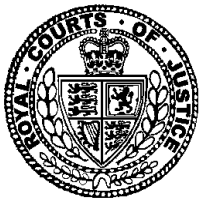

Neutral Citation Number: [2023] EWHC 1069 (Admin)

Case Nos: CO/506/2022 & CO/4312/2021

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/05/2023

Before :

THE HONOURABLE MRS JUSTICE COLLINS RICE

- -

B E T W E E N **:**

THE KING
-on the application of-
SHAWBROOK BANK LIMITED

Claimant

-and-

FINANCIAL OMBUDSMAN SERVICE LIMITED

Defendant

(1) MRS M HARGREAVES & the Personal Representatives of MR D HARGREAVES
(2) DIAMOND RESORTS (EUROPE) LIMITED
(3) MITSUBISHI HC CAPITAL UK PLC

Interested Parties

B E T W E E N**:**

THE KING
-on the application of-
CLYDESDALE FINANCIAL SERVICES LTD t/a BARCLAYS PARTNER FINANCE

Claimant

-and-

FINANCIAL OMBUDSMAN SERVICE LIMITED

Defendant

(1) MR GORDON HOPWOOD
(2) CLC RESORT DEVELOPMENTS LIMITED

Interested Parties

Mr Javan Herberg KC & **Mr Daniel Cashman** (instructed by Linklaters LLP) for Shawbrook Bank Ltd, the **Claimant** in the first case
Mr Ben Jaffey KC & **Mr Rayan Fakhoury** (instructed by Hogan Lovells International LLP) for Clydesdale Financial Services Ltd, the **Claimant** in the second case
Mr James Strachan KC & **Mr Gethin Thomas** (instructed by the Financial Ombudsman Service) for the Financial Ombudsman Service, the **Defendant** in both cases
Mr Jonathan Kirk KC & **Mr Lee Finch** (instructed by Hamlins LLP) for Diamond Resorts (Europe) Ltd and CLC Resort Developments Ltd, **Second Interested Party** in each case respectively
Ms Catherine Callaghan KC & **Mr Simon Pritchard** (instructed by Shoosmiths LLP) for Mitsubishi HC Capital UK PLC, **Third Interested Party** in the first case
Ms Fenella Morris KC (instructed by Michelmores) for Mr Hopwood, **First Interested Party** in the second case

Hearing dates: 14th -16th March 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 5th May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MRS JUSTICE COLLINS RICE

Mrs Justice Collins Rice :

SECTION A

Preliminary

(a) Introduction

1. These judicial review proceedings have to do with how the holiday timeshare sector is regulated by law.

2. The concept of a holiday timeshare is familiar. Consumers can buy, for a lump sum outlay, an entitlement to stay in resort accommodation – either a single venue, or one or more from a portfolio of venues – for given periods each year, over a number of years. They will expect to pay annual management fees to maintain membership of the scheme, and may be asked to contribute to the expenses of resort dilapidations. It is a contractual arrangement, and comes in a variety of package forms, usually with a 'club membership' flavour and involving fringe benefits. Sometimes timeshare club membership includes a feature that, at a given future date, the property or portfolio of properties where the consumer can stay will be sold, and the net proceeds of sale distributed among the members ('asset-backed' timeshares). Sometimes there are arrangements, if a member does not intend to use all their annual holiday entitlement, whereby they can opt for the scheme to 'rent out' their unused entitlement in return for money back.

3. Prospective timeshare customers are routinely given the option of loan and repayment arrangements to spread the cost of the lump sum element of buying a timeshare package. That typically involves a commercial relationship between the timeshare company and a bank or other finance provider.

4. This litigation features a particular type of asset-backed timeshare package, known in the industry as a 'fractional ownership timeshare'. As well as the standard sort of timeshare accommodation arrangements, it involves consumers buying, for their lump sum outlay, a 'share' in the 'ownership' of a single identified property in an accommodation portfolio. It does not confer any rights to stay in that particular property. But it holds out the prospect that the property will be sold at the end of the timeshare period and the net proceeds distributed pro-rata among the fractional owners. The freehold in the property is vested in a trustee for the benefit of the fractional owners. It is the trustee's responsibility to preserve the property, and in due course market it for sale, and distribute the proceeds. So the consumers' 'fractional ownership' is an interest under a trust for deferred sale.

5. The Financial Ombudsman Service Limited ('FOS') is in receipt of hundreds of consumer complaints about fractional ownership timeshare selling. Many are facilitated, if not stimulated, on a bulk basis by claims management companies. The FOS decided to select two lead cases for detailed consideration, and after a lengthy

inquisitorial procedure lasting several years and including receiving industry submissions at sequential stages, two extensive final ombudsman decisions were issued in these cases at the end of 2021. In each case, the ombudsman decided the package had been mis-sold and the contractual arrangement, including the associated loan, should be unwound. Each decision is put on a number of alternative bases, and is intended by way of a comprehensive application of the potentially relevant legal and regulatory principles. As well as applying them to the facts of the individual lead cases, the FOS no doubt has a view to the efficient future disposal of the bulk of the other outstanding cases.

6. These judicial review proceedings are brought to challenge the ombudsmen's articulation and application of the principles in the two cases in question, including with a view to their potential application more generally. The challenges are themselves made on a number of grounds, but they focus on error of law, and thus put the spotlight on a correct understanding of the legal and regulatory framework.

7. The claimant in each case – Shawbrook Bank Ltd ('Shawbrook') and Barclays Partner Finance ('BPF') respectively – is the financial services provider that financed the loans the consumers took out to cover their lump sum purchases. A further finance company, Mitsubishi HC Capital ('Mitsubishi'), also provides that facility by arrangement with timeshare companies, not in the present cases but in other pending FOS cases; it is an interested party. The timeshare companies that sold the packages – Diamond Resorts ('Diamond') and CLC Resort Developments ('CLC') respectively – are also involved as interested parties, as are the individual consumers/complainants themselves.

8. The claimants, and the commercial interested parties, acknowledge the extent to which the two ombudsmen's decisions, placed on a range of alternative bases, present a complex and multi-faceted target for their challenges. They seek declaratory judgment on an issue by issue basis, as well as the quashing of the individual decisions and their remission to be re-taken on a different basis. The FOS defends the decisions, both on the basis that some or all of the challenges made are not truly allegations of error of law in the first place, and also, to the extent that they are, that no error of law in any event appears.

(b) Judicial review of financial ombudsman decisions: legal framework and principles

9. The FOS was set up as part of a statutory scheme '*under which certain disputes may be resolved quickly and with minimum formality by an independent person*' (section 225(1) Financial Services and Markets Act 2000 – 'FSMA'). It is designed to provide independent, informal complaint resolution for the financial services industry without the need for litigation. Jurisdictional and procedural rules for doing so are set out, as part of the statutory scheme, in the Financial Conduct Authority's Handbook's section *Dispute Resolution: Complaints* ('DISP'). Its remit is inquisitorial not adversarial (*R (Williams) v Financial Ombudsman Service [2008] EWHC 2142* at [26]).

10. The present complaints engaged the FOS's 'compulsory jurisdiction' set out at section 226 of FSMA. As such, they were to be '*determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case*' (section 228(2) FSMA). DISP 3.6.4R provides:

> In considering what is fair and reasonable in all the circumstances of the case, the Ombudsman will take into account:
>
> (1) relevant:
>
> (a) law and regulations;
>
> (b) regulators' rules, guidance and standards;
>
> (c) codes of practice; and
>
> (2) (where appropriate) what he considers to have been good industry practice at the relevant time.

11. The caselaw underlines that the 'fair and reasonable' test is a subjective one for an ombudsman (see *R (IFG Financial Services Ltd) v Financial Ombudsman Service [2005] EWHC 1153 (Admin)*, at [13]). The combination of a subjective approach and a duty to 'take into account' the law raises an obvious question about how far an ombudsman is or is not constrained by the law. The question was considered by the Court of Appeal in *R (Heather Moor & Edgecomb) v Financial Ombudsman Service [2008] EWCA Civ 642*. From that case (see in particular [49], [80] and [89]) the following principles can be distilled.

12. Ombudsmen are dealing with complaints, not legal causes of action. They are not (conclusively) determining legal rights and duties. They are not bound to apply the common law. As an efficient, cost-effective and relatively informal type of alternative dispute resolution, ombudsmen '*should not be stifled by the imposition of legal doctrine*'. A determination reached by an ombudsman may properly differ from the conclusion that a court would reach. They have a statutorily protected discretion in the 'fair and reasonable' jurisdiction and are not susceptible to legal appeal.

13. On the other hand, they are creatures of statute with jurisdiction circumscribed by law. They have a legal obligation to take relevant law into account. They must direct themselves correctly as to what the relevant law *is*. They are '*free to depart from the relevant law*' but if they do they should say so in their decisions and explain why. And they are susceptible to judicial review on grounds of error of law in relation to their identification of what the relevant law *is*, as well as perversity and irrationality in relation to their substantive decisions.

14. The present challenges are brought on the basis that the two ombudsmen purported to be applying – not departing from – the law (both statute law and regulations, and the law in relation to the construction of contracts) and that they got the law wrong; or in other words that they misdirected themselves as to what the law *is*. The FOS says the challenges, on a proper analysis, largely disclose mere disagreement with how the relevant law – which regularly features evaluative matters – has been applied to the facts in furtherance of an assessment of what is 'fair and reasonable'. This is a material difference between the parties. It goes to the nature and extent of a reviewing court's functions, and (to at least some degree) to the precedent-setting value of its decisions. The alternative-base structure of the decisions raises related issues, considered further below.

15. The FOS draws attention to the guidance of the caselaw on how a reviewing court should approach reading an ombudsman's final decision. '[*I*]*t is axiomatic, therefore, that any Ombudsman's decision letter should be read as a whole and in a common sense, and certainly not in a legalistic, way*' (*R (Garrison Investment Analysis) v Financial Ombudsman Service [2006] EWHC 2466 (Admin)* at [5]). Decision letters '*are reports, not pleadings. A party to a complaint must know why he has won, or perhaps more importantly why he has lost, in clear and comprehensible terms. That is the requirement, but that is the only requirement and it can be met in a reasonably flexible way*' (*R (Williams) v FOS* at [51]). Again, '*Decision letters are not statutes. They are not legal documents. They set out decisions and explain them. They are to be read and interpreted in a common sense way*' (*Westcott Financial Services v Financial Ombudsman Service [2014] EWHC 3972 (Admin)*, at [33(x)]).

16. Ombudsmen are entitled to use and rely on their own knowledge of good industry practice, specialist expertise and experience in determining complaints (*R (Williams) v FOS* at [45]).

SECTION B

The regulatory classification of fractional ownership timeshare agreements

(Regulation 7, Timeshare Regulations)

(a) Legal framework

(a)(i) Restricted-use consumer credit agreements

17. By section 11(1)(b) of the Consumer Credit Act 1974 ('the 1974 Act'), a 'restricted-use credit agreement' includes a regulated consumer credit agreement '*to finance a transaction between the debtor and a person ('the supplier') other than the creditor*'.

18. By section 12(b) of the 1974 Act, such an agreement, if '*made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier*' counts as a 'debtor-creditor-supplier' agreement.

19. Sections 140A and 140B of the 1974 Act confer powers on a court in relation to such agreements. These powers arise where a court determines that the relationship between the creditor and the (consumer) debtor arising out of them is unfair to the debtor – whether because of any of the terms of the agreement or because of '*any other thing done (or not done) by, or on behalf of, the creditor*' either before or after the agreement is made. The powers in such circumstances include altering the terms of the agreement or of any related agreement.

(a)(ii) Collective Investment Schemes ('CIS's)

20. Section 235 of FSMA defines a CIS as follows:

> (1) In this Part "collective investment scheme" means any arrangements with respect to property of any description, including money, the purpose or effect of which is to enable persons taking part in the arrangements (whether by becoming owners of the property or any part of it or otherwise) to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income.
>
> (2) The arrangements must be such that the persons who are to participate ("participants") do not have day-to-day control over the management of the property, whether or not they have the right to be consulted or to give directions.
>
> (3) The arrangements must also have either or both of the following characteristics—
>
> > (a)the contributions of the participants and the profits or income out of which payments are to be made to them are pooled;
> >
> > (b)the property is managed as a whole by or on behalf of the operator of the scheme.
>
> (4) If arrangements provide for such pooling as is mentioned in subsection (3)(a) in relation to separate parts of the property, the arrangements are not to be regarded as constituting a single collective investment scheme unless the participants are entitled to exchange rights in one part for rights in another.

21. Establishing or operating a CIS falls within the 'general prohibition' in s.19 FSMA on carrying on regulated activities unless authorised or exempt[1]. Contravention of the general prohibition is a criminal offence (FSMA s.23).

22. Section 238 of FSMA imposes restrictions on the promotion of CISs. By s.238(1), '*an authorised person must not communicate an invitation or inducement to participate in a collective investment scheme*'.

23. Section 235(5) FSMA confers a power on HM Treasury to provide by order that arrangements do not amount to a CIS – in specified circumstances, or if the arrangements fall within a specified category of arrangement.

(a)(iii) Timeshare Contracts

24. That power was exercised by way of the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 ('the CIS Order'), the Schedule to which identifies '*arrangements not amounting to a CIS*'. Paragraph 13 of the Schedule

[1] Article 51ZE, Financial Services and Markets Act 2000 (Regulated Activities) Order SI 2001 No. 544

provides that arrangements do not amount to a CIS '*if the rights or interests of the participants are rights under a timeshare contract or a long-term holiday product contract*'.

