Neutral Citation Number: [2016] EWHC 2602 (Ch)

Case No: HC-2013-000370

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 20/10/2016

Before :

MRS JUSTICE PROUDMAN

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Between :

DAVID and BARBARA ABBOTT & ORS	**Claimants**
- and -	
RCI EUROPE	**Defendant**

- -
- -

Robert Deacon and Clive Wolman (instructed by **Edwin Coe LLP**) for the **Claimants**
Charles Graham QC and Nicholas Sloboda (instructed by **Herbert Smith Freehills LLP**) for the **Defendant**

Hearing dates: 11th, 12th, 13th, 16th, 17th, 20th, 23rd, and 24th May 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE PROUDMAN

Mrs Justice Proudman :

1. This is a case about timeshare exchanges. The defendant, ("RCIE", founded in 1974) operates a timeshare exchange programme. RCI LLC is organised on a global basis (its membership globally amounts to some 3.8 million members so that the claimants as a whole represent a tiny minority of RCIE's membership) and RCIE is one of seven regional sub-divisions which go to make up RCI LLC (which I will call "RCI" together with RCI LLC's constituent parts). Each regional division is responsible for providing services in that region and for creating and managing business relationships with developers of timeshare resorts in that region, but global standardisation applies in that members can travel across regions and RCI treats all members the same wherever they may be, subject to certain exceptions, irrelevant for present purposes. The retention rate of members in the Weeks programme (as to which see below) amounts to some 86%, but the remaining 14% include those who give up their timeshares on expiry, members who use their timeshare at their home resort and members whose resorts use a different provider, as well as those who leave because they are unhappy with the service.

2. RCIE does not sell timeshares as such, and receives no payment in relation to the purchase of a timeshare or the annual maintenance fees relating to the timeshare, but allows members to deposit their annual timeshare usage rights into RCIE's system and try to find alternative accommodation (in the form of annual timeshare usage rights) to use for their holidays. RCIE receives the membership fee paid by the customer, or on behalf of the customer by "affiliates", that is to say, those selling timeshares, on the customer signing up to the RCIE exchange programme.

3. RCIE pleads that it is in its interests to ensure that as many members as possible achieve their desired exchanges. It says that the value of the exchange system is driven by members, not RCIE, because it is the members who drive the demand.

4. This is a test case. On 28 March 2013 four (counting married couples together as RCIE does) current or former members of RCIE (Mrs Cunningham, Mrs Kravitz, Mr and Mrs Cole and Mr and Mrs Litherland), together with 483 other claimants including Mr and Mrs Abbott who give the case their name, commenced proceedings against RCIE, complaining about the operation of RCIE's exchange programme. The four claimants are "the Claimants" pursuant to the Order of Deputy Master Mark dated 12 November 2013. There is a generic claim with a master statement of case and also individual particulars of claim for the Claimants. The Claimants are or were all members of RCIE's "Weeks" Programme, the largest of the exchange programmes operated by RCIE. RCIE also operated a "Points" programme from about 2000, whereby members could obtain benefits such as cruises rather than an exchange.

5. I have had the advantage of representation by Mr Deacon and Mr Wolman for the Claimants and by Mr Graham QC and Mr Sloboda for RCIE.

6. The heart of the complaint is that RCIE has been renting out member-deposited annual timeshare usage rights which is said to be unfair to the members because it is said to reduce the opportunities for members to make exchanges. RCIE operates an "open" exchange system rather than the "closed" system which the Claimants say that it should. The Claimants say that timeshare deposited in the Weeks pool by

members should be available only to other members for the purpose of exchanges between members.

7. It was originally understood by RCIE to be said by the Claimants that RCIE is renting out the best timeshares deposited by members, called "skimming": see [14] of the generic particulars of claim. That does not however seem to be the current complaint which is (see Mr Deacon's opening),

> "RCI gets the ability to put into the system a lot of inventory that comes from resorts…and they're selling the members' inventory to pay for it."

And in Mr Deacon and Mr Wolman's closing skeleton,

> "that RCI rented out their timeshares (i.e. member deposited timeshares) without permission and made a profit from this activity."

See also [24] below.

8. There was crucially an operation called "segmentation" which the Claimants did not know about and which applied from about 2000 until 2009. Under segmentation, a maximum of 20% of the members' deposited time share never went into the Weeks pool but was allocated for rental purposes. Accordingly, up to a maximum of 20%, members could not take out of the pool that which other members deposited since RCIE took it for rental before it even went into the pool.

9. Certain members (both Weeks members and Points members) also sued RCI in the United States, alleging that RCI was "skimming" exchange inventory in order to rent it out for RCI's benefit. That action was settled in 2008 (Weeks) and 2011 (Points) on terms on a no-admissions basis. Gordon Gurnik, the President of RCI, says that only very small payments were made, although he does also say that RCI had agreed to provide balancing reports under the terms of the settlement, which included a requirement to produce balancing reports (reports for the years 2008-2013 have been disclosed but Mr Deacon and Mr Wolman say that the defects are likely to have been most egregious before 2008) dividing inventory into three segments based on trading power, as to which see below.

10. It was an important term of the settlement that their trading power had to be disclosed to members, with a high degree of transparency. The three categories were created by assessing the trading power for all inventory added or removed more than 60 days before their start date and dividing them into three groups, high, medium and low.

11. This was done to address concerns that RCI was skimming by taking out high demand inventory and replacing it with low demand inventory. The balancing reports for the Weeks members (at any rate those disclosed) show that RCI consistently added more inventory in each group than it took out. The Points settlement was monitored by Dr Thomas Maronick, a court-appointed independent expert, who was asked to review inter alia the balancing reports. He concluded that the settlement agreement was fair and reasonable and that in the US proceedings

there was adequate disclosure of the amount of inventory added and removed by RCI.

12. RCIE, while denying skimming in its technical sense (see [2] of the generic defence), accepts that it has been renting out rights but says that it is crucial to its success and is to the advantage of members. RCIE says that its complex and confidential algorithms allow it to balance timeshares across the system, increasing the opportunities for members to make a fair exchange.

13. The Weeks programme, RCIE says, is balanced in the sense that RCIE sources and adds more inventory into it, in terms of quantity and quality, than it removes by rental of inventory deposited by members.

Background

14. The Weeks programme works as follows. A member deposits one piece of inventory, that is to say a week that the member purchased from his, her or their home resort, into the Weeks pool. The member is offered the opportunity (subject to segmentation) to take out another piece of inventory from the pool, comparable to the value of the inventory put in (comparable in terms of level of demand, supply, usage, size and quality), so that the member can exchange a deposited timeshare for a different week in a comparable inventory. More value cannot be removed from the system than that deposited.

15. There are three constraints in the exchange system. First, that of supply, namely that if members merely relied on exchanges, it would be difficult to keep members happy (see Mr Lowe's evidence at Transcript Day 4 p.79) as the members would be fatigued with mass tourist resorts. RCIE therefore, says RCIE, goes out into the market to buy other inventory to add to the pool. Secondly, the fact that a member might own a popular inventory for a school holiday week while another member might own inventory for a less popular resort for a less popular week so that if the two deposits were treated comparably the system would fail. Thirdly, "spoiling", that is to say, inventory which is unused. First, RCIE rewards those who deposit early and secondly, RCIE says it tries to rent out properties before they spoil.

