottis* [1968] 10 WLUK 101, Lord Pearce referred to the need to look at *"probabilities"*, as well as contemporaneous documents and admitted or incontrovertible facts, when weighing the credibility of a witness's evidence (at p.431). In *Armagas Ltd v. Mundogas SA (The Ocean Frost)* [1986] 2 W.L.R. 1063, Goff LJ also referred to looking at *"the overall probabilities"* when ascertaining the truth (at p.57). And in *Gestmin SGPS S.A. v. Credit Suisse (UK) Limited* [2013] EWHC 3560, Leggatt J suggested (at para.22) that factual findings should be based on *"inferences drawn from the documentary evidence and known or **probable** facts"* (my emphasis). Here, I think it is inherently more probable that a timeshare product with an investment element is sold in a way promoting that element, and therefore risking a breach of Reg.14(3), compared with the sale of a product without the possibility of a monetary return.[11]

133. Having considered all of the above, I have come to the following findings on whether the Supplier breached Reg.14(3) in Mrs R's sale.

134. Novuna has said that Mrs R was shown slides during the sale, which I find were most likely those set out in the ESA. I think that is likely, given that they were used to sell the same product she bought, FPOC2, at the times she bought it. But I also think the sales staff would have been trained using the Manual, given that DF has said it was also in use at that time. That means, I think the sales staff would have highlighted the investment elements of FPOC Membership, and the ability to make a return, during the sales process. Further, this is consistent with Mrs R's own evidence of how FPOC Membership was sold to her in her original questionnaire, witness statement and during my conversation with her.

135. Overall, when considering the nature of FPOC Membership, the Supplier's historic sales process, the inherent probability that it is more likely that a product with an investment element was sold as an investment and Mrs R's own memories, I conclude that it was more likely than not that the Supplier did present FPOC Membership to Mrs R as an investment.

136. As I have set out above, I do not think the sales documentation provided to Mrs R was sufficient to conclude whether or not FPOC Membership was being presented as an investment. It follows, I do not think there was anything in the sales documentation that undid the impression in the sales process that FPOC Membership was an investment, by setting out a clear retraction of that impression.

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[11] I noted that this is different to saying that it is more likely than not that a product with an investment element is sold as an investment, simply due to that investment element. For the avoidance of doubt, I made no such finding.

137. Under Reg.14(3) of the Timeshare Regulations, marketing or selling FPOC Membership as an investment was banned. Having found Mrs R was sold it in that way, I now need to consider whether this breach of Reg.14(3) could give rise to an unfair debtor-creditor relationship between Mrs R and Novuna under s.140A CCA.

The effect of selling FPOC Membership as an investment

138. The leading judgment on unfair debtor-creditor relationships is that in the case of *Plevin*, 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, as noted above, whether a creditor (or someone acting on their behalf) has broken a rule is not determinative to the question asked by s.140A CCA.

139. 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 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."*

140. It is apparent that the question of 'fairness' in s.140A CCA is broader than simply considering whether a lender (or its agent) has breached a rule or other obligation during the course of relevant dealings. And the Court went on to hold 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."*

141. Paragraph 10 of the judgment makes 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 is when the inequality of knowledge and understanding is "sufficiently extreme".

142. 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. 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."

143. 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 could not say whether Mrs Plevin would have made a different purchasing decision had she known more, but that did not prohibit the making of a finding of unfairness.

144. Further guidance on deciding whether the impact of what happened led to any unfairness in a debtor-creditor relationship, and how to remedy that unfairness, was given in two subsequent judgments. The first of which was the judgment in *Carney v. NM Rothschild & Sons Ltd* [2018] EWHC 958 ("*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."

145. And of the judgment in *Kerrigan v. Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ("*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 at [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…"

146. 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:

"[…] 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."

147. 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.

148. Further, the judgment in *Plevin*, read alongside that in *Carney* and *Kerrigan*, makes clear that in a case such at Mrs R's, an important consideration is whether the relevant misconduct impacted the debtor's decision to enter into the agreements. And in *Shawbrook & BPF v FOS*, in dismissing the judicial review claims, including that each ombudsman had erred in law in their approach to s.56 and s140A 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)*

149. It follows that, for a breach of Reg.14(3) 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. 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.

150. In Mrs R's case, she explained in her July 2018 questionnaire:

"*We were lead to believe […] this was an investment not only for us but we could leave it for our children."*

151. Further, in Mrs R's witness statement, she explained what she was told about FPOC Membership being an investment. She said at paras 31 and 32:

"We were led to believe that we were purchasing an exclusive membership with an investment in a property that would provide a guaranteed return upon the sale of the Product.

We therefore agreed to purchase the Product …"

152. And at paras 56 and 57:

"Since instructing our Solicitors, we have been made aware that we have purchased nothing more than an ordinary, worthless timeshare, which is neither an investment or an asset. Timeshares have no resale value and they are not in high demand like we were told.

If we knew the implications and the true nature of the Product at the time of the meeting, we would never have entered into the Agreement in the first place."