25. By Article 2 of the CIS Order, a 'timeshare contract' has the meaning given by Reg.7 of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ('the Timeshare Regulations'). That provides as follows:

> **7**-(1) A "timeshare contract" means a contract between a trader and a consumer –
>
> > (a) under which the consumer, for consideration, acquires the right to use overnight accommodation for more than one period of occupation, and
> >
> > (b) which has a duration of more than one year, or contains provision allowing for the contract to be renewed or extended so that it has a duration of more than one year.
>
> (2) The reference to "accommodation" in paragraph (1) includes a reference to accommodation within a pool of accommodation.

This is accordingly a key definitional provision. A contract falling within its terms will be regulated within the bespoke regime set up by the Timeshare Regulations more generally, and *not* as a CIS even if it would otherwise qualify as one. For the timeshare sector that can mean the difference between being able to enter into such a contract and being prohibited from doing so.

(b) The decision challenged

26. In the first of the two decisions challenged in these proceedings, the complainants, Mr and Mrs Hargreaves, a retired couple in their late seventies, were long-standing existing customers of Diamond Resorts. They had been members of one of its timeshare 'clubs' since 2005. Their membership had accrued 10,000 'points', redeemable as annual holiday stays in one of Diamond's 'European Collection' portfolio of resorts. They had enjoyed many years of happy holidays. It was a very long-term arrangement, not due to expire until the end of 2054, and, as usual, required the payment of annual management fees and charges as a condition of membership. It included an interest in the proceeds of the sale of the whole portfolio at that distant maturity date, and a 'wish to rent' option to release unused holiday points in return for payment. On account of their age, they had a right to terminate the contract at any point, but would of course lose their interest in the future proceeds of sale if they did so. The package was transferrable, but if transferred to younger recipients, they would not have the age-related right to early termination.

27. While the couple were on one of their timeshare holidays in March 2014, they attended a presentation by Diamond about 'upgrading' their membership to join its 'Fractional Owners Club', and decided to do so. They traded in all their points, and paid £6,800 extra. That sum was financed by a 5-year loan arrangement provided by Shawbrook, which the couple in fact repaid early, in May 2014. Their new entitlements were to the same number of points, redeemable against the same portfolio of holiday stays, but for

a much shorter membership term – 15 years. They could still 'rent out' their rights, in return for financial income, if they could not or did not want to use all their points in any given year (participation in the 'fractional wish to rent' programme), but now the 'rent out' would be actively marketed for them. And they had the prospect of a share in the net proceeds of sale of a specified 'allocated property' at the end of the 15 year period. There were also travel vouchers and some other holiday bonus benefits. The evidence was that they had in mind to go on using their points for holidays as long as they felt able enough, then allow their adult children to do so for the remainder of the term, with, at the end, the prospect of that 'something back' for the children, from the proceeds of sale, which was not tied to a very long-term annual fees commitment.

28. The ombudsman decided, in the circumstances, the upgrade arrangement the couple had entered into did not fall within the definition of a 'timeshare contract' in Reg.7 of the Timeshare Regulations, because they had not '*acquired*' a right to periodic accommodation under it: '*it just continued such rights that they already had and shortened their duration*' (decision of 12th November 2021 in the Hargreaves' complaint – 'the first decision' – at [99]). Again, at [102], '*Mr and Mrs H exchanged their existing European Collection Points for an equal number of Fractional Points that didn't give them any new holiday rights. Mr and Mrs H enjoyed exactly the same rights to holiday accommodation before and after entering into the Upgrade Agreement.*' And further, at [108], '*the intention and effect of the Upgrade Agreement was to leave Mr and Mrs H's accommodation rights unchanged*'.

29. That being so, the ombudsman held the arrangement could not fall within the exemption provisions of the CIS Order. On a proper analysis, what the couple had done was enter into not a timeshare contract but *two* CISs – (a) by way of acquiring a fractional interest in the proceeds of sale of the allocated property and (b) by acquiring the right to participate in the new 'wish to rent' programme. Each CIS, conferring rights to receive future payments, constituted an investment scheme whose promotion and sale was regulated by FSMA (first decision, [123]).

30. Diamond was neither 'authorised' to establish and operate these CISs, nor exempt from authorisation. It was therefore in contravention of the 'general prohibition' in s.19 FSMA, and *a fortiori* of the restriction on the promotion of CISs, even by authorised persons, in s.238. In these circumstances, the ombudsman concluded as follows:

> 138. In conclusion, therefore, I still think that the Supplier [ie Diamond] wrongfully promoted, recommended and entered Mr and Mrs H into an agreement creating two CISs in contravention of the FSMA. That was a substantial breach of the applicable investor-protection legislation that had a significant effect on Mr and Mrs H. For if the Supplier had complied with the FSMA, it would not have entered into the Upgrade Agreement or arranged the connected loan from Shawbrook – nor would Mr and Mrs H have assumed the financial burdens of either agreement. And given the significance of this contravention as a result, I think that a court is likely to find that this created an unfair debtor-creditor relationship (arising out of the loan from Shawbrook taken together with the Upgrade Agreement) under section 140A of the Consumer Credit Act.

> 139. So, for the reasons I've set out above, I intend to uphold this complaint because I don't think Shawbrook's decision to turn down Mr and Mrs H's claim under section 140A was fair or reasonable.

(c) The claimant's challenge in the first case

31. Shawbrook has permission for judicial review on the following ground:

> **Ground 1**: The ombudsman erred in law in concluding that the Upgrade Agreement was not a 'timeshare contract' under Regulation 7 of the Timeshare Regulations (and thus gave rise to two Collective Investment Schemes).

32. Mr Herberg KC, for Shawbrook, says that was because the ombudsman failed correctly to classify the agreement within the regulatory framework by looking at the rights and obligations set out *within* the agreement, but instead did so by comparing the accommodation rights the consumers had had under their first agreement and considering whether the new contract conferred additional accommodation rights. That, he says, was the wrong test, and the wrong way to look at the agreement.

33. The correct approach, he says, was set out in *A1 Lofts Ltd v Revenue and Customs Commissioners [2010] STC 214* at [40] (cited with approval in *HMRC v Secret Hotels2 Ltd [2014] UKSC 16, [2014] 2 All ER 685*):

> The court is often called upon to decide whether a written contract falls within a particular legal description. In so doing the court will identify the rights and obligations of the parties as a matter of construction of the written agreement; but it will then go on to consider whether those obligations fall within the relevant legal description. Thus the question may be whether those rights and obligations are properly characterised as a licence or tenancy (as in Street v Mountford [1985] AC 809); or as a fixed or floating charge (as in Agnew v IRC [2001] 2 AC 710), or as a consumer hire agreement (as in TRM Copy Centres (UK) Ltd v Lanwall Services Ltd [2009] 1 WLR 1375). In all these cases the starting point is to identify the legal rights and obligations of the parties as a matter of contract before going on to classify them.

34. So here, it was necessary to look at the new contract and ask whether, in its own terms, it gave rise to *a* right to use overnight accommodation. It indisputably did. The next stage was to consider whether it fell within the full definition set out in Reg.7 of the Timeshare Regulations. And again, it indisputably did. Therefore it was a timeshare contract, exempted from being considered a CIS, and the rest of the ombudsman's analysis must fall like dominoes.

35. In other words, Shawbrook's position is that 'acquires' in Reg.7 must be satisfied where any contract is a *source* of relevant accommodation rights, irrespective of any antecedent source of accommodation rights. The historical comparison approach is wrong in implying the word 'more' into the acquisition of rights.

36. Mr Herberg KC tests that by illustrating some of the results he says would flow from the ombudsman's interpretation. It could exclude from the definition of a timeshare contract any *variation* of such a contract, if the accommodation rights themselves are not enhanced. But variation is a common feature of timeshare agreements, not least because many of them last for so long. It could also mean that any purchase of additional accommodation rights, however minimal, would produce a different outcome. It would be impossible to tell by looking at a contract whether or not it was a timeshare - identical contracts would be differently classified, and change classification, depending on antecedent factual externalities. And that, he says, is inimical to the regulatory scheme and indeed to the practical operation of the sector as a whole.

37. There he relies on the overall scheme of the Timeshare Regulations, their origins in maximum-harmonisation EU law, and their emphasis on highly detailed specification of the content of contractual and pre-contractual documentation. That in practice is complied with by carefully drafted standard-form documentation – and is so intended to be. The regulatory landscape is complex, but there is no indication in the Timeshare Regulations scheme that its application could be as contingent and unpredictable as the ombudsman suggests. The due diligence requirements for establishing the relevant factual antecedents would be daunting and burdensome, and the scheme imposes criminal liability on a provider making a mistake about which regime they are operating within.

38. In response, Mr Strachan KC, for the FOS, points out that the ombudsman did address himself to the correct test at [93]:

> …this is a question of characterising the agreement and it involves determining the nature of the rights and obligations that the parties intended to grant each other before categorising these in accordance with the law (*Agnew v IRC [2001] UKPC 28*, at paragraph [32] per Lord Millet).

Agnew too was cited with approval by the Supreme Court in *HMRC v Secret Hotels2 Ltd* at [32]. So, he says, the ombudsman correctly addressed himself to the rights and obligations the parties intended to grant each other and found on the facts that there was not, and could not be, any intention to 'acquire' that which was already held.

(d) Analysis

39. From the industry point of view, the attractiveness of fractional ownership timeshare agreements is clear enough – it provides additional short-term funding to support the management and disposal of its holiday properties, and an enhanced longer-term commitment to membership (and the maintenance of membership with annual fees) by the consumer. That could also be described as a general benefit for consumers, as well as intensifying the participatory 'club' atmosphere of timeshare schemes. This litigation, however, places under the microscope the benefits, and risks, of 'fractional

ownership' to *individual* consumers. There is no dispute that there are risks. There are no guarantees whatever about the ultimate yield for fractional owners when their allocated property is sold. The question at the heart of this litigation is whether, and how, consumers are protected in relation to those risks by the network of potentially relevant consumer protection laws.

40. Each side of the argument about the classification of the contract in the first case accuses the other of 'formalism' – looking at the matter artificially or legalistically, rather than acknowledging the reality of the transaction. The FOS says the whole 'upgrade' proposition was deeply artificial and asks, not at all rhetorically, what exactly the couple gained from their £6,800 outlay, since it certainly wasn't overnight holiday accommodation entitlements which they already had. But the claimants object that declassifying the agreement as a timeshare altogether, when that is what it plainly is on its face, is itself artificial, and a major and unsustainable distortion of the regulatory framework.

41. These opposing positions themselves reflect underlying tensions, both in the regulatory provision, and in the nature of fractional ownership timeshares themselves.

42. In the first place, any fractional ownership timeshare agreement, on its face, could fairly be described as a composite, or hybrid, product. It does confer classical holiday timeshare rights, but it also confers something extra – a beneficial interest in real estate that does not itself confer overnight accommodation rights at all. On a strict rights analysis, the legal connection between the two components is not close. Access to the property interest is made conditional on being a timeshare participant, so the class of beneficiaries is restricted to consumers with a long-term interest in the thriving of the scheme as a whole. But the two bundles of interests are not intrinsically, or otherwise legally, dependent on each other.

43. Then, the definition of a 'timeshare contract' in Reg.7 of the Timeshare Regulations is expressed in terms which are inclusive, not exclusive. On its face, so long as a contract includes the periodic holiday accommodation elements, Reg.7 confirms it is a timeshare contract – whatever else it also includes. The FOS accepts *in principle* a fractional ownership timeshare agreement can indeed be a timeshare contract within the meaning of Reg.7. That is confirmed by the approach the ombudsman took in the second of the two cases challenged, Mr Hopwood's complaint. There, another couple entered into such an agreement but this time not on a like-for-like exchange of points basis so far as accommodation rights were concerned. They had had only trial membership of the scheme previously, and they 'acquired' completely new holiday accommodation rights by their contract. There is no dispute that that was correctly classified as a 'timeshare contract'. So the regulatory classification of these contracts *in general* or *in principle* is not in issue.

44. I proceed on the basis, therefore, that it is uncontroversial that the special nature of the timeshare accommodation component means that a contract containing that component will, at least prima facie, fall within Reg.7, and attract the special timeshare regulatory scheme, whatever else it also contains. That is no doubt because the regulation of the timeshare sector is bespoke, specific, detailed and intensive, and the presence of the core holiday timeshare component in a contract is the legally distinctive feature that will attract that regulatory regime, in full, to the contract as a whole. That is what the

inclusive definition in the legislation appears to provide for, and that is the *in principle* position taken in practice by the FOS.

45. However, although the definition of a timeshare contract is inclusive, the timeshare regulatory regime itself is both self-contained and exclusive. A timeshare is not a CIS, even if it would, apart from Reg.7, otherwise qualify as one. It is differently regulated. And it is this tension between an inclusive scope provision and an exclusive regulatory regime which perhaps causes some of the analytical discomfort apparent in the present case. The 'fractional ownership' component of the arrangement would be differently regulated – potentially as a CIS – if it were contained in a standalone consumer contract. But its inclusion in a timeshare agreement pulls it in another direction altogether. Where, as the ombudsman thought the Hargreaves' situation indicated, the facts are such in a given case that it can be inferred a consumer's motivation to enter the contract is primarily focused on the fractional ownership and not the timeshare component at all (because they already have that component), the analytical discomfort is particularly acute, and the pull of the alternative, mutually exclusive, regulatory regimes felt strongly. But Reg.7 is not obviously drafted to be sensitive to consumer motivation. The issue in the present dispute, in these circumstances, is on a proper analysis a limited one: whether a like-for-like exchange of accommodation rights prevents a fractional ownership timeshare contract from falling within Reg.7 when it would otherwise do so.