16. For the first few years, RCIE's system was not computerised but was operated on a card index system. However, there was, says RCIE, a problem in that members with the best timeshares had no incentive to deposit. In about 1980 a simple means was introduced of ensuring that members received comparable timeshares on their exchanges, namely (i) the concept of red, white and blue weeks (being the most to least popular weeks), (ii) rating accommodation according to the configuration of and number of bedrooms in the deposited unit and (iii) allowing inventory available 45 days or less before its start date (at risk of spoiling) to be available to all members. By 1989, when computers became more sophisticated, RCIE introduced the system of "trading power", calculating trading power for each deposit according to supply, demand, usage, unit configuration and resort quality as well as the red, white and blue weeks system. Members could exchange into a week with the same or a lower rating of trading power than that which they deposited.

17. In 1993, a "SLAM" system was introduced, grouping inventory into seven broad categories of trading power. Members could still exchange into inventory in their

overall category or below, but deposited inventory was spread across categories, keeping members who had deposited high value inventory satisfied (as high value inventory was reserved predominantly for them), but also allowing high value inventory to be spread across the system to minimise the risk of spoiling.

18. In 2009-2010, SLAM and its categories were replaced by the current system of Deposit Trading Power ("DTP") and Exchange Trading Power ("ETP"). DTP is the trading power (measured in Trading Power Units ("TPUs") ranging between 0 and 60) that a member is assigned on deposit, such as supply, demand and utilisation of the week, including such factors as the region, the resort (taking into account member feedback), the configuration, size and quality of accommodation, the date of deposit (the earlier the better- preferably nine months or more in advance- and thereafter the DTP falls by a fixed percentage) and the start of the week. ETP is the trading power assigned to the deposited week, that is to say, it is the trading power that any member needs to book that particular week. While DTP is fixed on deposit, ETP changes depending on fluctuations in future supply, demand and the utilisation for such inventory as time progresses.

19. The algorithmic system for calculating DTP and ETP was developed from 2005 by "very bright, mostly PhD, mathematicians": see Sean Lowe's evidence at Transcript Day 4 p. 84. Almost all inventory deposited by members will be allocated an ETP which is lower than the DTP which the member was originally given for it: see Mr Abhishek's evidence at Transcript Day 4 p.162. The system is intended to be scrupulously fair, says RCIE, and the only intervention made by RCIE is to prevent market forces from hurting those with the least popular deposits by providing that everyone who deposits at least 9 months before the commencement of their week obtains DTP of at least 8: see Mr Abhishek's evidence at Transcript Day 4 p.157. The algorithms are confidential and a proprietary trade secret.

20. The same algorithm grades the inventory (in TPUs) which RCIE itself deposits into the Weeks pool, but RCIE only earns a credit when a member takes what RCIE has deposited for an exchange. Again, when RCIE rents out any member's deposited inventory, it calculates the value of the extraction in TPUs.

21. As I have said, it was an important term of the US settlement that the details of a member's trading power had to be disclosed to that member.

22. The Weeks programme began in the 1970s but was a closed programme at first, that is to say that only exchanges were permitted. It is not clear when it became an open system, although the Claimants initially thought that it started in about 2000. However, Mr Gurnik says (in [101] of his first witness statement) that it started, "at least since I have been involved in inventory management at RCI (that is to say, since about 1990)". Mr Gurnik says that the key characteristic of an open system is that the pool is not limited to inventory deposited by members but is supplemented by inventory acquired by RCIE, deposited by affiliated resorts or derived from Points members. The large scale open system operated from 2004 when credit accounting was first introduced.

23. Mr Gurnik says (at [101]-[103] of his first witness statement) that,

> "The cost of the exercise was historically recognised by RCI as a marketing expense…However the cost of supplementing the RCI Weeks pool through the acquisition of inventory (without any dedicated revenue stream to offset the costs associated with acquiring and administering such inventory) meant that the scale of the exercise was limited…
>
> Initially, [in about 2000] RCI recognised [the costs of the Points system] as a marketing expense as well. Within a few years, RCI introduced an accounting treatment which enabled it to recover the costs of providing the benefits or inventory in question or (where the inventory was acquired without cost to RCI) to monetize the value of what RCI had added, by renting out some member-deposited inventory. The accounting treatment is a credit inventory accounting methodology (and is discussed in more detail below [in [118]-[124] and in Claire Mahoney's witness statement]…
>
> From around 2004/5, the credit inventory accounting methodology allowed RCI to capture and recover inventory acquisition costs and to monetize the value inherent in inventory acquired by RCI at no cost, which in turn meant that RCI could afford to increase the scale of its acquisition activity for the benefit of members."

24. The root of the current complaint of the Claimants is that (a) they were not told that the system was not a closed one, indeed the contract suggests the opposite, and (b) RCI Europe monetised the value of inventory acquired without cost to it.

25. Mr Gurnik says (in [115]-[117] of his first witness statement),

> "It is my understanding that some members have, in the past, expressed a perception that RCI rents out good inventory in a way which is detrimental to members' interests…
>
> I do not believe that the perception that desirable timeshare was rented out to the detriment of RCI members is, or was, accurate. The two most common reasons that inventory sometimes appears available for rental but not exchange are:
>
> (a) RCI has acquired the property from a resort for the purpose of renting it out. This acquired inventory was not deposited by a member and would never have been available for exchange. The fact that it is made available for rental increases vacation opportunities for members (because they can rent it); or
>
> (b) Prior to the introduction of Enhanced Weeks in 2010 [under which members were given access to tools and searches that told them what trading power they needed to exchange into different inventory in the Weeks pool and under which there were additional exchange features], the member did not have

> sufficient trading power to exchange into the inventory, but was offered the inventory as a rental as an alternative. Since the introduction of Enhanced Weeks, members now see all inventory that is available for exchange, even if they do not have enough Trading Power to make the exchange."

The Claimants

26. There seems little doubt that the claimants have a grievance in that the holidays they want have not been available. They do not think that the Weeks programme as operated offers a fair exchange for their timeshares. I have studied their witness statements to this effect.

27. The Claimants' "principal complaint" (see e.g. [6] of Mrs Cole's first witness statement) is that there were rarely any holiday exchanges available that they wanted to go to at the time that they wanted to go.

28. RCIE says that it can only offer for exchange the holidays that it has on hand and that the brochures state that members should only buy timeshare on the basis of benefits that they will have from operating and using that timeshare, rather than benefits they think they will get by exchanging it through an RCIE exchange programme. [3] of the generic defence says,

> "As RCI has always made clear, not all members will achieve the exchanges which they desire. That is inherent in any exchange system."