153. Finally, in my conversation with Mrs R, she said that FPOC Membership was sold to her as an investment that could be passed on to her children. She said she was not aware it was a 'timeshare', rather she thought it was an investment and, had she known more, she would not have gone ahead with the purchase if she knew she was buying a timeshare. Mrs R said that the main selling point for her was that FPOC Membership was an investment where she would be able to get back what she paid for membership, plus a share of the sale proceeds.

154. When considering what Mrs R told me in conversation, I am mindful of the guidance set out above in *Smith v. Secretary of State for Transport*. I find that Mrs R gave me her honest recollections, but I am also mindful that the conversation took place almost ten years after the sale and some years after her first complaint had been made. Given that, it is understandable that her memories were not perfect and, at times, she struggled to remember what had happened. However, there was nothing she said that made me doubt what she had said in her questionnaire or witness statement.

155. Mrs R has explicitly linked her agreement to purchase FPOC Membership with it being sold to her as an investment, noting that it was something she could leave to her children and something that would produce a return on her 'investment'. I find that these recollections are not inconsistent with the other evidence I have seen in this complaint, in fact being told FPOC Membership was something that could be left to family members was specifically mentioned in the Manual.

156. Novuna has suggested that the parts of Mrs R's witness statement set out in paras 56 and 57 were influenced by PR, in that it was only after speaking with PR that she was made aware she had "*purchased nothing more than an ordinary, worthless timeshare"*. It may be that after taking advice, Mrs R's perception of the 'value' of FPOC Membership to her changed, but in my view, that does not change that it is plain to me that the prospect of a financial gain was an important and motivating factor in Mrs R's purchasing decision. That does not mean she was not also interested in taking holidays, in fact I think her evidence shows this was something that was attractive to her (see para 28 of her witness statement). But that is not surprising given the nature of FPOC Membership, given that it provided holidays alongside the interest in the sale proceeds of the Property. But I have not seen enough evidence to persuade me that the prospect of a financial gain from FPOC Membership was so insignificant, in Mrs R's view, compared to the holiday rights, that her interest in taking holidays rendered the Supplier's breach of Reg.14(3) unimportant to the decision she ultimately made.

157. Mrs R has not said or suggested, for example, that she would have carried on with the purchase of FPOC Membership had the Supplier not led her to believe that it was an investment opportunity. And as she faced the prospect of borrowing and repaying a substantial sum of money while subjecting herself to long-term financial commitments, had she not been encouraged by the prospect of a financial gain from FPOC Membership, I have not seen enough to persuade me that she would have pressed ahead with her purchase regardless. It follows, I think this breach of Reg.14(3) led, in the circumstances of Mrs R's complaint, to Novuna participating in an unfair debtor-creditor relationship that requires it to do something to relieve that unfairness.

158. At the time of the sale, Mrs R worked in a bank. Novuna has suggested this is important and should be factored in when deciding whether there was any unfairness in the debtor-creditor relationship. As held in *Plevin*, s.140A CCA allows a court to take into account a wide range of factors when weighing up the question of fairness and Mrs R's circumstances, experience and sophistication are things to properly consider. But I cannot see that Mrs R's role means that she should have appreciated the risks in the investment element of FPOC Membership or that the sale was a breach of Reg.14(3). Mrs R may have been in a better position than some other customers to understand the way Novuna's loan worked, but I do not find her job meant the unfairness I have found was diminished sufficiently (or at all) to mean Novuna no longer needs to relieve the unfairness.

159. Finally, I have not considered Mrs R's claim made under s.75 CCA or that she had been lent to irresponsibly. That is because even if found those claims had merit, I would not direct Novuna to do anything more than I propose to direct it to do with respect to the unfair debtor-creditor relationship.

Fair Compensation

160. When I uphold a complaint against a business, I have the power to award fair redress. In particular, I may make a money award against Novuna for such an amount I consider to be fair compensation for any financial loss, including an award for interest. Normally that would be to put the consumer, so far as is possible, in the position they would have been in had the mistake not happened. In Mrs R's case, I think that means remedying the unfairness that I found due to the Supplier's acts and omissions that were done on Novuna's behalf.

161. I have also considered the law on how a court would approach the granting of relief after an unfairness was found. In particular, in *Carney* it was held (at para 101):

> *"Finally, and as noted above, the Court has a wide discretion as to any relief to be ordered once the unfair relationship has been found. In that regard I adopt paragraph 71 of the Bank's written closing submissions which I did not understand to be challenged. This is that 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 […] It should not give the Claimant a windfall, but should approximate, as closely as possible, the overall position which would have applied had the matters giving rise to the perceived unfairness not taken place […]"*

162. Having found that Mrs R would not have agreed to purchase FPOC Membership were it not for the Supplier's failing, I find unwinding of the FPOC Membership is a fair resolution of this complaint. Mrs R needs to be refunded what she paid toward FPOC Membership, both in terms of loan repayments and maintenance fees, with interest. But Mrs R also needs to account for any benefits she received from taking out FPOC Membership, both in terms of inducements to purchase and any holidays taken as part of her membership. And she would need give up any ongoing rights she acquired under the FPOC Membership. So, she would need to agree to relinquish her FPOC Membership, if it has not already been terminated, or assign to Novuna her rights under it or hold them on trust for Novuna.