46. The first question, then, is whether the alleged 'error of law' by the ombudsman in the first decision – in finding that it did – is properly capable of being so characterised in the first place. I am persuaded it is. The ombudsman was purporting to allocate the Hargreaves' contract into its correct regulatory category, and that is a question of law and a binary one at that. It also boils down to the meaning of the word 'acquired' in Reg.7, and that can fairly and properly be categorised as a question of law. It is a question of the interpretation of secondary legislation.

47. Next, as to the approach the ombudsman took, I can see he directed himself appropriately to start by considering the rights and duties arising and intended to arise under the 'upgrade' contract. There is no dispute what those rights and duties were. The only question is whether, as a matter of law, Reg.7 comprehends them.

48. In my view, it clearly does. Reg.7 is a scope provision and operates by way of a contract descriptor. As such, it is directed to the substance of the legal rights and duties set out in the contract. The Hargreaves' legal timeshare rights were set out in, derivable from, and attributable to, their fractional ownership timeshare ('upgrade') contract. That contract became the source of, and governed, the parties' legal relationship. It became the basis on which their rights and duties were enforceable against each other. It was the sole reference point and origin of the consumers' rights to use overnight accommodation thereafter. It is properly described as the legal mechanism by which those *rights* are *acquired* – given legal effect.

49. I can see the ombudsman had an instinct that the upgrade agreement was of questionable value, and some risk, to the Hargreaves in all the circumstances. I can see he felt his analysis looked past the legal formalities to the reality of the value/risk issues – what the Hargreaves' bargain was in real life. But the regulatory framework requires analysis one step at a time. The first step is to look at the *substance* of the rights and duties in whatever contractual arrangement currently generates and governs them. That is not a

historical or comparative factual exercise, it is an exercise in classifying live contractual rights and duties for the purpose of assigning them to one regulatory regime or another.

50. We spent some time at the hearing on questions such as whether, on a correct classical analysis, the 'upgrade' contract was a variation, or perhaps a novation, of its predecessor, whether it was a wholly separate contract part of the consideration for which was the yielding up of rights on termination of the first contract, or whether the first contract somehow continued to subsist (minus any 'points') in parallel to the 'upgrade' agreement. I do not think, in the end, it matters – and, crucially, I think it is important for the regulatory regime that it does not matter. What matters is that a consumer has legal rights to the periodic use of overnight accommodation on a more than annual basis, derivable from a contractual relationship. If so, then the contract from which those rights gain their legal force is a timeshare contract, and regulated as such.

51. What sort of overall bargain that was for the consumer in any individual case is another question altogether. The whole point of the initial classification of the contract is to situate it within the regime identified by statute as the most appropriate for answering that question. Identifying the right regime has to come before the evaluative stage, not afterwards. It cannot be done by working backwards from the interests of individual consumers, since the characterisation and protection of those interests is dependent on the applicable regime rather than the other way around.

52. My conclusion therefore is that the ombudsman in the first case made an error of law in holding the relevant contract not to fall within the scope of Reg.7 of the Timeshare Regulations. The error was to conflate the classification of the legal rights and duties arising under the contract with a premature engagement with the evaluation of those rights and duties from the perspective of the individual consumers. The consumers had timeshare rights the live source of which was their fractional ownership timeshare agreement. That, like any other fractional ownership timeshare agreement, came within the terms of Reg.7.

53. In testing that conclusion, I do bear in mind the ease and indeed artificiality or formalism with which the alternative view could be circumvented – for example by drafting devices or by making the smallest additional 'acquisition' of overnight rights a condition of entering the fractional ownership dimension. I also bear in mind the undue complexity with which a straightforward scope provision such as Reg.7 could be loaded were any evaluative dimension to be inserted into it on an individualised basis. And I bear in mind the importance of certainty for everyone in knowing which regime applies. But my conclusion is essentially that as a matter of contextualised statutory interpretation, Reg.7 is a straightforward gateway provision, which simply requires the matching of its words to a contract which is an operative source of the rights described. That is all 'acquires' means.

54. That conclusion does not, however, affect the ultimate outcome of these judicial review proceedings. The ombudsman in the second case accepted he was dealing with a 'timeshare contract', and the ombudsman in the first case proceeded on the alternative basis that he was.

SECTION C

Regulation of the marketing and sale of fractional ownership timeshares

(Regulation 14(3), Timeshare Regulations)

(a) Legal framework

55. 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:

> **14.-** (3) 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.
>
> **…**
>
> (5) A trader who contravenes paragraph (3) commits an offence.

56. That key reference to 'investment' is not statutorily defined. But before me 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.

(b) The decision challenged

57. In both cases, the ombudsman found that the Reg.14(3) prohibition had been breached.

58. That decision is not challenged in the second case. There, the timeshare representative had given a presentation which included a slide setting out three choices: (a) 'rent your holidays' – pros: choice, flexibility and convenience; cons: hit and miss quality, dead money and 100% loss; (b) 'buy a holiday home' – pros: investment, quality guarantee, use/enjoy/sell and money back; cons: large capital outlay, fixed location, not flexible, may be unused; (c) 'fractional ownership club' – have the *best of both worlds*. The ombudsman held this to mean that the fractional ownership contract was being marketed as combining choice, flexibility and convenience with being a quality-guaranteed *investment*. It is accepted for the purposes of these judicial review proceedings that that was a finding which was open to him on the facts. The claimants also point out that that concession helps illustrate how absolute the prohibition is, and how closely policed: a 'bare comparison' is enough to trip a timeshare seller over the line.

59. The decision in the first case is, however, challenged. Here, the ombudsman clearly acknowledged that Diamond had made express efforts to avoid describing the fractional ownership timeshare contract as an investment, and indeed to stress that it was not. That was evidenced in their internal compliance documents and policies. It was also

clearly and repeatedly evidenced in the suite of six contemporaneous – and signed – contractual documents which emphasised in express terms that the package on offer was a proposition about 'memorable holidays' and not about financial investment.

60. However, the ombudsman proceeded on the basis (including by reference to the pre-legislative scrutiny stages of Reg.14(3)) that 'disclaimers' of this sort were not an end of the matter. Reg.14(3) should not be interpreted restrictively, because that would defeat its purpose as a central plank of the statutory protection for consumer timeshare purchasers. Instead, he interpreted Reg.14(3) as including '*any inference that the cost of the contract would be recoupable at a profit in the future*' and as prohibiting a trader implying to consumers that *'future financial returns from a timeshare were a good reason to purchase it*'. Specifically, '*in an appropriate case, the prohibition may capture the promotion of investment features incorporated into a timeshare to persuade customers to purchase – which I think includes leading a potential purchaser to expect a financial gain from a timeshare*' (first decision, [171]-[173]).

61. The ombudsman then set out that '*if the Supplier gave the prospect of a financial return – however unpredictable it might have been – importance during its presentation to Mr and Mrs H by portraying their share in the Allocated Property's net sales proceeds as a significant benefit, it's hard to see why that would not have amounted to marketing and selling Owners Club membership as an investment*'. He noted from the contemporaneous documentation that the couple had declared their reasons for 'upgrading' to a fractional ownership contract as being that they wanted to '*leave something of value*' to their children. They wanted to '*get something back*' for them – they did not wish to '*relinquish and get nothing*' (first decision [177]-[179]). He inferred in all the circumstances that they had been led to believe that membership of the fractional ownership scheme '*would help them to achieve their aim of acquiring an investment that their children would inherit and benefit from*' (first decision [180]).

62. The ombudsman's consequent reasoning included the following steps:

> [181] ...the Owners Club was designed to offer its members a way of making a financial return from the money they invested – whether or not, like every investment, the return was more, less or the same as the sum invested.
>
> [182] So, on balance, in light of what I've said above and given the inherent probabilities of a situation in which the investment elements of the Owners Club were front and centre of Mr and Mrs H's upgrade, I think it's more likely than not that 'property ownership' was advanced by the Supplier as a key benefit of the Owners Club. And as an Allocated Property was 'owned' by members of the Owners Club only to the extent that they participated in the net proceeds from its sale (they didn't have any preferential rights to stay in their Allocated Property or to use it in any other way), the notion of property ownership promoted by the Supplier was specifically its potential investment benefit.
>
> [183] Indeed, as the investment elements of Owners Club membership were plainly major parts of its rationale and

> justification for its cost, it would not have made much sense if the Supplier included the features in the product without relying on them to promote sales. And given the particular circumstances in which Mr and Mrs H – as existing European Collection members – joined the Owners Club, the investment elements did play an important part in the Supplier's sale.
>
> …
>
> [188] …just because it was *possible* to sell Owners Club membership without breaching Regulation 14(3) of the Timeshare Regulations doesn't mean that's what happened in practice, or in the present case. And I still think that, on the balance of probabilities, the Supplier actively relied on the Owners Club's potential to provide an investment return as a significant selling point in its presentation to Mr and Mrs H.

(c) The claimant's challenge in the first case

63. Shawbrook has permission for Judicial Review on the following ground.

> **Ground 3:** The ombudsman erred in law in his construction of, and approach to, Regulation 14(3) of the Timeshare Regulations.

64. Mr Herberg KC accepts the passages from [171]-[173] above do accurately set out the correct legal test: the ombudsman recognised the need for an intention to profit or make a financial gain. The problem is, he says, that he did not apply that test when he came to look at the facts. There was nothing in any of the *contemporaneous* materials to evidence an intention on the Hargreaves' part, or an inferable inducement or positive indication on Diamond's, that the fractional ownership would ultimately yield something of more than residual value (that is, just that there would be something (as opposed to nothing) to get back). There was no sign of a demonstrated profit motive. Despite his formulation, the ombudsman did not apply a test of profit. That, says Mr Herberg, is an error of law.

65. He says that error proceeded from looking at the fractional ownership component of the Hargreaves' 'upgrade' in artificial isolation rather than as part of the whole package they wanted. On a proper analysis, he says, the Hargreaves had recognised they were getting older, would not be able to keep going on overseas holidays indefinitely, and would not live to see the final cashback in 2054. They did not want to terminate the contract, however, as they were entitled to do; they wanted to go on holidaying as long as they could, and did not want to lose the final benefit altogether. On that basis, moving sooner rather than later to a 15 year fractional ownership arrangement made obvious sense. Their own holidays could continue for the foreseeable future, the remaining holiday rights could be enjoyed by their children – whether by permission or by inheritance – without a distant-term fees commitment, and a cashback payout would still be a bonus at the end. Nothing in that, says Mr Herberg, has any necessary quality

of *investment* about it. The ombudsman's frame of reference, he says, was wrong and that was an error of law.

(d) Analysis

66. My necessary starting point is the ombudsman's explicit acceptance that a fractional ownership timeshare does not inevitably or inherently – purely by virtue of its fractional ownership component – transgress the prohibition in Reg.14(3). That is a point of some importance. Reg.14(3) prohibits the *marketing or selling* of a timeshare contract as an investment. It does not prohibit the *existence* of an investment component in a timeshare contract or the marketing or selling of such a product *per se*. The ombudsman accepted it was at least in principle possible to sell a fractional ownership timeshare without infringing Reg.14(3).

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

68. Mr Herberg's answer to this invites the following analysis. In the Hargreaves' particular case, sight should not have been lost – as it appeared to have been – of the fact that they obviously *did* get more for their money than fractional beneficial ownership. They got an enhanced package of benefits, including a more advantageous 'wish to rent' option. And they effectively bought, for their children if not for themselves, a way out of the extremely long and potentially burdensome term of their European Club membership – which would have had to be financially maintained in circumstances in which the children might not be able to use the holiday entitlements – while conferring the cashback terminal 'bonus'. That was the reality of the consumer benefit, and it was a genuine benefit quite apart from any profit dimension.

69. Second, and more generally, perhaps there is an implication that sight should not be lost of the communal benefit of the fractional ownership business model. Membership of a fractional ownership timeshare scheme has to be looked at as a whole, taking *all* the benefits and burdens into account. The price, costs and fees may not be simplistically apportionable – they represent a composite proposition for long-term 'memorable holidays' in a curated 'club membership' context. Delivering all that obviously requires investment by the providers. The 'something back' cash prospect at the end is plainly never more than by way of a managed buy-back – limited by, but secured on, the realisability of property – of the residual value of a package the primary purpose of which is always and obviously to confer pleasurable experience over a term of years. That 'something back' has an advantage for any consumer over the alternative – nothing back, and either less investment by the providers over the years, or higher cost to the consumer more generally.

70. I must, again, start by directing myself to how far this challenge is properly described as an allegation of error of law. I do proceed with some caution here. The challenge, as Mr Herberg expressed it, was not to the meaning the ombudsman gave Reg.14(3), including its reference to 'investment'. It was not a challenge to the test of investment the ombudsman purported to apply. It was to how he purported to apply it to the facts, and specifically to what is said to be his conflation of 'getting something of value back' with a view to profit or gain – getting something *more* back.

71. I did hesitate over some of the ombudsman's analysis. In the passages set out at [180]-[188] above there are some indications suggestive of a view that, notwithstanding his express declaration to the contrary, it was the intrinsic design of fractional ownership timeshares, or the simple fact that the consumers were exchanging like-for-like accommodation rights, that led with a degree of inevitability to a breach of Reg.14(3). That would, at least potentially, have indicated an error of law.

72. But I remind myself that I am not to make the mistake of reading an ombudsman's decision as if it were a legal judgment. Looking at what the ombudsman said fairly, and as a whole, I can see that he set out the correct test, accepted that it was at least possible for *this* contract to have been marketed compliantly with Reg.14(3), and, in my view, applied the correct test to the evaluation of the facts as he found them before concluding that it had not been so marketed/sold in this case. I do not see that he lost sight of the 'profit' meaning of investment, made the legal mistake of confusing profit with 'something back', or made an 'in principle' decision about the sale of fractional ownership timeshares where no new accommodation rights are obtained.