29. Mr and Mrs Cole in particular had some awful holidays, especially the holiday they took in Barbados, which they described in graphic detail in their witness statements and oral evidence: Transcript Day 2 p.84-86, p.150 and p.155-156. However, their bad holiday experiences did not cause the alleged loss as a matter of law as the weeks the Coles took came from a member deposit and not from anything RCIE put into the system: see Transcript Day 5 p.144. Moreover Mrs Cunningham's evidence was that she had always found the RCI system frustrating (Transcript Day 3 p.73) that is to say even before it became an open system.

30. It is incidentally noteworthy that Mr and Mrs Cole (as opposed to the other Claimants) succeeded in getting an exchange every year that they wanted one, from 2000 to 2006 and again in 2009. They banked their deposits early and rang RCI armed with a list of holiday options that they were prepared to consider.

Is the term of the contract (which the parties call the Permitted Use Clause) struck down by the Unfair Terms Contract Act?

31. There are various versions of the "Permitted Use Clause" in the brochures ("RCI terms of membership"). Clause 6.2 is taken from the contracts entered into between 1996 and 2005,

> "6.2 By depositing Holiday Ownership rights, you relinquish all rights to use them and agree that those Holiday Ownership rights may be used by RCI without restriction to conduct

> exchanges, inspection visits, promotions and other purposes in RCI's discretion…"

32. Clause 9.3 entered into between 2006 and 2011 reads,

> "By depositing your Holiday ownership rights, you relinquish all rights to use them and agree that they may be used by RCI without restriction."

33. A different clause 9.3 was entered into from February 2011 onwards,

> "By depositing your Holiday Ownership rights, you relinquish all rights to use them and agree that they may be used by RCI for any commercially reasonable purpose including without limitation to fulfil exchange requests by other RCI members, for inspection visits, promotions, rental, sale, marketing or for other purposes at RCI's sole discretion, including use in other exchange or accommodation programmes."

34. However, as Mr Deacon and Mr Wolman point out, each contract provides in the same or similar terms,

> "Before you can request an exchange or receive an exchange confirmation, you must:
>
> …deposit Holiday Ownership rights with us and we will put them into the [RCI] pool of exchange accommodation"

Moreover, under "Helpful Hints and Tips" the brochures say,

> "Confirmed exchanges depend upon deposited space. Members can only take out of the space bank pool what other members have deposited…"

Again, the brochure says,

> "The space bank pool stores all of the timeshare weeks", and again,
>
> "Once you deposit your week it becomes available for other RCI members to exchange into."

There are other examples of suggestions in the brochures that RCIE was merely in the business of exchange. These statements were not correct during the segmentation years as pleaded in [15] of the Particulars of Claim, and they were not correct at all in that RCIE has been extracting member deposited inventory from the pool for rental purposes.

35. It does not matter which version of the Permitted Use Clause is scrutinised, but I propose to concentrate on the earlier version of clause 9.3 as it is in the widest terms.

36. There is a dispute between RCIE on the one hand and the Claimants on the other as to whether or not the clause should be considered as a whole. Mr Graham QC says that the clause contains two distinct features, which he calls the "Relinquishing Clause" ("you relinquish all rights to use them") and "the Permitted Use Clause" ("and agree that they may be used by RCI without restriction"). Mr Graham QC points out that in [6] of each of the Claimants' particulars of claim it is pleaded,

> "At all material times RCI has owned and operated, and continues to operate now, the RCI exchange club whereby members of the club transfer their existing holiday usage rights (or "timeshares") to RCI for particular years with a view to RCI arranging timeshare exchanges between the club's members."

37. Accordingly, says Mr Graham QC, it is admitted that the right to use the timeshares is transferred from the member to RCI. Mr Deacon and Mr Wolman, however, say that there is no relinquishment of rights as control was ceded to RCIE but not ownership of the inventory. Either the clause is struck down as a whole or it is not.

38. The Claimants rely on the Unfair Contract Terms Act 1977 and regulation 8 of The Unfair Terms in Consumer Contracts Regulations 1999 ("the 1999 Regulations", which replaced The Unfair Terms in Consumer Contracts Regulations 1994, "the 1994 Regulations", and are similar for present purposes) in contending that the clause as a whole (which they refer to as the Permitted Use Clause) fails the statutory test of fairness of a term (which it is common ground was not individually negotiated) in that contrary to the requirement of good faith it creates a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. They say that it is accordingly an unfair term in a contract concluded with a consumer by a seller or supplier and it must be treated as severed from the remainder of the contract which continues to bind the parties.

39. The first thing to notice is that the pleading of breach of contract says that the removal of inventory was not to the benefit of members: see [38] of Mrs Cunningham's, [18] of Mrs Kravitz's, [28] of Mr and Mrs Litherland's and [20] of Mr and Mrs Cole's particulars of claim. To my mind, the Claimants have not proved this: see the balancing reports, RCIE's evidence and [53] below.

40. Secondly, the Claimants rely on the *contra proferentem* rule, in other words, that the Permitted Use Clause should be construed, under Regulation 7(2) of the 1999 Regulations, against the person relying on it, that is to say, RCIE. The problem with this argument is that Regulation 7(2) is only triggered when "there is doubt about the meaning of a written term", and it is not suggested by the Claimants that there is such a doubt within the meaning of Regulation7(2).

41. Thirdly, the Permitted Use Clause is unfair if (see Regulation 5(1) of the 1999 Regulations),

> "…contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."

42. Thus the term must cause both a significant imbalance in the parties' rights and obligations and a breach of the requirement of good faith as well as a detriment to the consumer.

43. In *Director General of Fair Trading v. First National Bank Plc* [2002] 1 AC 481, Lord Bingham said in [17] (see also [36] per Lord Steyn, [45] per Lord Hope and [54] per Lord Millett) ,

> "The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour…The illustrative terms set out in Schedule 3 to the Regulations [the 1994 regulations] provide very good examples…This involves looking at the contract as a whole. But the imbalance must be to the detriment of the consumer; a significant imbalance to the detriment of the supplier, assumed to be the stronger party, is not a mischief which the Regulations seek to address."

44. Mr Graham QC relies on *Aziz v. Caixa d'Estalvis de Catalunya* (C-415/11); [2013] All ER EC 730 decided on 14 March 2013, in which the First Chamber said (at [68]),

> "…in order to ascertain whether a term causes a 'significant imbalance'…it must in particular be considered what rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable the national court to evaluate whether and, as the case may be, to what extent, the contract places the consumer in a legal situation less favourable than that provided for by the national law in force…"

45. I agree with Mr Graham QC that there is no significant imbalance because of the fetters on the exercise by RCI of its discretion. Whether or not the clause has to be construed as a whole, and whether or not the Claimants strictly relinquish their rights, the Claimants undoubtedly deposit their inventory with RCIE as part of the bargain with RCIE. The member agrees to join the RCI exchange scheme and pays RCI an enrolment fee. He, she or they can obtain access to exchanges in return for making a deposit and can take bonus weeks without deposit. If a member chooses to deposit inventory into the pool, RCI allocates trading power to that member which gives the member the opportunity to make a fair exchange. Once a member has deposited his or her rights, his, her or their interest is limited to the use which he, she or they can make of the trading power. Once a member has deposited his, her or their inventory he, she or they do not have any interest in it save that he, she or they do have the right to withdraw the inventory from the pool as long as it has not been assigned to anyone else and as long as the member has not confirmed an exchange on the basis of the trading power received.