163. I propose to direct Novuna to work out compensation in the following way – whether or not a court would award such compensation:

a. Work out the total of the repayments that Mrs R made on her Novuna loan, less any monthly travel savings bonus or other promotional giveaways that might have been paid;
b. Add the maintenance fees paid by Mrs R for FPOC Membership;
c. Deduct the market value of any holidays Mrs R took using her FPOC Membership[12];

("the net repayments")

d. Add simple interest to each of the net repayments from the date each one was made until the date Novuna settles this complaint. The rate of interest is 8% per annum simple[13];
e. Pay the balance to Mrs R;
f. remove any adverse information about the Novuna loan from Mrs R's credit file; and,
g. if necessary, arrange for FPOC Membership to be relinquished so that there are no ongoing liabilities. If relinquishment of Mrs R's FPOC Membership is not possible, as long as she agrees to hold the benefit of his interest in the Property for Novuna (or assign it to Novuna, if that can be achieved), Novuna must indemnify her against all ongoing liabilities as a result of her FPOC Membership.

The parties responses to my second provisional decision

22. Novuna accepted what I said in PD2 and said it would work out the compensation due to Mrs R.

23. Novuna then sent its calculation to PR. It said it was in accordance with the method I had proposed to work out fair compensation. With regard to the calculation at paragraphs 163(b) and (c) in PD2, Novuna said Mrs R had paid £852.53 in maintenance fees but taken holidays worth £1,866. So, it proposed to make a deduction of £1,013.47 to the compensation.

24. PR disagreed with the proposed deduction and asked for me to determine what I found to be fair compensation in Mrs R's complaint.[14]

25. Having been provided with information from both parties, I wrote to them to explain how I thought Novuna ought to calculate compensation. In summary, I said:

- I thought the amount of maintenance fees Mrs R would have paid in 2015 was

[12] I recognised that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, I said if it was not practical or possible to determine the market value of the holidays Mrs R took using her Fractional Points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the FPOC Membership Agreement seemed to me to be a practical and proportionate alternative in order to reasonably reflect her usage.
[13] I said that HM Revenue & Customs may require Novuna to take off tax from this interest. If that is the case, Novuna must give Mrs R a certificate showing how much tax it has taken off if she asks for one.
[14] It was also concerned that Novuna had not agreed to 'relinquish' Mrs R's FPOC Membership, but I am satisfied that Novuna saying it would arrange the surrender of the membership was the same thing.

€995, but I could not see any payment for that amount was sought by or paid to the Supplier.
- The maintenance fees paid by Mrs R in 2017 were €999.
- I did not think Novuna's way of working out the cost of a holiday taken by Mrs R in 2016 was clear or fair. Although I acknowledged the maintenance fees charged was not designed to be the actual cost of taking holidays, I thought it was a fair proxy to use as the past holiday cost in this case.
- I thought a holiday taken in 2017 by friends of Mrs R, although only available to friends and family of FPOC members, was a promotional holiday designed to sell memberships to new customers. I did not think it was taken using Mrs R's FPOC Membership and so I did not think it was fair to make any deduction for this holiday.
- I thought the fairest way to resolve this complaint was for Novuna to not return the maintenance fee paid in 2017 and treat it as a proxy for the cost of the holiday Mrs R took using her FPOC Membership in 2016. I thought the fee was sufficiently similar in amount to that which would have been charged in 2015.

26. Both PR, on behalf of Mrs R, and Novuna accepted what I had said about compensation.

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.

27. As both parties agreed with PD2, I see no reason to depart from my provisional findings as set out above. So for the same reasons as I explained in PD2, I uphold Mrs R's complaint.

28. I direct Novuna to work out compensation in the following way – whether or not a court would award such compensation:

    a. Work out the total of the repayments that Mrs R made on her Novuna loan, less any monthly travel savings bonus or other promotional giveaways that might have been paid (the net repayments);
    b. Add simple interest to each of the net repayments from the date each one was made until the date Novuna settles this complaint. The rate of interest is 8% per annum simple[15];
    c. Pay the balance to Mrs R;
    d. remove any adverse information about the Novuna loan from Mrs R's credit file; and,
    e. if necessary, arrange for FPOC Membership to be relinquished so that there are no ongoing liabilities. If relinquishment of Mrs R's FPOC Membership is not possible, as long as she agrees to hold the benefit of his interest in the Property for Novuna (or assign it to Novuna, if that can be achieved), Novuna must indemnify her against all ongoing liabilities as a result of her FPOC Membership.

My final decision

29. I uphold Mrs R's complaint about Mitsubishi HC Capital UK Plc, trading as Novuna Consumer Finance and direct it pay compensation as set out above.

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[15] HM Revenue & Customs may require Novuna to take off tax from this interest. If that is the case, Novuna must give Mrs R a certificate showing how much tax it has taken off if she asks for one.

30. Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs R to accept or reject my decision before 6 December 2024.

Mark Hutchings
Ombudsman