73. Instead, he looked at all the circumstances, including the contemporaneous evidence, and concluded that this timeshare contract had *in fact* been sold as an investment. He found the pure fractional ownership component was given importance by Diamond for the Hargreaves' purposes and portrayed as a significant benefit, quite apart from the reduction in the overall term. He found it was at least implicit in the selling that that benefit was a prospect of financial *gain*. That was an entirely fact-sensitive and evaluative decision. The ombudsman did not make a blanket or 'in principle' decision, referable to the inherent qualities and properties of fractional ownership timeshare contracts. It was a decision directed to finding, interpreting and evaluating the material facts and the communications which took place in this particular case.

74. On the basis on which permission for judicial review has been granted, there is no challenge in the present proceedings to the ombudsman's factual findings or to the rationality of that evaluative exercise as such, and I do not express a concluded view about those accordingly. I confine myself in the circumstances to the following observations.

75. Mr Herberg, in my view, makes a fair and reasonable case that the contemporaneous evidence before the ombudsman was capable of supporting a conclusion that the upgrade was not sold as investment, by reference either to the conduct of Diamond or the objectives of the Hargreaves. The ombudsman reached a different view, but another rational interpretation was possible. It might even have been a better fit. The reduced term of the new contract, from their children's point of view, was evidently a, if not the, major attraction of the new deal: continuing holidays for the foreseeable future for those who could take them, and 'something back' in an imaginable timescale, not in distant decades (or indeed the alternative of nothing back for anyone at all).

76. At the same time, even a persuasive alternative view is not the same as a legally obligatory one. It seems to me to have been properly open to the ombudsman to be sensitive, in all the circumstances of this particular case, to the potential that 'getting something back' here, in reality, signalled at the very least both an unexamined expectation or hope on the Hargreaves' part of yielding more than £6,800 at the end of the term, and an active complicity in that view by Diamond. He was entitled to hold in mind the basic account-book economics of what marginal gain that money bought for the Hargreaves and their children compared with the alternative timeshare choices, and indeed alternative investment choices, available, had they simply exercised their own right to early termination when the time came. And he was entitled to bear in mind that, in all the circumstances, the marketing of a fractional ownership timeshare as an 'upgrade' but without any enhanced accommodation rights carried a very high risk of being *understood* to be an investment proposition – a risk which had perhaps not been adequately and fairly averted, managed or addressed in this particular case. He 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.

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

78. The problem comes back to the difficulty in articulating the *intrinsic benefit* of fractional ownership over any other timeshare *from an individual consumer perspective*. Even on Mr Herberg KC's account, it did not clearly emerge as more than a byproduct of (or a price to pay for?) a reduction in the term of the timeshare. 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.

SECTION D

Pre-contractual information requirements for fractional ownership timeshares

(Regulations 12-13, 15 and Schedule 1, Timeshare Regulations; Regulation 6, CPUT Regulations; Principle 2, RDO Code)

(a) Legal framework

(a)(i) Timeshare Regulations

79. A further central plank of the regulation of timeshare contracts is the detailed prescription of information to be provided before the contract is formed. Failure to comply is a criminal offence. The Timeshare Regulations are *highly* specific as to both content and form of the information to be provided.

80. Regulations 12 and 13 provide as follows, as relevant:

> **Key information**
>
> **12.**—(1) Before entering into a regulated contract, the trader must—
>
> (a)give the consumer the key information in relation to the contract, and
>
> (b)ensure that the information meets the requirements of this regulation.
>
> (2) The trader must comply with paragraph (1) in good time before entering into the contract.
>
> (3) The "key information" in relation to a contract means—
>
> (a)the information required by Part 1 of the standard information form (see regulation 13(2)),
>
> (b)the information set out in Part 2 of that form, and
>
> (c)any additional information required by Part 3 of that form.
>
> (4) The information must be—
>
> (a)clear, comprehensible and accurate, and
>
> (b)sufficient to enable the consumer to make an informed decision about whether or not to enter into the contract.

(5) The information must be provided—

(a)in the standard information form, completed in accordance with regulation 13(1),

(b)in writing,

(c)free of charge, and

(d)in a manner which is easily accessible to the consumer.

(6) The information must be provided in English and may, in addition, be provided in another language.

…

(8) A trader who contravenes paragraph (5) of this regulation commits an offence.

Completing the standard information form

13.—(1) The standard information form must be completed as follows—

(a)the information required by Part 1 of the form must be inserted in the appropriate places (without deleting the existing text in that Part),

(b)Part 2 of the form must not be amended, and

(c)the information required by Part 3 of the form must be inserted in the appropriate places in accordance with any applicable notes (which may then be deleted).

(2) The "standard information form" means the form set out in—

(a)Schedule 1, in the case of a timeshare contract;

…

81. I set out Schedule 1 also in full, to illustrate the high level of detailed control over the content and format of pre-contractual information which is imposed by the Regulations.

SCHEDULE 1

Standard Information Form for Timeshare contracts

Part 1

Identity, place of residence and legal status of the trader(s) which will be party to the contract:

Short description of the product (e.g. description of the immovable property):

Exact nature and content of the right(s):

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

Date on which the consumer may start to exercise the contractual right:

If the contract concerns a specific property under construction, date when the accommodation and services/facilities will be completed/available:

Price to be paid by the consumer for acquiring the right(s):

Outline of additional obligatory costs imposed under the contract; type of costs and indication of amounts (e.g. annual fees, other recurrent fees, special levies, local taxes):

A summary of key services available to the consumer (e.g. electricity, water, maintenance, refuse collection) and an indication of the amount to be paid by the consumer for such services:

A summary of facilities available to the consumer (e.g. swimming pool or sauna):

Are these facilities included in the costs indicated above?

If not, specify what is included and what has to be paid for:

Is it possible to join an exchange scheme?

If yes, specify the name of the exchange scheme:

Indication of costs for membership/exchange:

Has the trader signed a code/codes of conduct and, if yes, where can it/they be found?

Part 2

General information:

-The consumer has the right to withdraw from this contract without giving any reason within 14 days from the conclusion of the contract or receipt of the contract if that takes place later.

-During this withdrawal period, any advance payment by the consumer is prohibited. The prohibition concerns any consideration, including payment, provision of guarantees, reservation of money on accounts, explicit acknowledgement of debt etc. It includes not only payment to the trader, but also to third parties.

-The consumer shall not bear any costs or obligations other than those specified in the contract.

-In accordance with international private law, the contract may be governed by a law other than the law of the United Kingdom and possible disputes may be referred to courts other than those of the United Kingdom.

Signature of the consumer:

Part 3

Additional information to which the consumer is entitled and where it can be obtained specifically (for instance, under which chapter of a general brochure) if not provided below:

1. INFORMATION ABOUT THE RIGHTS ACQUIRED

- conditions governing the exercise of the right which is the subject of the contract and information on whether those conditions have been fulfilled or, if they have not, what conditions remain to be fulfilled,

- where the contract provides rights to occupy accommodation to be selected from a pool of accommodation, information on restrictions on the consumer's ability to use any accommodation in the pool at any time.

2. INFORMATION ON THE PROPERTIES

- where the contract concerns a specific immovable property, an accurate and detailed description of that property and its location; where the contract concerns a number of properties

(multi-resorts), an appropriate description of the properties and their location; where the contract concerns accommodation other than immovable property, an appropriate description of the accommodation and the facilities,

-the services (e.g. electricity, water, maintenance, refuse collection) to which the consumer has or will have access to and under what conditions,

- where applicable, the common facilities, such as swimming pool, sauna, etc., to which the consumer has or may have access and under what conditions.

3. ADDITIONAL REQUIREMENTS FOR ACCOMMODATION UNDER CONSTRUCTION (where applicable)

-the state of completion of the accommodation and of the services rendering the accommodation fully operational (gas, electricity, water and telephone connections) and any facilities to which the consumer will have access,

- the deadline for completion of the accommodation and of the services rendering it fully operational (gas, electricity, water and telephone connections) and a reasonable estimate of the deadline for the completion of any facilities to which the consumer will have access,

- the number of the building permit and the name(s) and full address(es) of the competent authority or authorities,

- a guarantee regarding completion of the accommodation or a guarantee regarding reimbursement of any payment made if the accommodation is not completed and, where appropriate, the conditions governing the operation of such guarantees.

4. INFORMATION ON THE COSTS

- an accurate and appropriate description of all costs associated with the timeshare contract; how these costs will be allocated to the consumer and how and when such costs may be increased; the method for the calculation of the amount of charges relating to occupation of the property, the mandatory statutory charges (for example, taxes and fees) and the administrative overheads (for example, management, maintenance and repairs),

- where applicable, information on whether there are any charges, mortgages, encumbrances or any other liens recorded against title to the accommodation.

> 5. INFORMATION ON TERMINATION OF THE CONTRACT
>
> -where appropriate, information on the arrangements for the termination of ancillary contracts and the consequences of such termination,
>
> -conditions for terminating the contract, the consequences of termination, and information on any liability of the consumer for any costs which might result from such termination.
>
> 6. ADDITIONAL INFORMATION
>
> -information on how maintenance and repairs of the property and its administration and management are arranged, including whether and how consumers may influence and participate in the decisions regarding these issues,
>
> -information on whether or not it is possible to join a system for the resale of the contractual rights, information about the relevant system and an indication of costs related to resale through this system,
>
> -indication of the language(s) available for communication with the trader in relation to the contract, for instance in relation to management decisions, increase of costs and the handling of queries and complaints,
>
> -where applicable, the possibility for out-of-court dispute resolution.

82. Regulation 15 makes important further provision. In particular, Reg.15(3) imposes a requirement that the 'key information' provided precontractually must also be set out in the contract itself. Reg.15 provides as follows:

> **Form of contract**
>
> **15.**—(1) A trader must not enter into a regulated contract unless the contract complies with the requirements of this regulation.
>
> (2) The contract must be in writing and include—
>
> (a)the identity, place of residence and signature of each of the parties;
>
> (b)the date and place of conclusion of the contract.
>
> (3) The contract must set out the key information in relation to the contract which is required under regulation 12.

(4) That key information must be set out—

(a)as terms of the contract, and

(b)with no changes, other than permitted changes.

(5) "Permitted changes" means changes to the key information which were communicated to the consumer in writing before the conclusion of the contract and which—

(a)were expressly agreed between the trader and the consumer, or

(b)resulted from unusual and unforeseeable circumstances beyond the trader's control, the consequences of which could not have been avoided even if all due care had been exercised.

(6) Any permitted changes must be expressly mentioned in the contract.

(7) The contract must include the standard withdrawal form set out in Schedule 5.

(8) If a trader contravenes paragraph (1)—

(a)the trader commits an offence, and

(b)the contract is unenforceable against the consumer.

(a)(ii) Consumer Protection from Unfair Trading ('CPUT') Regulations 2008

83. There is other potentially relevant consumer protection law which has a bearing on the precontractual provision of information. The CPUT Regulations impose a prohibition on '*unfair commercial practices*' (Reg.3(1)); breaching the prohibition is a criminal offence. A commercial practice is unfair if, among other things, '*it is a misleading omission*' (Reg.3(4)(b)). That is further defined in Reg.6 as follows:

Misleading omissions

6.—(1) A commercial practice is a misleading omission if, in its factual context, taking account of the matters in paragraph (2)—

(a)the commercial practice omits material information,

(b)the commercial practice hides material information,

(c)the commercial practice provides material information in a manner which is unclear, unintelligible, ambiguous or untimely, or

(d)the commercial practice fails to identify its commercial intent, unless this is already apparent from the context,

and as a result it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

(2) The matters referred to in paragraph (1) are—

(a)all the features and circumstances of the commercial practice;

(b)the limitations of the medium used to communicate the commercial practice (including limitations of space or time); and

(c)where the medium used to communicate the commercial practice imposes limitations of space or time, any measures taken by the trader to make the information available to consumers by other means.

(3) In paragraph (1) "material information" means—

(a)the information which the average consumer needs, according to the context, to take an informed transactional decision; and

(b)any information requirement which applies in relation to a commercial communication as a result of a Community obligation.

(4) Where a commercial practice is an invitation to purchase, the following information will be material if not already apparent from the context in addition to any other information which is material information under paragraph (3)—

(a)the main characteristics of the product, to the extent appropriate to the medium by which the invitation to purchase is communicated and the product;

(b)the identity of the trader, such as his trading name, and the identity of any other trader on whose behalf the trader is acting;

(c)the geographical address of the trader and the geographical address of any other trader on whose behalf the trader is acting;

(d)either—

(i)the price, including any taxes; or

> (ii)where the nature of the product is such that the price cannot reasonably be calculated in advance, the manner in which the price is calculated;
>
> (e)where appropriate, either—
>
> (i)all additional freight, delivery or postal charges; or
>
> (ii)where such charges cannot reasonably be calculated in advance, the fact that such charges may be payable;
>
> (f)the following matters where they depart from the requirements of professional diligence—
>
> (i)arrangements for payment,
>
> (ii)arrangements for delivery,
>
> (iii)arrangements for performance,
>
> (iv)complaint handling policy;
>
> (g)for products and transactions involving a right of withdrawal or cancellation, the existence of such a right.

84. The reference to 'the average consumer' in Reg.6(1) has to be read in the light of the interpretation provisions in Reg.2. As relevant, they provide as follows:

> **Interpretation**
>
> **2.**—(1) In these Regulations—
>
> "average consumer" shall be construed in accordance with paragraphs (2) to (6);
>
> …
>
> (2) In determining the effect of a commercial practice on the average consumer where the practice reaches or is addressed to a consumer or consumers account shall be taken of the material characteristics of such an average consumer including his being reasonably well informed, reasonably observant and circumspect.
>
> (3) Paragraphs (4) and (5) set out the circumstances in which a reference to the average consumer shall be read as in addition referring to the average member of a particular group of consumers.