46. A member can only obtain access to an exchange system which is operated fairly, with reasonable care and skill (see the Supply of Goods and Services Act 1982 s. 12 and 13) and under which RCI could not exercise the discretion arbitrarily,

capriciously or unreasonably: see *Braganza v. BP Shipping Limited and another* [2015] UKSC 17 and [2015] 1 WLR 1661, applying *Socimer International Bank Limited v. Standard Bank London Limited* [2008] EWCA Civ 116; [2008] Bus LR 1304. These fetters apply whether or not the Permitted Use Clause (however defined) was included in the contract.

47. Moreover, it is important to note, in the context of considering the contract as a whole, that a member can terminate his or her contract at any time without penalty: see for example clause 15 of the 2006 Terms and Conditions. Indeed a member could recover the unused part of his or her membership fee and could withdraw from the pool any deposited inventory, provided that inventory had not been assigned to another person and he, she or they had not exchanged against a deposit. However, even then the member could cancel the exchange. Mr Gurnik was not challenged on his evidence that membership was voluntary.

48. Thus what RCI does with the deposited inventory does not in my view affect the substance or core of the parties' bargain. After deposit, the member's interest is represented by his or her trading power and his or her contractual entitlement to access the exchange system, which RCI is obliged to operate with the fetters mentioned above.

49. If I am wrong about this, I must go on to consider the requirement of good faith. The Permitted Use Clause was the mechanism by which RCI could add additional inventory to the pool. It did not need to be drawn to the attention of the member because it could not unfettered be used to the disadvantage of consumers and, if it were, the member could simply leave the exchange system without penalty.

50. The Claimants particularly drew attention to three terms listed in Schedule 2 to the 1999 Regulations, namely the term at [1(i)], [1(j)] and (particularly, said Mr Deacon) [1(k)] which have the object or effect of,

> "(i)…irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
>
> (j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
>
> (k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;"

51. As to (j) and (k), the Permitted Use Clause did not enable RCIE to alter any terms of the contract or characteristics of the service to be provided. This is very different from the kind of cases where terms have been struck down as unfair under the 1999 (or 1994) Regulations, namely terms providing for penal default interest or repossession clauses. As to (i), Mr Graham QC says that the member was not bound to any terms irrevocably. There was merely a clause as to how RCI should exercise its discretion.

52. However, if the Permitted Use Clause was unfair, the effect would be to strike it down under Regulation 8(1) of the 1999. RCIE would not, as it accepts, be permitted to use the inventory to the disadvantage of the consumer, which would allow RCIE to use deposited inventory only in accordance with the fetters specified above.

53. The problem with the Claimants' case is that they have not shown that steps taken by RCI in relation to member deposited inventory caused a shortfall in suitable exchange opportunities of a lower quality than they otherwise would have been. In other words, causation has not been proved.

Other Acts and Regulations

54. The Claimants' skeleton arguments mentioned a number of other statutes and regulations, namely the Consumer Protection from Unfair Trading Regulations 2008 ("the 2008 Regulations"), the Timeshare, Holiday Products, Resale and Exchange Contracts 2010 ("the 2010 Regulations") and the Consumer Rights Act 2015 ("the 2015 Act").

55. As to the 2008 Regulations, Mr Deacon insists that in the light of Recital 21 of the Directive 2005/29/EC enacted on 11 May 2005 concerning "unfair business-to-consumer commercial practices in the internal market" the principle of *Marleasing SA v La Comercial Internacional de Alimentacion SA* (C-106/89) 13 November 1990; [1993] BCC 421 meant that the 2008 Regulations had to be read as providing for civil remedies, despite the fact that the 2008 Regulations are said to provide criminal remedies only.

56. However, Flaux J (in *McGuffick v. Royal Bank of Scotland plc* [2009] 2386 (Comm) at [89]), HHJ Keyser (in *AJ Building and Plastering Limited v. Turner and Ors* [2013] EWHC 484 (QB) at [86]), and the Law Commission (in *The Law Commission No.332/The Scottish Law Commission No.226, March 2012* [1.1] and [1.2]) said that the 2008 Regulations did not provide for private law rights. Recital 21 of the Directive said that "persons or organisations" should be given a remedy but left it to member states to decide who that should be. The 2008 Regulations decided that the Office of Fair Trading and other enforcement authorities were the persons who had the right of remedy.

57. The Law Commission thought that regulations should provide for private law rights other than under regulation 6 (material omissions) which is the regulation Mr Deacon says applies. Accordingly, the Consumer Protection (Amendment) Regulations 2014 were passed adding private rights of redress for contracts entered into after 1 October 2014 (regulation 1 (3)). However, the 2014 Regulations did not extend to material omissions.

58. Mr Deacon did however put the 2008 Regulations to RCIE's witnesses, which I agree with Mr Graham QC was unfair, bearing in mind that they were not pleaded and no prior warning was given.

59. The 2010 Regulations only came into force on 23 February 2011 and it is common ground that they do not apply retrospectively. RCIE's contractual terms were altered on 23 February 2011 to reflect the 2010 Regulations and it is not alleged that

they failed to comply with the 2010 Regulations or indeed that the Claimants entered into a contract with RCIE after 23 February 2011. Instead Mr Deacon merely said that he was putting the 2010 Regulations "as background", "letting you be aware that these provisions are here".

60. As to the 2015 Act, the Claimants only rely on s. 50(1) and 71(2), which do not apply to contracts made before 1 October 2015 (see Regulation 3(c) of the Consumer Rights Act 2015 (Commencement No. 3, Transitional Provisions, Savings and Consequential Amendments) Order 2015/1630 see also 2016/484) - the 1999 Regulations apply- but Mr Deacon does not say that the 2015 Act applies retrospectively and in any event the same test applies.

61. I do not therefore see the relevance of statutes and Regulations other than the Unfair Contract Terms Act 1977, the 1994 Regulations and the 1999 Regulations.

Implied term

62. It is pleaded in the generic Particulars of Claim (and replicated in the individual Claimants' Particulars of Claim) that,

> "…It was an express or alternatively an implied term of the Claimants'…contracts with the Defendant, necessary to give business efficacy thereto, that the Defendant would not:
>
> (1) Remove or withhold timeshares from the exchange pool for its own commercial benefit to the detriment of members wishing to exchange.
>
> (2) Use timeshares in the exchange pool for its own commercial benefit to the detriment of members wishing to exchange."

63. Apart from the fact that I do not think that the Claimants have proved the relevant detriment, it was obviously not an express term that the Defendant would not remove, withhold or use timeshares to the detriment of members. Accordingly one is left with implied terms.

64. The Supreme Court has reaffirmed the principle (see *Marks & Spencer plc v. BNP Paribas Securities Services Trust Co (Jersey) Limited and another* [2015] UKSC 72; [2016] AC 742) that for a term to be implied into a contract, its inclusion must either be so obvious as not to require stating or necessary in order to give business efficacy to the contract. Lord Neuberger (with whom Lord Sumption and Lord Hodge agreed) said of the second matter (at [21]),

> "…that a term can only be implied if, without the term, the contract would lack commercial or practical coherence."

65. Under this test, I do not think that the terms were so obvious as not to require stating or necessary to give business efficacy to the membership contract.

Breach of fiduciary duty

66. The existence of a fiduciary duty was asserted by Mr Deacon and Mr Wolman in reliance on *AIB Group (UK) plc v. Mark Redler & Co Solicitors* [2014] UKSC 58; [2015] AC 1503, *Bristol and West Building Society v. Mothew* [1998] Ch 1, *Dunne v. English* (1874) LR 18 Eq 524, *Twinsectra v. Yardley* [2002] 2 AC 164 and *Hospital Products Limited v. United States Surgical Corporation* (1984) 156 CLR 41. They said that the following features of the contract between RCIE and members pointed to a fiduciary relationship,

a. Personal property was entrusted by each Weeks member, acting as principal, to RCIE in the form of timeshares or usage rights,

b. RCIE undertook for a fee to provide a service, namely to facilitate the exchange of timeshares between Weeks members,

c. RCIE was given discretionary powers over the allocation and disposal of the property as and when it was deposited in the pool in order to provide this service,

d. Further, RCIE represented to each member that it was also entrusted with the property of all the other Weeks members as and when they deposited inventory in the pool and had the same duties and powers in relation to their property as it did to the property of the principal.

67. In the circumstances, say Mr Deacon and Mr Wolman,,

a. Each member trusted RCIE to deal with his own timeshare in accordance with the exchange service it was paid to provide.

b. RCIE acted as agent or other fiduciary on behalf of each principal in that in that it undertook the duties of an agent.

c. In addition, or alternatively, RCIE owed custodial stewardship duties (as in the *AIB* case per Lord Toulson at [51]) to each principal in relation to his, her or their inventory and acted as trustee or had duties akin to a trustee.

d. RCIE acted as a fiduciary each time it made an arrangement, or entered into an agreement with another member, or outsider, to let him make use of the principal's inventory, subject to standard conditions.

e. Unauthorised application of inventory constituted a breach of the custodial stewardship duty and a breach of fiduciary duty.

f. RCIE's core duty was to deal with the inventory within the members' exchange service.

g. If RCIE wanted to deviate from this core duty it had to get the informed consent of all members and could not use the Permitted Use Clause to get round this requirement.

h. RCIE had to make full disclosure (as in *Dunne v. English*, per Sir George Jessel MR at p.533 and *Mothew*, per Millett LJ at p. 18).

i. RCIE could not exploit for itself business opportunities arising while performing its duties and had to disclose all material facts about the business at hand.

68. Mr Deacon and Mr Wolman rely on the part of the *Hospital Products* case where Mason J says (at p. 96-7),

> "The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person, who is accordingly vulnerable to abuse by the fiduciary of his position."

69. However, I cannot see that the Claimants can point to anything to show that the transfer of inventory involved in a deposit was a transfer in the nature of a trust, so that the member retained a beneficial interest in the inventory. It is counterintuitive to suggest that a member does as there can be no beneficial interest in inventory which the member cannot use. In any event, RCIE could not act with single-minded loyalty for each member of the Weeks programme as each member has a competing interest with the other members, for example as to trading power.

70. The Claimants use the language ("principal", "trust", "fiduciary duties") of fiduciary duty, but that by itself is insufficient. There is accordingly no basis for the suggestion that RCIE is acting as trustee, agent or custodian, or otherwise than in accordance with its contractual rights.

71. Mr Deacon and Mr Wolman say that it was part of RCI's case before the European Court of Justice ("ECJ"), and was accepted by the ECJ, in *RCI Europe v. Commissioners for Her Majesty's Revenue and Customs*, Case C-37/08, ECR I-7533, 3 September 2009, that RCI did not act as principal but merely as an intermediary between members.

72. The first point to note is that the ECJ was not concerned with the status of RCI but only with Value Added Tax and the place where services were supplied (in relation to exchange fees and membership fees, not rentals: see [18]-[20] of the Agreed Statement of Facts) as a matter of construction of Article 9(2) of the Sixth Directive. Secondly, only the Advocate General, and not the ECJ, considered whether or not RCI was acting as agent. [8] of the decision of the ECJ simply paraphrases [12] of the Advocate General's opinion, which drew a distinction between the members' interest in the property under the timeshare contract and the annual usage right. The Advocate General said in terms in [102]-[104] of her opinion that RCI was acting as principal, not as agent. Thus there was no contract between members, which there would have to have been if RCI was acting as an agent. Mr Deacon and Mr Wolman say that the Advocate General was merely analysing the case of a travel agent (to which special regulations apply) but I do not think that this is the case. It seems to me that [102] is wider than this.

73. Ms Mahoney was cross-examined on the basis that RCI had concealed rentals in its submissions to the ECJ, but she said, correctly, (at Transcript Day 5 p.31) that the relevant issue was whether RCI should be paying VAT on exchange fees and membership fees, as the agreed statement of facts said.

74. Mr Deacon and Mr Wolman also relied on cross-examining Mr Gurnik and Mr Lowe on the allegation that members retained their timeshare usage even after deposit. Both said they did not: see Transcript Day 4 p.47 and 76.

75. Accordingly I find that the Claimants have not proved that there was any breach of fiduciary duty.

Misrepresentation

76. Mr Deacon and Mr Wolman rely on s.2(1) of the Misrepresentation Act 1967, namely,

> "Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true."

77. Mr and Mrs Cole and Mr and Mrs Litherland gave evidence that when they were sold their timeshares, the salesmen appeared to operate on behalf of RCIE as well as on behalf of the persons who sold the timeshares, so that *Hall v Cable & Wireless plc* [2009] EWHC 1793 (Comm); [2011] BCC 543 at [25] does not apply. The timeshare sales process was undoubtedly a hard selling one. However, neither Mr and Mrs Cole nor Mr and Mrs Litherland gave evidence that the sales representatives actually used the words ascribed to them in the particulars of claim. Instead they drew attention to the fact that it all happened a long time ago so that their memories are hazy.

78. The pleading by Mr and Mrs Cole is as follows (at [12]),

> "In order to induce the Claimants to purchase the Canaltime timeshare, join the RCI exchange club and contract with RCI for that purpose, the following express and/or implied representations were made to the Claimant [sic] by the Canaltime representative at the presentation:
>
> a. That timeshares transferred to the exchange pool would be made available only to other members for the purpose of exchanges between members. [This has been called before me the "closed" representation.]

b. That the Canaltime timeshare week would entitle the Claimants to any exchange accommodation in RCI brochure either in Europe or the World at any time of the year. [This has been called before me the "anytime anywhere" representation.]"