> (4) In determining the effect of a commercial practice on the average consumer where the practice is directed to a particular group of consumers, a reference to the average consumer shall be read as referring to the average member of that group.
>
> (5) In determining the effect of a commercial practice on the average consumer—
>
> > (a)where a clearly identifiable group of consumers is particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, and
> >
> > (b)where the practice is likely to materially distort the economic behaviour only of that group,
>
> a reference to the average consumer shall be read as referring to the average member of that group.
>
> ...

(a)(iii) Industry Principles

85. Further standards for the provision of precontractual information appear in relevant industry codes of practice. The Resort Development Organisation, to which the timeshare companies in the present case belong, has a code of conduct ('the RDO Code'), by which its members undertake to comply with a set of principles. These include trading principles, sales and marketing principles, and principles for 'ongoing protection for the consumer'. The second of these provides as follows:

> **2. Sales and Marketing Principles**
>
> 2.1 RDO Members will in no case mislead a consumer into believing that a product or service has other features and/or benefits than those laid down in the contract.
>
> 2.2 RDO Members will in particular ensure:
>
> > 2.2.1 Appropriate marketing techniques that make it clear what the object of the approach to the consumer is;
> >
> > 2.2.2 Appropriate selling methods that treat the consumer with respect and allow the consumer choice between purchasing and reflection; and
> >
> > 2.2.3. The provision of any necessary assistance to consumers to enable them to make an informed decision.

(b) The decisions challenged

86. The ombudsman in the first decision held that Diamond failed to provide the consumers '*with key information that was material to their understanding of their share in the net sale proceeds of the Allocated Property*' ([197]). He did so on three alternative bases: (a) breach of Reg.12 of the Timeshare Regulations; (b) breach of Reg.6 of the CPUT Regulations; (c) breach of Principle 2.2.3 of the RDO Code.

87. His analysis was as follows (first decision, [203]-[204]):

> [203] Without more information about the Allocated Property than the Supplier gave Mr and Mrs H, there was no way they could determine whether upgrading their European Collection membership represented value for money and a worthwhile endeavour given their circumstances and what they were trying to achieve for their children. For making such an investment decision on an informed basis demanded information on:
>
> (1) the market value of the Allocated Property at the time; and
>
> (2) the main matters that had a bearing on how the value might change over time – including, for example:
>
> (i) what was known or could reasonably be said about the market most relevant to the Allocated Property given its location and characteristics;
>
> (ii) major risks (such as the exchange-rate risk); and
>
> (iii) key factors that might impact the success of the resort and, in turn, how appealing accommodation located inside it might have been to others.
>
> [204] Mr and Mrs H were essentially left in the dark without such basic information – not only when it came to considerations that were relevant to their decision making but necessary if they were going to make an informed decision about upgrading to membership of the Owners Club and borrowing the money needed to meet the purchase price being asked of them.

88. The ombudsman held that, as a result, the consumers were not '*given an objective measure against which to judge whether their purchase and the borrowing needed to support it represented the 'value' that they wanted to leave their children*' (first decision, [205]).

89. He considered that to amount to a *significant* breach of Reg.12. He also considered the absence of valuation information to amount to a misleading omission within the terms of Reg.6 of the CPUT Regulations. It was '*material*' information for the purchase of fractional ownership, and '*necessary*' for making an informed decision about entering into the contract. For the same reason, it '*fell squarely*' within Principle 2.2.3 of the RDO Code.

90. A similar, but not identical, approach was taken by the ombudsman in the second decision ([293]-[296]). He criticised CLC for not providing precontractually '*some indication of the value of the interest bought at the date of sale and the possible amounts realised when the allocated property was later sold*'. He held this to be a breach of the Timeshare Regulations, specifically the requirement in Sch.1, Part 1 to provide information about '*the exact nature and content of the rights*' – in a case in which those rights include an interest in the sale of real property – and of the requirement in Reg.12(4) for the Sch.1 information to be '*clear, comprehensible and accurate, and sufficient to enable the consumer to make an informed decision about whether or not to enter into the contract'*.

91. The ombudsman in the second decision did not proceed on the alternative CPUT Regulations basis. But he did consider the RDO Code and held CLC to have failed to comply with industry best practice standards as set out in Principle 2.2.3 by failing to provide '*necessary assistance to the consumer to enable them to make an informed decision*'.

(c) The claimants' challenge

92. Shawbrook has permission for judicial review on the following ground:

> **Ground 2:** The ombudsman erred in law in his approach to Regulation 12 of the Timeshare Regulations, the RDO Code and Regulation 6(1)(a) of the Consumer Protection from Unfair Trading Regulations 2008.

BPF has permission for judicial review on the following ground:

> **Ground 1:** Error of law in construction of Regulation 12 of the Timeshare Regulations and the RDO Code of Conduct.

93. The claimants, and the commercial interested parties, mount a concerted challenge to the conclusion that a fractional ownership timeshare contract may not lawfully be entered into without the provision of valuation information relating to the 'allocated property'. They explain that this amounts to the introduction of a novel, complex and burdensome requirement for which there is no, or no sufficient, basis in law.

94. They say it represents a major and unsustainable extrapolation from the Timeshare Regulations' 'key information' provisions, not only because there is no clear basis for it, expressly or by analogy, in the otherwise highly specific information regime itself, but also because it shatters the standardised and prescriptive structure of that regime by introducing both variability and uncertainty into what must be provided in order to avoid illegality backed by criminal sanctions. The 'nature and content' of a right is one thing – an objective question of legal fact, as Mr Herberg KC put it. Its 'value' is something entirely different – a matter of expert opinion and indeed one on which experts might differ. And Reg.12(4) relates *only* to the 'key information' set out in the Schedule; it is not intended or able to generate whole new classes of 'key information' based on a freestanding idea of what is 'sufficient to enable the consumer to make an informed decision'.

95. They also say that a requirement to provide valuation information is entirely inconsistent with the scheme of the Timeshare Regulations more generally. That is because its provision would almost inevitably place the provider in contravention of the Reg.14(3) prohibition on marketing a timeshare as an investment. They say the Timeshare Regulations bite (and, it might be added, bite hard) on fractional ownership timeshare contracts by absolutely prohibiting their presentation as investments; they do not engage, and do not permit engagement, with these products on any alternative basis that they are, after all, being presented as investments. They say the decision also overlooks, and is inconsistent with, the requirement in Reg.15(4) for the 'key information' required by Reg.12 to '*be set out – (a) as terms of the contract and (b) with no changes, other than permitted changes*'. It is impossible for snapshot valuation information or future valuation estimates to be conveyed in a manner capable of being converted into contract terms. For all these reasons, they say the ombudsmen erred in law.

96. The claimant in the first case says further that the ombudsman erred in law in the first decision by overlooking the hierarchy – implicit in the two sets of Regulations but explicit in the underlying EU law which they implemented – which places the specificity of the Timeshare Regulations above the generality of the CPUT Regulations. If the Timeshare Regulations do not require, or do not permit, the provision of valuation information within its detailed and bespoke regime, the CPUT Regulations provide no alternative route to those effects.

97. There is a further challenge, which might be summarised by saying that the ombudsman took altogether too broad-brush an approach to the interpretation and application of CPUT Reg.6, in particular by paying insufficient attention to the *causal* dimension – the requirement that the omission in question causes or is likely to cause a transaction decision to be taken that would not otherwise have been taken – and to the requirement that the causation test be applied to the 'average consumer' rather than on a fact-specific or subjective basis.

98. The claimants also make, or adopt from the interested parties, a challenge that both ombudsmen made errors of law in interpreting and applying the RDO Code. Clearly, if the provision of valuation information would be positively inconsistent with the legal regulatory scheme, the Code would have no basis in law for suggesting a different view. In addition, it is said that no such 'good industry practice' as relied on by the ombudsmen exists, so as to support what would otherwise be a conclusion with no foundation in a provision particularising a requirement not to *mislead*.

(d) Analysis

(d)(i) The Timeshare Regulations – 'key information'

99. 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?

100. 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.

101. If fractional ownership timeshare contracts are intrinsically beguiling, the ombudsmen can see they are also inherently risky. What is in them, in *purely* monetary terms, for the consumer can be hard to pin down, especially in a case like the Hargreaves', where the fractional ownership rights may be something of a magnet by themselves rather than just an added attraction to holiday rights. The ombudsmen can see that a consumer might easily *assume* at least the possibility of getting not just something back, but something beneficial - worth having and worth paying a premium for in the first place. And of course the *potential* for that sort of worthwhile outcome is never out of the question. It may not be positively advanced as a reason to enter into a contract. But the thought may nevertheless hang in the air.

102. Whether a fractional ownership contract turns out to yield a marginal profit for a consumer or not depends on a lot of variables over a longish timescale, even given the trust structure within which the property will be held and sold. Some of those variables are under the control of the provider – how many fractions they sell per property, at what price, how well they maintain the property, how many properties are to be sold at once, what their overall land development strategy is, and so on. Some are not – currency fluctuations, foreign property markets, global economic conditions. Consumers are at a substantial information disadvantage in these circumstances, and do take on a composite risk of getting little back, or at least much less of a return on the premium they pay for fractional ownership than they could have obtained easily and safely by doing something else with their money.

103. I can see that the ombudsmen identified an information and advice deficit in these circumstances, and turned their attention to the information provisions of the regulatory framework to address it. The intuitions driving that are easy to recognise. But these challenges ask serious questions about how intuitive, or effective, their solutions really are.

104. In the first place it is unclear from the decisions – and in the absence of explicit provision of comparable granularity to the rest of the Timeshare Regulations – exactly what information it is the timeshare companies would need to give to avoid criminal liability under Reg.12. The list given in the first decision – a recent market valuation of the whole property, 'what was known or could reasonably be said about the market most relevant to' the property, 'major risks', 'key factors that might impact the success of the resort', 'how appealing accommodation located in it might be' – raise a great many more questions than they answer, and indeed on any basis may leave the consumer not much the wiser. The (different) list given in the second decision – 'some indication of the value of the interest bought at the date of sale' and 'the possible amounts realised when the allocated property was later sold' is little clearer. I can see that the ombudsmen are giving impressionistic or indicative *guidance* here about the sort of material they think would help the consumer. But these kinds of formulation do not sit easily in a highly specific and prescriptive legal regulatory framework as such. What the ombudsmen say might work as guidance, but it does not obviously work as law.

105. And it is law, and potential error of law, which is properly in issue here. Whatever caveats must arise because of the limits of ombudsmen's functions in relation to the determination of legal rights and duties, and the latitude of their jurisdiction otherwise, these ombudsman decided that failure to provide this 'value' information breached the *requirements* of Reg.12. That being correct in law depends on fitting it into the definition of 'key information', since Reg.12(4), correctly interpreted, is a qualification on *how* the 'key information' is presented, not an addition to it. That is clear because of Reg.12(3), which is worded as an exhaustive definition. So that, in turn requires the 'value' information to be fitted in to the terms of Sch.1.

106. Both ombudsmen rely on the reference in Sch.1 to '*exact nature and content of the rights*' as being the basis for perceiving a legal obligation to provide 'value' information. But first, having regard to the high level of specificity in the Schedule, it is obvious that 'value' information is nowhere specified as such. And second, 'exact nature and content of the rights' is clearly intended, in context, to be a fair and objective *identification and description* of those rights. 'Value' information may possibly be context for, or commentary on, those rights, but the 'exact nature and content of rights' is something different from information which may (or may not) be relevant to how much they might be *worth*, now or in the future.

107. The logic of the ombudsmen's position is that fractional ownership timeshare contracts contain a 'something back' product; although they cannot be sold or marketed as investments *as such*, they can still be sold and marketed, they may have a potential to yield a return, and they are likely – perhaps highly likely – to be *assumed* to be investment opportunities. If timeshare companies can get past the Reg.14(3) prohibition, consumers remain exposed and vulnerable because they are being sold something the value of which they *cannot* work out for themselves, since at least some of the information they would need to do so is held exclusively by the timeshare company itself. Therefore, the logic goes, that information should be provided.

108. Caution is, however, needed about that 'should'. The ombudsmen may have identified a potential consumer protection problem, and a potentially desirable solution, but in my view they cross the line from interpreting to creating the law if they hold this is what

Reg.12 already requires. And that is manifest when the sheer vagueness of what they suggest this legal obligation might look like is confronted.

109. It is also, in my view, manifest when read alongside the Reg.14(3) prohibition itself. The ombudsmen seem to think their 'value information' solution sits alongside and complements the prohibition – that it produces a continuum of consumer protection, picking up where the prohibition on marketing leaves off. But I see the force of the objection sustained in these challenges that the two do not dovetail easily in this way. The prohibition is designed to be a sledgehammer deterrent to the positioning of timeshares in the investment marketplace. The 'value information' idea is addressed to the making of consumer decisions in exactly that marketplace. It inevitably draws providers towards that space even if – which is an odd proposition in itself – they are limited to providing only negative warnings and risk information and eliminate anything about positive prospects for present and future value. To be of use to a consumer the information would have to be accurate and therefore to at least some degree balanced. There are daunting practical difficulties thrown up by the prospect of simultaneous legal obligations (each backed by criminal sanctions) to stay on the right side of the prohibition while providing precontractual information for the ostensible purpose of facilitating an investment decision. Had there been an intention to impose a legal obligation to provide valuation information, the highly detailed Timeshare Regulations might have been expected to tackle that tension in terms.

110. I do not, and do not need to, go so far as to infer from the Regulations a legal *prohibition* on the provision of valuation information. My conclusion is that there is no legal *obligation*, derivable from Reg.12 of the Timeshare Regulations, to provide it, and that the ombudsmen's solution is, in its own terms, distinctly problematic for the regulatory framework. It remains my view that the principal *legal* consumer-protection control over buying and selling fractional ownership timeshares is the Reg.14(3) prohibition. That provision alone makes it hard enough to market a timeshare product containing a bare interest in the proceeds of the deferred sale of real property lawfully, without inviting the fleshing out of the law as positively demanding investor-protection information obligations at the same time.

(d)(ii) The CPUT Regulations – 'misleading omission'

111. I turn then to consider the alternative bases on which the ombudsmen relied as establishing an obligation to provide 'valuation' information. In the first place, it is notable that both of these – Reg.6 of the CPUT Regulations and Principle 2.2.3 of the RDO Code – are directed at, and particularise, a duty not to *mislead* consumers. In neither of the present cases was misrepresentation found. The mischief identified by the ombudsmen was not that consumers were *misled*. It was that consumers were in a position of information deficit as to their ability to compute the value and risk to their money of fractional ownership. My starting point therefore is that these provisions are in the circumstances not an *obvious* source of an obligation to provide valuation information. But the question is, nevertheless, one of construction in context.

112. The question in relation to Reg.6 is, accurately, a legal one. Must it, or can it, be read as requiring the provision of valuation information? These are questions about legal rights and duties. As drafted, Reg.6 imposes such an obligation if, but only if, *all* the following tests are satisfied: (a) the information is 'material'; (b) 'taking account of all the features and circumstances of the commercial practice' the information has been

'omitted'; and (c) the omission causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise. Each of these parts of the test is further elaborated.

113. First, then, is valuation information 'material' in the context of fractional ownership timeshares? By Reg.6(3), it will be if it is information which the average consumer needs, according to the context, to take an informed transactional decision. And by Reg.6(4), where, as here, the commercial practice is an invitation to purchase, a non-exhaustive list is provided covering basic *descriptive* information about the product. Again, the 'valuation' information contemplated by the ombudsmen is not obviously analogous to the Reg.6(4) list. But the concept of 'material' information is a good deal more open-textured and commodious than the detailed specificity of the Timeshare Regulations' concept of 'key information', even if defined in somewhat circular terms (precisely what it adds to the causation test is hard to put a finger on).

114. The causation test is itself the distinctive mechanism of this piece of consumer protection legislation, and it must be applied by reference to the elaborated construct of the 'average consumer' as provided in Reg.2. That in turn requires account to be taken of the 'material characteristics of such an average consumer', including, somewhat bemusingly, that they are *reasonably well informed* as well as being reasonably observant and circumspect. And then it requires an assessment of whether the omission of the information in question can be identified as a cause, or likely cause, of this average consumer taking a relevant decision.

115. The third piece of the picture is the direction to assess the non-provision of the information by reference to factual context, and to all the features and circumstances of a commercial practice, as part of deciding whether a misleading omission has occurred.

116. So do the CPUT Regulations indicate a 'misleading omission' to provide valuation information in the transaction in question here? To work that out in the context of the Hargreaves' case (only in their case did the ombudsman go down this route) would have meant addressing the causation test: was this information left out by Diamond, bearing in mind all the features and circumstances of timeshare selling in general and the specific factual context in particular, so causing or being likely to cause an average (well-informed, observant and circumspect) consumer to enter a timeshare contract when they would not otherwise have done? Answering that question is a relatively sophisticated exercise, requiring as it does some degree of fact-sensitivity, the application of a measure of objectivity in the 'average consumer' test, and consideration of the commercial practice context. Looking at the approach the ombudsman took, the following points arise.

117. First, the analysis occupies a single paragraph only:

> [225(2)] Regulation 6(1)(a) of the CPUT Regulations stipulated at the time of sale that a commercial practice amounted to a misleading omission if, in its factual context and taking into account the matters in Regulation 6(2), the practice omitted material information. As I've said before, without such basic information as the value of the Allocated Property and the main matters that had a bearing on how the value might change over time (including the risks of investing in it), Mr and Mrs H were

> left in the dark when it came to considerations that were not only relevant to their decision making but necessary if they were going to make an informed decision about purchasing Owners Club membership and borrowing the money needed to meet the purchase price being asked of them. And that, in my view, made the information 'material'.

I am satisfied that this must be understood as an exercise in identifying and applying the law. The ombudsman is setting out why he considers the CPUT Regulations impose a *legal duty* to provide value information, so leading to the 'same conclusion' even if he were wrong about Reg.12 of the Timeshare Regulations.

118. However, as such, it is no more than a partial statement of how Reg.6 of the CPUT Regulations works. It does not mention or apply the crucial causation test. It does not reference the 'average consumer' component (there are various references to average consumers elsewhere in the decision, but not in the context of the developed definition in Reg.2 CPUT or of this particular test). The ombudsman again identifies here what he considers to be an investment information deficit and uses the language of relevance, materiality and necessity. But that is by no means equivalent to an accurate application of Reg.6 or a sustainable finding of a 'misleading omission' within the terms of that provision.

119. It is plain also that an application of Reg.6 in the context of timeshare selling would have had to take into account the existing special regulatory context within which that 'commercial practice' takes place. Again, I do not need to, and do not, go so far as to conclude that the Timeshare Regulations fully occupy this territory or that they exclude any possible finding of a 'misleading omission' in a timeshare context. But the analysis *would* have to take account of the marketing prohibition, and of the fact that, on the ombudsman's counterfactual, *all* the 'key information' stipulated by the Timeshare Regulations had duly been provided.

120. And finally, to sustain a finding of a 'misleading omission' – the other side of the coin of a legal obligation to provide information – a clear and proper focus would have needed to be given to exactly what it was that had been misleadingly omitted. None of the items listed as 'basic information' by the ombudsman entirely speaks for itself. His list is given by way of non-exhaustive example ('*such as…*'). That is not a satisfactory articulation of the legal rights and duties engaged by the CPUT Regulations or the purported application of the law to the facts of a given case, from the point of view of either the consumer or the provider.

121. In these circumstances my conclusion is that, in the first decision, the ombudsman erred in law in misstating and misapplying the requirements of Reg.6 of the CPUT Regulations.

(d)(iii) - The RDO Code – 'necessary assistance'

122. None of the foregoing is to say that the ombudsmen were necessarily wrong to infer that something more in the way of consumer protection than the legal requirements for precontractual information provision might be *desirable*. The combination of the 'something back' component of fractional ownership timeshares (the freestanding property interest), their potential to be and be assumed to be investments, the

elusiveness of the identification of what might constitute good or bad reasons for consumers entering into such an arrangement, and consumers' information deficit in relation to assessing the values and risks involved, all adds up to something that the ombudsmen could reasonably have concerns about. In the beguiling context of 'long-term happiness' contracts, consumers are in a position of inequality of bargaining power, knowledge and possibly interest, and there is a real risk of unlooked-for financial disappointment.

123. The RDO Code of Practice's 'sales and marketing principles' were relied on by both ombudsmen as a source of a 'good practice' obligation to provide valuation information. There is no dispute that an industry code of practice of this nature can in principle add to strict legal requirements in terms of what an ombudsman can expect or indeed require in the way of commercial good practice. It can also, in an appropriate case, sound to some degree in public law. It cannot, however, detract from or conflict with legal requirements.

124. The RDO principles are briefly stated. They do not deal with information provision as such – perhaps because of the detail and specificity of the relevant legal requirements in themselves. Instead they focus in the first place on not misleading consumers into believing a product has features or benefits not laid down in the contract. That is not relied on, in those terms, in the present cases. Further to that principle of not misleading consumers, providers are expected 'in particular' to ensure the provision of any necessary assistance to consumers to enable them to make informed decisions. The ombudsmen considered the consumers needed some valuation information to enable them to make an informed decision about whether to enter into their fractional ownership timeshares.

125. The challenges in this litigation propose error of law in, respectively, the approach to and construction of this principle. The ombudsmen were not, however, purporting to interpret or apply the law. They cited the Code accurately. They made a value judgment in the application of a non-legal standard which – notwithstanding its anchorage in a principle of 'not misleading' – is entirely open-textured in its expectation that providers will ensure necessary 'assistance' to enable an 'informed decision'. They concluded the providers had not done that in the present case. There is no apparent error of law, whether of construction or approach, in any of that.

126. The specific objections made to the ombudsmen's decision-making in this respect cover a number of points. It is pointed out that both ombudsmen appeared to assume that no potential issues of conflict with or subtraction from the formal legal requirements arose, without addressing that necessary step. It is argued that issues of conflict, or at least tension, do arise, because of the Reg.14(3) prohibition and the self-contained specificity of the Reg.12 'key information', which the ombudsmen failed to consider. It is said that, in so far as they were relying on established industry good practice, no such practice of supplying value information was evidenced or exists – the ombudsmen were proposing something entirely novel and unforeseeable by the industry, and doing so unfairly without recourse to consultation. DISP itself indicates that ombudsmen are to have regard to good industry practice '*at the relevant time*'. And it is said the ombudsmen were wrong to think the provision of value information was necessary assistance in any event.

127. There is no rationality or broader public law challenge to this decision for which permission has been granted – the claimants have permission to rely on error of law alone. The two possible errors of law suggested in these challenges rely on interpreting both Reg.14(3) and Reg.12 as *prohibiting* the provision of value information – the former because it is impossible to provide anything without infringing the prohibition on marketing a timeshare as an investment, and the latter because, proceeding from a maximum-harmonisation EU measure, it must be read as excluding the possibility of further assistance of this nature being encouraged as a matter of good practice. Neither proposition in my view is made out in law. I agree that Reg.14(3) may make it extremely difficult for providers to supply value information consistently with respecting the prohibition, but I cannot agree it is in principle impossible, and therefore unlawful. And while Reg.12 *may or may not* place a ceiling on what the law can *require* by way of precontractual information, I cannot agree that it places a legal prohibition on giving consumers any more information and help. A legal prohibition on giving consumers more information and help than the law demands is highly counter-intuitive in this consumer-protection regulatory landscape, and in the absence of any express indication of such a prohibition in the legal provisions themselves I am unable to extrapolate one from the principles suggested.

128. I am in receipt of invitations, notwithstanding that permission has not been granted for judicial review on rationality grounds, to expand the scope of my consideration to include a formal finding on such grounds. I am unwilling to do so. I consider it neither necessary nor desirable to permit the evolution of these already expansive and to some extent generalised judicial review proceedings beyond the confinement to issues of law to which those giving permission plainly considered important. I do not need to address this point in order to dispose of these judicial review proceedings in any event. In these circumstances, I confine myself to the following further observations.

129. As I have already explained, the ombudsmen may well have been right to identify a consumer protection problem with the selling of fractional ownership timeshares which the law does not fully address. They may also have been right to think about supra-legal good practice standards and guidance as the space within which to look for a solution. They may have been right to give a general indication that consumers would be assisted by having something more – whether that is value information as such, or perhaps the provision of clear warnings and/or signposts to advice – over and above what is already provided in the standard-form documentation by way of disclaimers that the product is not being sold as an investment as such.

130. It seems to me, though, that the industry would need more help and guidance than these decisions provide by themselves in order fairly to understand how timeshare providers are securely to avoid the Reg.14(3) prohibition while at the same time providing whatever is considered useful for consumers in *understanding* both that, and how, fractional ownership timeshares put their money at risk. There is at least a tension here. The Reg.14(3) prohibition is the central pillar of the consumer protection the law provides in this respect. Supplementing it by way of good practice guidance capable of pulling in the opposite direction needs to be approached with considerable care and circumspection. It does appear the ombudsmen were seeking to break new ground for the whole industry with these decisions, rather than identifying that the timeshare providers in the cases before them were outlying transgressors of recognised existing industry norms. The legal landmarks already dominating this landscape point to a

careful and thoughtful approach in coming up with new features, before branding a failure to provide them as being *unfair*.

131. And finally, while open textured and indicative indications of the information to be provided are not *inherently* problematic in the field of good practice, in the way they are in the field of legal obligation and criminal liability, these decisions remain at a distinctly impressionistic level in terms of what consumers might need and expect from timeshare companies. It seems to me that more thought might be given, for example, to the classification of 'assistance' into information provision, warnings and advice; and to some classification of information provision which addresses the difference between disclosure of information unique to the provider – particularly in relation to how it operates or intends to operate the fractional scheme so as to affect a consumer's individual interests – and the provision of information available from other sources.

SECTION E

Responsibility of lenders for the acts and omissions of timeshare companies in negotiating fractional ownership timeshare contracts

(Consumer Credit Act 1974, sections 56, 140A and 140B)

(a) Legal framework

132. I have already referred in this judgment to the provisions of sections 11 and 12 of the Consumer Credit Act 1974. The decisions in this case relate to lending under s.11(1)(b) – the banks provided loans for the consumers which count as restricted-use credit agreements to finance a transaction between the consumer and the timeshare company in each case. Because this was done in the context of a pre-existing relationship between the bank and the timeshare company, they also count as debtor-creditor-supplier agreements within the terms of s.12(b).

133. In relation to agreements of this sort, there are two provisions in the Act which potentially impose liability on the bank for actions of the timeshare company. The first is s.75. That provides that if the consumer has a claim against the timeshare company in either misrepresentation or breach of contract they have a like claim against the bank. The bank and the timeshare company will be jointly and severally liable. Neither misrepresentation nor breach of contract was found by the ombudsmen in the present cases.