79. Mr and Mrs Cole attended a timeshare presentation in July or August 1999 by Canaltime Developments, an affiliate of RCIE, in Taunton. There was no representative of RCIE present, but RCI banners and brochures were much in evidence. They say that they believed that they could exchange anywhere in the world, always with 5 star accommodation. They accept that they were told that the quality of the exchange would depend on the quality of the home resort, which suggests that they were told, in very basic terms at least, about trading power.

80. In the Royal Park Albatros Club in Tenerife, a Gold Crown Resort (to which Mr and Mrs Cole had a free trip), a salesman called Jonathan showed Mr and Mrs Cole a brochure in November 1999 and other literature from RCIE, and said that if they bought a red floating week, which came with membership of RCIE, that would give them "the greatest currency value to be used in the exchange system". Such a red floating week meant that Mr and Mrs Cole not having children, could take holidays at less popular times.

81. Jonathan said that while the first salesman had said that Mr and Mrs Cole could use the RCI brochure to book holidays anytime anywhere, this was incorrect. He explained that there was a grading system within RCI and that the canal boat timeshare was low in that system but that if Mr and Mrs Cole upgraded to the Royal Park Albatros Club in Tenerife they could indeed book exchanges anywhere in the world. Mr and Mrs Cole said that they were getting married in August 2000 and wanted to go to Hawaii on honeymoon and Jonathan said that it was possible to do so: they "would be in a great position to secure with RCI the resort that [they] wanted for [their] honeymoon". Jonathan apparently presented Mr and Mrs Cole with the brochure ([38] of Mrs Cole's first witness statement), although she said in oral evidence that the first salesman did not: Transcript Day 2 p.32.

82. However, Mr and Mrs Cole only plead the original representations by Canaltime in relation to misrepresentation and I intend to hold them to their pleadings.

83. It is Mr and Mrs Cole's own case (see [2] and [3] of the skeleton argument of Mr Deacon and Mr Wolman) that representations made prior to 2000 to the effect that inventory which they deposited would be made available only to other members for the purposes of exchange would in substance have been accurate and truthful prior to 2000. In any event neither Mr nor Mrs Cole said in written or oral evidence that this representation was ever actually made to them.

84. Mrs Cunningham said in [16] of her first witness statement,

> "I understood that the RCI scheme was a mutual scheme, in that all those who were joining it put in their weeks for exchange. I believe that the concept was explained to me by one of the timeshare people. Once deposited our weeks were retained within the system so that we would be seeking to

> exchange with weeks that other members had put into the system."

Again, that was true at the time that Mrs Cunningham joined the Weeks pool in 1981.

85. As to the anytime anywhere representation, it is Mr and Mrs Cole's own case that they were told in November 1999 that the representation was untrue: see Transcript Day 2 p.51.

86. Mrs Cunningham merely said in [16],

> "It was also emphasised to me that by joining RCI I would be able to take holidays anywhere in the world."

Again the reference to "joining RCI" suggests that the representation was made well outside the limitation period.

87. Mr and Mrs Litherland's pleading is in much the same form as that of Mr and Mrs Cole, pleading the closed representation and the anytime anywhere representation made to them in October 2004.

88. Mr and Mrs Litherland bought a timeshare through a man called Tom Pearson in Praia da Oura, Portugal. Again, he flicked through an RCI brochure (without letting Mr and Mrs Litherland have it) and said that the Praia da Oura timeshare week would enable Mr and Mrs Litherland to have any exchange accommodation in the RCI brochure in Europe or the Americas or elsewhere at any time of year. At first, he tried to sell them a red week but then said that even a week in January (a blue week) could be swapped for a week at any time of year. Mr and Mrs Litherland accordingly bought a blue week, although after complaining it was upgraded to a red week. Mr and Mrs Litherland said that they told Mr Pearson that they had young children of school age and therefore that he knew or should have known that Mr and Mrs Litherland would need to seek exchanges during school holiday periods.

89. Mr Litherland accepted that the closed representation was not made to them: see Transcript Day 2 p.167-8. Mr and Mrs Litherland realised in January 2005 that the anytime anywhere representation was untrue and that they had been deceived by Mr Pearson (see Transcript Day 2 p.178 and Day 6 p.386) so that, as with Mr and Mrs Cole (who were aware that they had been deceived by the Canaltime representative when they met Jonathan at the Royal Albatros Club in Tenerife in November 1999), their claims are time-barred. The pleaded claim in oral misrepresentation is accordingly time-barred by s.2 and s.9 of the Limitation Act 1980.

90. It seems to me that the representatives of the timeshare companies were indeed acting on behalf of RCIE. There was no member of RCIE present, the timeshare representatives had the RCI brochures and operated under banners screaming RCI. They were representing companies which were "affiliates" of RCI. It is not surprising that Mr and Mrs Cole and Mr and Mrs Litherland were confused about who represented RCIE. Mrs Cole accepted (at Transcript Day 2 p.48) that she knew that the Canaltime salesman did not work for RCI although she said,

> "Mrs Justice Proudman: But did you think that the gentleman who spoke to you worked for RCI as well as working for Canaltime?
>
> Mrs Cole: Not actually worked for the [sic] but a representative. So he had the knowledge –he'd been trained by them to give their –what's the word – I can't think of the word- how their system worked basically, so that he was like- he'd been trained by them to sort of say: this is how it works; this is what it involves; and having a membership to RCI would then entitle you to be part of this community to exchange your timeshares"

91. Mr Graham QC said that RCI attempted to ensure that consumers were aware that sales representatives did not represent RCI, pointing to clauses in the affiliation agreements saying that the representatives did not act as agents of RCI and were not to make representations on RCI's behalf. They also agreed to show their customers a notice stating in terms that the representatives did not represent RCI and were not agents of RCI.

92. Moreover, he pointed out that a potential agent cannot create an agency himself. Agency must emanate from something done by the principal: see *Armagas v. Mundogas* [1986] AC 717 at 777-8. While it is true that the pleading does not point to anything done by RCI to hold the representatives out as having authority to speak for RCI, there was no member of RCIE present at the presentations, the timeshare representatives had the RCI brochures and operated under banners indicating RCI. They were representing companies which were affiliates of RCI, without Mr or Mrs Cole or Mr or Mrs Litherland having seen the affiliation agreements. It is not surprising that they were confused about who represented RCIE.

93. However, the Claimants never pleaded apparent authority, so that the facts relied upon have not been identified.

94. Moreover none of the Claimants could really have believed that they could say exchange a canal boat holiday for a deluxe holiday in Hawaii and, however hard the selling, I do not accept that they were told this without qualification by the representatives.

95. Further I do not think that Mr Deacon and Mr Wolman can, by using the term "RCI Exchange Club" say that RCIE was not entitled to derive any benefit from the timeshares so that "it was reasonable to expect" RCI to "act solely in the interests of the depositors". Although RCI was the first to use the expression "Club" in "RCI is the world's largest and most successful holiday club", RCIE was not a charity but a commercial organisation, a fact which the Claimants knew.