134. The second is s.56. As relevant, it provides as follows:

> **56 Antecedent negotiations**
>
> (1)In this Act "antecedent negotiations " means any negotiations with the debtor —
>
> …

> (c)conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement within section 12(b) or (c),
>
> and "negotiator" means the person by whom negotiations are so conducted with the debtor or hirer.
>
> (2)Negotiations with the debtor in a case falling within subsection (1)(b) or (c) shall be deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity.

Section 56 thus creates a form of deemed statutory agency. Negotiations between a timeshare company and a consumer are deemed to be conducted by the company not only in its own capacity, but in the capacity of an agent of the bank providing the consumer's loan.

135. This deemed agency assumes particular importance for present purposes because of the powers conferred by sections 140A and 140B of the Act to hold, and provide relief for, 'unfair' relationships between debtors and creditors – that is, the loan agreement between the bank and the consumer financing the lump sum outlay the consumer provides under the timeshare agreement. As relevant, ss.140A provides as follows:

> **140AUnfair relationships between creditors and debtors**
>
> (1)The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following—
>
> (a)any of the terms of the agreement or of any related agreement;
>
> (b)the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;
>
> (c)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).
>
> (2)In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).
>
> …

> (4)A determination may be made under this section in relation to a relationship notwithstanding that the relationship may have ended.
>
> …

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.

136. Section 140B gives extensive powers to the court to remedy or unwind 'unfair relationships':

> **140BPowers of court in relation to unfair relationships**
>
> (1)An order under this section in connection with a credit agreement may do one or more of the following—
>
> (a)require the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person);
>
> (b)require the creditor, or any associate or former associate of his, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement;
>
> (c)reduce or discharge any sum payable by the debtor or by a surety by virtue of the agreement or any related agreement;
>
> (d)direct the return to a surety of any property provided by him for the purposes of a security;
>
> (e)otherwise set aside (in whole or in part) any duty imposed on the debtor or on a surety by virtue of the agreement or any related agreement;
>
> (f)alter the terms of the agreement or of any related agreement;
>
> (g)direct accounts to be taken, or (in Scotland) an accounting to be made, between any persons.
>
> …
>
> (3)An order under this section may be made notwithstanding that its effect is to place on the creditor, or any associate or former associate of his, a burden in respect of an advantage enjoyed by another person.

…

(b) The decisions challenged

137. Both ombudsmen held the relevant bank responsible as deemed agent, under s.56, in respect of the acts and omissions of the timeshare company which constituted the various regulatory breaches the ombudsmen found had occurred. They made findings of an unfair debtor-creditor relationship under s.140A in each case because of the vitiating effect of those breaches. And they directed relief having regard to what a court might be expected to do under s.140B.

138. In applying s.56 in this way, the ombudsmen addressed themselves to the guidance of the decided authorities in two cases: the decision of the Supreme Court in *Plevin v Paragon Personal Finance Ltd [2014] UKSC 61, [2014] 1 WLR 4222* and the decision of the Court of Appeal in *Scotland & Reast v British Credit Trust Ltd [2014] EWCA Civ 790*. They drew from these cases a conclusion that the words of s.56 were unqualified and there was no basis for introducing any qualification into them.

139. The ombudsman in the second case recorded that the application of s.56 to this effect had not been challenged before him.

(c) The claimants' challenge

140. Shawbrook have permission for judicial review on the following ground:

> **Ground 4:** the ombudsman erred in law in his approach to sections 56 and 140A CCA 1974, by attributing to Shawbrook through Diamond's agency, and treating as relevant to the assessment of fairness of the credit relationship under section 140A, matters which extend beyond the legal responsibility of Shawbrook.

BPF, notwithstanding that they did not take the point before the ombudsman, have permission for judicial review on the following ground:

> **Ground 2:** error of law in the application of s.140A(1)(c) and s.56 CCA.

141. What Mr Jaffey KC says is that the ombudsmen erred in using s.56 to impose unfair credit bargain liability on the banks, for regulatory breaches of the timeshare companies, where the banks did not and could not owe those regulatory obligations in the first place. He says they have extended the statutory deemed agency further than even actual agency could have gone, by transferring over the primary duties imposed by statute on sellers alone.

142. He points out that *Plevin* was not a case about s.56 at all, although there are some dicta there about it. He says that on a proper reading of those dicta, the Supreme Court was in fact expressing clear reservations about the extent to which the acts of a seller (a credit broker in that case) could be attributed on an agency basis to a lender which was not itself subject to a seller's regulatory obligations. He relies on *Plevin* for the

proposition that s.140A(1)(c) involves a two-stage test: first, to establish whether agency exists but then second, and separately, to consider the *scope* of the agency so found. He says agency cannot work in the way relied on by the ombudsmen without 'identity of liability' – that is to say, an identity of regulatory obligations imposed on both seller and lender. He says that while a court could look at regulatory standards as a benchmark for assessing overall fairness, it cannot do so without first considering whether s.56 does properly attract the full scope of regulatory *breaches* to the lender in the first place. He says that any indications in *Scotland & Reast* indicating a broader approach in using agency principles to impose regulatory obligations applying to others cannot survive the decision in *Plevin*.

(d) Analysis

143. The starting point here is the statutory function conferred on a court by s.140A(1) of determining whether a relevant debtor/creditor relationship is 'unfair'. That function arises only if the relationship is potentially 'unfair' *because* of one of the elements listed in the subsection; these elements are a limitation on the scope of the statutory function, by reference to potential identified and prescribed *causes* of unfairness. One such causal component is provided by the reference in s.140A(1)(c) to 'any other thing done (or not done) by, or on behalf of, the creditor'.

144. Section 140A is strikingly addressed to *things*. It is not on the face of it addressed to pre-existing legal *liabilities*, if any, arising from those things (acts and omissions), in the sense of caring whether or not they have other legal consequences than those it provides for itself. It is concerned solely with the identification of factual matters – things done or not done – which, if they are a potential cause of unfairness, will come within the ambit of the statutory function. It is a threshold or gateway provision, setting out the preconditions for a court to have a role in considering whether or not a relationship is unfair. There is a vivid contrast in this respect between s.140A and s.75: the latter operates directly on and by the imputation of legal liabilities, the former does not.

145. The Court of Appeal in *Scotland & Reast* was dealing with a different factual matrix from the present cases – a transaction linking a loan agreement with a payment protection insurance sale in which it was found the seller had misled the claimants – but it is a decision on the operation of s.56. The Court held in terms that the s.75 imposition of *liability* on the creditor for misrepresentation did not exclude the imposition of *responsibility* on the creditor for the factual conduct of antecedent negotiations by the seller for the purposes of s.140A (at [72]).

146. The Court took a straightforward approach to the words of s.56: antecedent negotiations are deemed to have been conducted by the negotiator as agent for the lender '*and that is so irrespective of what the position would have been at common law*' (at [56]). There could be no doubt that the *acts* and *representations* of the seller were attributable to, 'done on behalf of', the lender on this basis (at [65]). That satisfied the threshold test for s.140A and the next stage was the evaluation of the fairness or otherwise of the relationship. The Court concluded (at [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.

I note that the word 'responsible' is used in this context, and not 'liable'.

147. Mr Jaffey KC objects that *Scotland & Reast* either (a) does not assist the ombudsmen here because a lender can be liable for representations (the factual matrix in that case) but it is not under (direct) regulatory obligations in relation to timeshare sales or (b) cannot survive the subsequent decision in *Plevin*.

148. I cannot read *Scotland & Reast* as turning on the former point; there is no suggestion anywhere I can see that the 'scope' of the s.56 deemed agency should be regarded as limited by the need to consider whether there are or could be independent sources of *liability* to which the lender might otherwise be subject for the acts or omissions imputed to it. On the contrary, the Court's approach is the simple one of identifying the contribution s.56 makes to identifying the *facts* – acts and omissions – which are to be relevant to the s.140A overall assessment of fairness. '*The words of s.56(2) would seem to provide a straightforward answer.*' (at [56]).

149. As regards the status of *Scotland & Reast*, it was cited with approval by the Court of Appeal in *Smith v Royal Bank of Scotland [2021] EWCA Civ 1832* in relation to its analysis of the threshold test for s.140A (although I cannot see that the s.56 point squarely arose there; and the case has gone on appeal to the Supreme Court). *Scotland & Reast* was also cited without criticism in *Plevin*.

150. The Supreme Court in *Plevin* was considering how s.140A worked, and endorsed (at [29]) the view that there was no basis for a constrained interpretation of s.140A(1)(c):

> Under that subsection it extends to any case whatever in which human action (or inaction) produces unfairness. The only limitation on the extreme breadth of sub-paragraph (c) is that the action or inaction in question must be 'by or on behalf of the creditor'.

In other words, it is a provision concerned with the *facts* of human action or inaction, not with legal *liabilities*. The question for the Supreme Court in *Plevin* was whether the 'by or on behalf of' test was satisfied on the facts before it. It found that it was not, because the applicable regulatory regime there had placed the relevant functions *exclusively* elsewhere. In coming to that conclusion, the Court noted that the Consumer Credit Act itself did make extensive use of the technique of imputing *responsibility* to a creditor for the acts or omissions of other parties who are not (or not necessarily) the creditor's agents, but that where it did so '*it invariably does it in express and clear terms*' (at [31]). The Court went on to cite s.56 as an example of that: '*sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one*'.

This is contrasted with s.75, which '*does not provide for a deemed agency, but it imposes liability under a debtor-creditor-supplier agreement for the misrepresentations and breaches of contract of the supplier*'. None of these examples was applicable in *Plevin* itself – the Court's conclusion was that in the absence of such a provision the question of 'by or on behalf of' had to be approached from first principles. But the court endorsed (at [34]) the view that s.140A is capable of giving '*extensive protection to the debtor extending beyond the right to enforce the creditor's legal duties, in any situation where the creditor or his associates (or their agents) have made the relationship unfair*'.

151. I cannot find any error of law in the ombudsmen's approach on this basis. They directed themselves correctly to the statutory provisions and to the relevant authorities. I can find no support in the authorities for a proposition that the deemed agency of s.56 is limited in scope to circumstances where there is actual or potential 'identity of liability' in relation to the regulatory obligations of lender and seller. On the contrary, I find support for the proposition that, where s.56 applies, the legal liabilities of the lender and seller *apart* from s.56 are largely irrelevant. There is no basis for replicating on the facts of the present cases the analysis that led to the decision in *Plevin*. The applicable provisions of the Consumer Credit Act, read together with the relevant sector-specific regulatory regime here, do *not* support a deduction that Parliament intended to place regulatory duties exclusively elsewhere than on the creditor, precisely because, unlike in *Plevin*, those provisions in the present cases *do* include s.56. The 'by or on behalf of test' did not therefore fall to be considered from first principles. The imputation of *responsibility* (as opposed to *liability*) to the creditor for the acts or omissions of the seller is provided for '*in express and clear terms*' by statute.

152. The ombudsmen therefore, in my view, correctly concluded on the authorities as they stand that the gateway to the functions conferred by sections 140A and 140B was properly to be regarded as unlocked by s.56, and that it was open to them to proceed to make an assessment as to whether the relationship between the banks and the consumers was made unfair because of the acts or omissions of the timeshare companies in the antecedent negotiations. I look at the substantive decisions which followed – that they *were* unfair, in both cases – further below.

SECTION F

Construction of standard form fractional ownership timeshare contracts

(Regulation 7, Unfair Terms in Consumer Contracts Regulations 1999)

(a) Legal Framework

153. The construction of fractional ownership timeshare contracts partakes, in the first place, of classical common law principles of contractual interpretation, which are well-established and not in material dispute in the present litigation. They were helpfully

summarised in the *"Ocean Neptune"* case – *Lukoil Asia Pacific Pte Ltd v Ocean Tankers Pte Ltd [2018] EWHC 163 (Comm)* at [8]:

> The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

154. From a judicial review perspective, it can be noted that contractual construction has been described as a question of mixed law and fact – broadly, determining the meaning of the words in their context being essentially a factual exercise and the effect to be given to them being a question of law. It is also opportune to restate in this connection that ombudsmen's decisions are not legal judgments, finally determinative of legal rights and obligations.

155. Overlying the classical foundations of contractual interpretation are statutory provisions which may modify the correct approach to construing contracts in circumstances such as the present. Fractional ownership timeshare contracts are made on the sellers' standard terms and conditions. That reflects not only commercial reality but also of course requirements such as Regulations 15 and 12 of the Timeshare Regulations which require the 'key information' to be included as contract terms and make other relevant provision as to the form and content of timeshare contracts. It is a consumer context – there is an inequality of bargaining power and limited scope for consumers to negotiate.

156. The Unfair Terms in Consumer Contracts Regulations 1999 ('UTCCR') make relevant provision, in these circumstances. Specifically, they provide that '*if there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail*'. They also make substantive provision for evaluating contract terms in terms of unfairness to consumers. If terms are unfair, they will not bind the consumer. The key provision made is as follows.

> **Unfair Terms**
>
> **5.**—(1) A contractual term which has not been individually negotiated shall be regarded as unfair if, 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.
>
> (2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.
>
> (3) Notwithstanding that a specific term or certain aspects of it in a contract has been individually negotiated, these Regulations shall apply to the rest of a contract if an overall assessment of it indicates that it is a pre-formulated standard contract.
>
> (4) It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was.
>
> (5) Schedule 2 to these Regulations contains an indicative and non-exhaustive list of the terms which may be regarded as unfair.
>
> **Assessment of unfair terms**
>
> **6.**—(1) Without prejudice to regulation 12, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.
>
> (2) In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate–
>
> (a)to the definition of the main subject matter of the contract, or
>
> (b)to the adequacy of the price or remuneration, as against the goods or services supplied in exchange.
>
> **Written contracts**

> **7.**—(1) A seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language.
>
> (2) If there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail but this rule shall not apply in proceedings brought under regulation 12.
>
> **Effect of unfair term**
>
> **8.**—(1) An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.
>
> (2) The contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term.