96. Moreover, despite discovering the true position about the oral misrepresentations by the timeshare sales representatives, Mr and Mrs Cole remained a member of RCIE from 1999 until 2014 and Mr and Mrs Litherland remained a member from 2004 until 2009. Mrs Cunningham remained a member from 29 August 1981 to date and Mrs Kravitz was a member from January 1997 until 6 November 2010. She cancelled her membership in August 2000 but re-joined in July 2003.

97. Yet further, Mr and Mrs Cole, Mrs Cunningham and Mrs Kravitz all rented timeshare. I find that the availability of bonus weeks to rent, rather than exchanges, was the real reason that Mr and Mrs Litherland signed up to RCIE. The letter they wrote on 25 January 2005 suggests this and that they well knew about the rentals.

98. In any event, even if the Claimants did rely on the oral misrepresentations in entering into the contract with RCIE, Mr and Mrs Cole and Mr and Mrs Litherland (as well as Mrs Cunningham) would shortly thereafter have realised that they were wrong as it became evident that Mr and Mrs Cole, Mr and Mrs Litherland and Mrs Cunningham could not go "anywhere anytime" through RCIE. But they remained members so that any loss could not have been caused by the misrepresentations.

99. As to the representations in the brochures, pleaded by each of the Claimants as having been relied on (Mrs Kravitz [10], Mr and Mrs Cole [16c], Mrs Cunningham [53], Mr and Mrs Litherland [16]), it is clear (see Transcript Day 2 p.133-40, p.195-6, Day 3 p. 167 and 174) that the Claimants had never read the brochures and simply focused on the resorts listed in the brochures so that there was no reliance. None of the Claimants' written evidence said that they ever read the relevant sentences. In any event no exchange system could offer, by reference to its brochure, a holiday anytime, anywhere.

Limitation of actions

100. S. 32 (1) (b) of the Limitation Act 1980 provides as follows,

> "(1) …where in the case of any action for which a period of limitation is prescribed by this Act…
>
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant:…
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it"

101. S. 32(2) provides that,

> "For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

102. The Claimants say that RCIE "deliberately concealed" from them,

(a) The fact that it knowingly removed time shares from the exchange pool for its own commercial benefit and/or to the detriment of members' interests,

(b) The fact that it knowingly used time shares in the exchange pool for its own commercial benefit and/or to the detriment of members' interests.

(c) The extent to which it removed members' timeshares from the exchange pool and used the time shares.

Accordingly, say the Claimants, they did not discover (and could not with reasonable diligence have discovered) the true facts giving rise to their right of action until 2009. There was no mention of rental of member-deposits in the evidence or in public reports and accounts. Thus they are, say the Claimants, within the six year period for bringing an action.

103. Mr Graham QC relies on the decision of the House of Lords in *Cave v. Robinson, Jarvis and Rolf* [2002] UKHL 18; [2003] 1 AC 384 and the decision of the Court of Appeal in *Williams v. Fanshaw Porter & Hazelhurst (a firm)* [2004] EWCA Civ 157; [2004] 1 WLR 3185. In the latter case, Park J (sitting in the Court of Appeal) outlined four points about the requirements of s.32 (1) (b) (at [14]) and as to the fourth point he said,

> "(iv) The requirement is that the fact must be "deliberately concealed". It is, I think, plain that, for concealment to be deliberate, the defendant must have considered whether to inform the claimant of the fact and decided not to. I would go further and accept that the fact which he decides not to disclose either must be one which it was his duty to disclose, or must at least be one which he would ordinarily have disclosed in the normal course of his relationship with the claimant, but in the case of which he consciously decided to depart from what he would normally have done and to keep quiet about it."

104. There is no pleaded case as to any conscious and deliberate decision to conceal something which was disclosable, that is to say,

(a) That it was the duty of RCI to disclose such matters to them or that RCI would ordinarily have disclosed such matters in its prior relationship with them,

(b) That RCIE (through its officers or employees) considered whether to inform Mr and Mrs Cole and Mr and Mrs Litherland about the misrepresentations orally made to them and

(c) That RCIE consciously decided not to do so.

105. Mr Deacon and Mr Wolman accept that a mere failure to disclose should not be treated as concealment. However, they rely on *Cave v. Robinson Jarvis & Rolf* and *Giles v. Rhind and another (No 2)* [2008] EWCA Civ 118; [2009] Ch 191 to support their arguments relying on s.32 (2) of the Limitation Act 1980. It is evident from Lord Scott's speech in *Cave* (at [65]) that one should not look at s. 32 (1)(b) without also looking at s.32 (2). He said, (at [65]),

> "I respectfully agree that it is difficult to think of a case of deliberate concealment for section 32(1)(b) purposes that would not involve unconscionable behaviour and that most

> cases of deliberate commission of breach of duty for section 32(2) purposes would be in the same state. But the statutory language does not require that the behaviour of the defendant be unconscionable and its addition as a criterion to be satisfied before a case can be brought within section 32 is, in my opinion, unnecessary and unjustified."

Again, in *Giles v. Rhind*, Arden LJ (with whom the other members of the Court of Appeal, Sedley LJ and Buxton LJ, agreed) said (at [38] and [53]) that she would reserve the question of how wide the expression "breach of duty" was, i.e. whether it included a duty to disclose. However it seems that where deliberate breach of duty is alleged, s.32 (2) does not require deliberate wrongdoing by the defendants for the limitation period to be postponed.

106. However, as a matter of common sense there must be *some* link between the alleged misrepresentations and the cause of action. I do not see that there is any link between the knowledge about removal of the time shares from the exchange pool and the misrepresentations, either oral or in the brochure. The claim form was not issued until 28 March 2013. The Claimants are accordingly statute-barred from bringing the action in so far as it relates to misrepresentation.

107. If I am wrong about this, there was either no reliance on the oral or brochure representations or there was no loss caused by them for the reasons I have given. Misrepresentation does not therefore lie.

Conclusions

108. There is little doubt that RCI was in breach of the terms of its contract during the segmentation years since the contract said that deposited inventory would be put into the pool of exchange accommodation and up to 20% was not put in at all. It is also clear that the RCI representatives were not told this. The (undated but agreed to have been produced in 2002) training manual called "RCI Community" says under the heading "Addressing Members' Concerns",

> "**Member: Why can't I exchange my week for rental inventory?**
>
> Guide: The RCI Exchange system is based on member deposits. Rental Inventory is specially acquired to give our members access to space that would not be available against their regular exchange.
>
> **Members** [sic]**: Can I use my week and just pay the Domestic or International Exchange fee?**
>
> Guide: No, since this space is not acquired through member depositing their weeks, it is not available for exchange.
>
> **Member: Is RCI taking exchange inventory and renting it?**

> No, rental inventory was acquired through special promotional agreements with resorts or specifically purchased by RCI for rental purposes. Members deposited weeks are only used in the RCI exchange system."

The last sentence is plainly untrue, despite Mr Graham QC's valiant attempts (in Transcript Day 8 p.74-83) to explain it away,

> "What Mr Gurnik was saying…is that he could not say whether RCI was renting out premium inventory on a material scale at the time the document was drafted", and
>
> "…this is a fair and proper answer to give if the focus of the customer's question is to try and find out the difference between this RCI rental programme and the members deposited exchange."

109. In the generic Particulars of Claim it is said (at [8]),

> "In order to induce the Claimants to join the RCI exchange club (and in so doing to enter into contracts with the Defendant) it was represented to them in the RCI brochure that timeshares transferred to the Defendant for the purpose of exchange between members would be held in the…Pool and made available to members for that particular purpose".

110. However, misrepresentation is not available for the reasons stated above.

111. Alternative matters relied upon are that RCIE would not,

> (1) Remove or withhold timeshares from the exchange pool for its own commercial benefit to the detriment of members wishing to exchange.
>
> (2) Use time shares in the exchange pool for its own commercial benefit to the detriment of members wishing to exchange.

And that it was the common understanding of the Claimants and RCI that timeshares would be used for the purpose of exchange between members. And breach of fiduciary duties and trust are also pleaded.

112. It is not clear what causation or damage is relied on since it has not been proved that the timeshares were used to the detriment of members. The Claimants have not shown that steps taken by RCI in relation to member deposited inventory caused a shortfall in suitable exchange opportunities or caused members to take exchanges of lower quality. There is thus a causation gap.

113. As to quantum, further information was sought in RCIE's letter of 27 April 2015 (on the basis that the Claimants' replies to the Requests for Further Information dated 12 February 2015 were insufficient) and the Claimants replied that damages for breach of contract are claimed on the basis that timeshares were removed from

the exchange pool by RCIE for its own commercial benefit causing the Claimants to be unable to get the exchanges they wanted, causing the following pecuniary losses:

> "a. The loss of value to the exchange scheme as promised.
>
> b. The loss of use of their own timeshare.
>
> c. The costs incurred each year in finding and arranging alternative holidays or otherwise seeking to mitigate the losses incurred as a result of RCI's breach of contract."

114. It is said that the loss of the value of access (under a.) is the difference between the exchange actually received in any given year and the exchange which would have been received had the exchange system functioned as promised and that ([5]),

> "These differences in value will be either a matter for agreement or a matter for expert evidence."

However, the Claimants have not sought either to agree the differences in value or adduce expert evidence of them. The Claimants said on 4 June 2015 without agreement from RCIE (see the Further Information of the Test Claimants Regarding Quantum) at [15],

> "In cases where timeshares deposited in the exchange pool have been used without the claimant's [sic] consent it would be appropriate to award a sum which would have been agreed between the parties in the course of hypothetical negotiations over what would have been agreed to be paid for such use. This would require expert evidence and should be dealt with after the trial on liability."

115. Mr Deacon and Mr Wolman rely on Lord Lloyd's speech in *Ruxley Electronics v. Forsyth* [1996] 1 AC 344 but that does not permit damages not to be pleaded.

116. As for non-pecuniary losses, there are claims in respect of lack of amenity and disappointment and again *Ruxley* is relied upon. Again, however, the claim is unclear. In [8], the Claimants say,

> "The quantum of the claim for lack of amenity and disappointment will depend on what, if any, holiday was taken in any given year in place of the holiday of choice and the level of frustration and disappointment attendant on being unable, in any given year, to book the holiday of choice."

117. Again, however, no attempt has been made to put a figure on the loss it is said that the Claimants suffered. In [9] it is said,

> "In the event that no loss has been suffered by a particular claimant the following damages are awardable where breach of contract is established."

And the Particulars go on to cite authority for "damages for breach of contract where there has been benefit to RCI but no loss to the claimant", "Remedies for breach of trust/fiduciary duty" etc., but again, neither causation nor quantum is pleaded.

118. Mr Deacon and Mr Wolman rely on damages under *Attorney General v. Blake* [2001] 1 AC 268 for an account of profits for breach of contract. However, the fact that the Claimants have failed to quantify their claim does not mean that it is unquantifiable. The Claimants cannot say, on the one hand, that they have not adduced any expert evidence and on the other, that this is such an exceptional case that damages would be inadequate. In *A-G v. Blake*, Lord Nicholls said (at p.285),

> "Normally the remedies of damages, specific performance and injunction, coupled with the characterisation of some contractual obligations as fiduciary, will provide an adequate response to a breach of contract. It will be only in exceptional cases, where those remedies are inadequate, that any question of accounting for profits will arise. No fixed rules can be prescribed. The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. A useful guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit."

119. There is no legitimate interest in preventing RCIE's profit-making activity as the Claimants knew that RCI was a commercial entity. In any event one cannot simply point to profits made by RCIE in relation to rentals of inventory deposited by the Claimants since the Weeks pool operates on a global basis through RCI.

120. The Claimants also rely on damages under *Wrotham Park Estate Co Limited v. Parkside Limited and others* [1974] 1 WLR 79, namely the sum which might reasonably have been negotiated between a claimant and a defendant. In *Abor and another v. Saudi Economic and Development Co (SEDCO) Real Estate Limited and others* [2013] EWHC 1414 (Ch), David Richards J said (at [225]),

> "Negotiating damages have not, however, replaced the usual compensatory damages as the primary remedy in damages for breach of contract. It is a basis of assessment available where a breach of contract has been established but the claimant cannot establish any financial loss, assessed on the usual basis, flowing from the breach."

121. The Claimants' solicitors' letter of 4 June 2015 says that

> "…the information which would allow us to assess the profits RCI has made or "the fruits of their wrongdoing is exclusively in the hands of RCI. We await a satisfactory conclusion to the disclosure process."

122. However, this is in response to a letter of RCIE's solicitors in which they said,

> "…The reference to the "value of the lost timeshare and damages for distress/disappointment" is simply not sufficient.
>
> …it cannot be correct that it is not possible for your clients to provide particulars of the value of their own timeshare(s) until the Defendant has provided further information with respect to the operation of the exchange system…"

123. Further, by [3] of an order dated 16 March 2016 of HHJ Keyser QC, sitting as a judge of the High Court, the Claimants were permitted to "file and serve a Reply, limited to matters raised by the amendments to the Defence". However, the Reply deals with other matters such as an allegation that RCI was not "transparent, open and fair" with its members: see [4] of the Replies. Thus this has become a case that RCIE was not transparent with its members but I do not see how that relates to the causes of action. Although I see Mr Deacon's point, I agree with Mr Graham QC that RCIE was thereby deprived of the opportunity to disclose documents or submit evidence dealing with the extent to which members were informed about rental of premium inventory.

124. I also note that the Claimants' second witness statements were largely identical: see the comments of Chadwick J in *Smith New Court Securities Limited v. Scrimgeour Vickers (Asset Management) Limited* [1992] BCLC 1104 at 1115-6. The Court of Appeal's decision was reversed by the House of Lords and Chadwick J's decision reinstated but there was no criticism of Chadwick J's judgment on this point by the Court of Appeal in any event.

125. I therefore find for the defendant.