(b) The decision challenged

157. Although it appears that the standard terms in CLC's contract were not specifically complained of by the consumers in the first place, the ombudsman in the second decision made a series of findings that various terms were unfair. These findings focus on the form and content of a number of provisions in the contractual documentation, particularly those dealing with the consumers' liability to pay management charges, and to make contributions to a 'sinking fund' – that is, a fund established for the purpose of making good dilapidations to the timeshare properties.

158. In some cases, the ombudsman thought the term in question failed the requirement in Reg.7(1) to be '*expressed in plain, intelligible language*'. In others, he found them to be substantively unfair in any event: specifically by causing '*a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer*', contrary to the requirement of good faith specified by Reg.5(1).

(c) The claimant's challenge in the second case

159. BPF have permission for judicial review on the following ground:

> **Ground 3:** Misconstruction of relevant contractual provisions.

This is plainly a ground of some generality. Both BPF and CLC make point by point submissions on each of the provisions the ombudsman engaged with, and set out their disagreements with his views. Pulling the perspective back a little, some themes might be discernible in these challenges.

160. First, there is a complaint that the ombudsman failed to construe the contractual material properly *in context and as a whole*, and as a result simply misunderstood what the contract terms meant and what their effect was.

161. Second, it is said that the ombudsman systematically failed to approach contractual construction in accordance with the requirement in Reg.7(2) UTCCR that '*if there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail*'. Because of that, it is said, the ombudsman made findings of unfairness based on choices he had made about construction which were in reality the most *un*favourable to the consumer he could have come up with.

162. Third, it is said that the ombudsman, in construing the contractual material in a manner adverse to the consumer, failed to have to regard to the extent to which terms as to reasonableness should have been implied.

(d) Analysis

163. This is a challenge on a ground directed to *construction*. There is some overlap between the construction challenge and the challenge to findings of unfairness. That is particularly so where Reg.7 is engaged. I deal in this section with the challenge in so far as it is it addressed to the themes I have identified above, and to Reg.7 more generally. I deal with the challenge to the substantive findings of unfairness below.

164. In any exercise in construing a document with legal effects, it is essential to read it as a whole and in context. That applies both to contracts and to ombudsmen's decisions.

165. Timeshare contracts are characteristically voluminous. That is partly because of the regulatory context within which they operate, as already noted, including the detailed specification of mandatory contractual content. It is also because the product itself may be relatively complex. Fractional ownership timeshares are relatively complex products, and they are consumer contracts, so the parties' rights and duties need to be set out carefully, clearly and in detail. In the present case, the contractual arrangements are set out in a collection of different documents. There was a 'Fractional Property Owners Club Application and Purchase Agreement' dated 4th October 2011. There were 'Fractional Purchase Agreement Terms and Conditions' and a 'Member's Declaration' of the same date. There was a 'Club La Costa Fractional Property Owners Club Information Sheet' which was twelve pages long. There was a Management Agreement and 'Club Rules' (in two versions), running to some 40 pages.

166. I can see from the ombudsman's decision that not only had he thoroughly familiarised himself with both the totality and the detail of this documentation, he had also in mind a quantity of evidence, including from the industry, about what it meant and how it worked in practice. His first task then – the starting point with any construction exercise – was to consider whether there was any realistic doubt about what any of the contract terms meant. He had to consider that objectively, and with the consumer context in mind. Whether there was any realistic doubt did need to be addressed by looking at the whole suite of the material: a doubt raised in isolation might have been answered elsewhere. But it also had to be addressed in the wider context within which the bargain was struck.

167. The ombudsman's decision sets out that he found several instances of doubt and ambiguity in what the contractual documentation said about the fees and charges the consumers were required to pay over the currency of the timeshare. BPF and CLC do not agree about the existence or extent of the ambiguity he found. But the existence of ambiguity is an entirely evaluative matter, and disagreement is not an indication of

reviewable error. I find no sign that the ombudsman went wrong in his approach to or understanding of his task here. He looked at both the detail and the whole of the material, and thought about it in context, including that this was a consumer contract. His identification of doubts and ambiguities seems to me to be to be consistent with a proper approach to the exercise. But it is of course only a first step.

168. An important second step in a contract to which Reg.7 applies is to consider whether any of the doubts and ambiguities arise because there has been a failure to express the term in plain, intelligible language. The ombudsman found, in several cases, that it was. Again, that is a wholly evaluative matter. The standard of plainness and intelligibility has to be considered and applied in its consumer protection context. The ombudsman made reasoned findings that in several respects this contractual material was insufficiently plainly and intelligible expressed, and breached Reg.7(1). I find no basis for concluding that he erred in doing so or made findings in this respect which were not properly open to him.

169. Then the question logically arises about what is to be done, as a matter of construction, about resolving any ambiguity. Here, the provision in Reg.7(2) that '*if there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail*' (and indeed the reading in of implied terms as to reasonableness) raises something of a conundrum. That provision is easy enough to understand in a situation in which the question of construction arises in a straightforward enforcement context: if a seller seeks to enforce an ambiguous provision against a consumer, or vice versa, then it is the meaning which most helps the consumer that will prevail. (That does, of course, contemplate that different constructions of the same contract term will 'prevail' in different circumstances.)

170. But it is harder to be sure how Reg.7(2) works where the ambiguity has to be resolved – if it *does* have to be resolved – for the purpose of making an overall assessment of whether a term is fair or not. Two views are possible. The first is that any ambiguous term has initially to be construed in the most favourable way possible for the consumer, and then an assessment of its fairness made on that basis. The second is that a more holistic assessment of unfairness falls to be made, with ambiguity, enforceability and all other circumstances taken into account at the same time. The challenge to the ombudsman is made largely on the basis that the first approach is the only correct one. I was not shown any authority to that effect. It is certainly the approach which, overall, minimises the level of consumer protection. It also has the inherent problem of requiring the construction exercise to be undertaken rather artificially, deliberately separated from the context in which its 'prevalence' matters one way or the other. I am not persuaded that the logic of the first approach must sweep all before it. But in any event, I need not express a final view on the matter, and do not do so, for the following reasons.

171. In judicial review proceedings, a challenge of 'misconstruction' must be directed to error of law and/or public law defect in factual or evaluative matters. In this case, the generalised challenge of 'misconstruction' turns out, as developed before me, to comprehend a range of different kinds of objection. Of these, some, on closer inspection, are not 'misconstruction' points at all – they are challenges to substantive decisions of unfairness. Those that do focus on construction points lead to one of two places. The first is to a finding of breach of Reg.7(1), and I consider these to be unexceptionable findings for the reasons given. The second, via a question about the

proper operation of Reg.7(2), is to a further question about the correct approach to an issue of substantive unfairness again. The need to make a choice about how Reg.7(2) works only arises if it could conceivably make a difference to the ultimate decisions the ombudsman reached about unfairness, and to the steps he took in relation to the terms he considered to be unfair. It is to these I turn next.

SECTION G

The ombudsmen's conclusions on unfairness and remedy

(a) Preliminary

172. It is at this point that the interaction between the multiplicity of alternative bases in the two decisions before me, the corresponding multiplicity of challenges made to the decisions, the extended analysis in this judgment, and the ombudsman's broad remit as to what is '*fair and reasonable in all the circumstances of the case*', finally has to be addressed.

173. The complaints the consumers originally made to the ombudsmen were brought against the banks. They were complaints brought under s.140A of the Consumer Credit Act on the basis that an unfair debtor/creditor relationship had arisen. They asked the ombudsmen to do what was '*fair and reasonable*' by way of undoing the unfairness, asking them to bear in mind what a court would do in the exercise of its own extensive powers under s.140B.

174. In each case, the ombudsman upheld the complaint that *the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) was unfair to the debtor.* And in each case, relief was provided by reference to s.140B.

175. Shawbrook has permission for judicial review on the following ground:

> **Ground 5:** the ombudsman erred in law in finding the terms of the upgrade agreement to be a source of unfairness and/or in the approach to the grant of relief under sections 140A and 140B CCA 1974.

BPF has permission for judicial review on the following ground:

> **Ground 4:** error of law in the approach to a finding of unfairness and/or grant of relief under ss.140A and 140B CCA.

These then are the final challenges made to the overall conclusions of the ombudsmen, and to the steps they directed to be taken as a result.

176. In my foregoing analyses, I have explained why a number of the (alternative) bases the ombudsmen relied on in reaching their ultimate conclusions about unfairness are not,

on closer inspection, fully sustainable as such to the extent that they rely on instances of unlawfulness but are themselves vitiatied by error of law. What remains for further consideration now, in relation to their potential for supporting an overall conclusion of unfairness, are (a) the ombudsmen's findings in each case that the fractional ownership timeshares had been sold as an investment in breach of Reg.14(3) of the Timeshare Regulations, (b) their finding that the banks must be considered 'responsible' for the acts and omissions of the timeshare companies in doing so because of the operation of s.56 of the Consumer Credit Act, (c) the possibility that the timeshare companies should have given more information or assistance to the consumers as a matter of good practice, and (d) the possibility that some contractual terms were substantively unfair within Reg.5 UTCCR in causing '*a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer*'.

177. That is the basis on which I now have to consider the ombudsmen's finding of unfairness under s.140A. As set out above, that unfairness may be attributable either to '*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)(c)) or to '*any of the terms of the agreement or of any related agreement*' (s.140A(1)(a)).

(b) Analysis

178. A great deal of time and money has been spent on these ombudsmen decisions and now on this judicial review litigation. That, I am told, is because all of the parties involved, with the exception of Mr Hopwood and Mrs Hargreaves (whose interests in her own right, and the interests also of her late husband's estate, have been settled out of court on an ex gratia basis), have a pressing need for clarification of where they stand in law *generally*. The FOS has a large number of similar cases already on their books, and has reason to apprehend many more. Ombudsmen cannot be expected to go on having to make decisions on an array of possible alternative grounds; in these cases in which they have done so, they have tried to cover exhaustively all the possible grounds of unfairness, and the FOS waits to see what a court will make of matters in the end. At the same time, these decisions represent a statement of intent by the FOS. Banks and timeshare companies are both at obvious and cumulative risk of the outcomes of all cases in which the FOS may replicate the positions taken here. They are themselves directed by DISP 1.3.2A to '*ensure that lessons learned as a result of determinations by the Ombudsman are effectively applied in future complaint handling*' including on a systemic basis. And so there were multiple alternative bases for the decisions, and multiple grounds of challenge.

179. I raised at the outset of the hearing of these claims for judicial review the point that, in the circumstances, acceding to the invitation to give a thorough review to these decisions on each alternative base relied on, and to respond to each ground for which permission for judicial review was granted, inevitably opened up the prospect of a judgment containing a quantity of *obiter dicta* – analysis of legal matters which are not strictly determinative of the cases actually before a court. That was fully acknowledged. Such a prospect is usually to be resolutely avoided; questions of law are to be determined only when cases turn on them. Courts do not perform advisory functions.

180. If I have not therefore dealt exhaustively with each and every point raised in these proceedings, I have nevertheless gone a long way to acceding to the request to deal with

the alternative bases capable of *general* application on which the ombudsmen made their decisions even where that was not strictly necessary for the disposal of the claims. In the circumstances – and particularly because FOS has set its stall out in these decisions and the industry is expected to respond beyond the facts of individual cases – I considered it, on balance, in the interests of justice and of fairness to all the parties involved to do so. Looking in detail at a number of aspects of the regulatory landscape helps in any event to contextualise and test the coherence of the decisions it *has* been necessary to make. And doing so may more generally inform and support regulatory practice and decision-making, help get cases decided more quickly, and avoid the need for piecemeal and voluminous litigation in future. If not, it may at least help inform and set the agenda for such litigation as arises in future on points which, if not determinative in the present cases, may be in other cases.

181. Having said that, I now turn to set out what is, in my view, determinative of this particular set of judicial review proceedings.

182. Both decisions proceeded on the (at least alternative) basis that each agreement was a timeshare contract within the terms of Reg.7 of the Timeshare Regulations. I have already said that one of the main planks of the legal regulation of the timeshare sector is the absolute prohibition contained in Reg.14(3) of the Timeshare Regulations on selling or marketing timeshare contracts as investments. That prohibition means what it says. In the case of selling and marketing fractional ownership timeshares, it may, for the reasons I have canvassed, be difficult to comply with in practice. None of that is in principle controversial.

183. The prohibition was held by the ombudsmen to have been breached in both present cases. That is not challenged in the second case, and I have not interfered with the ombudsman's decision on this point in the first case. That means that by law, these timeshare contracts, and their associated loan agreements, should not have been entered into in the way they were *at all*. That makes the ombudsmen's determinations on this point in each case a finding which eclipses an array of other fairness points about the detail of the circumstances of marketing, negotiation and sale, and the terms of the contracts themselves.

184. Then the ombudsmen's decisions must be read as a whole. Within the 'alternative bases' structure of the decisions, both ombudsmen considered the Reg.14(3) finding *alone* sufficient to support a conclusion of unfairness within s.140A(1) in relation to the underlying acts and omissions of the timeshare companies constituting those breaches. That can be seen in the first decision particularly at [188]-[190], and even more explicitly in the second decision at [320]: '*I do consider the breach of Regulation 14(3) to have been serious and to have caused Mr and Mrs H to enter into the FPOC membership and loan, so capable of creating an unfair relationship even when viewed in isolation*'. (Reading the decision as a whole, and in a fair and non-legalistic way, I am entirely unpersuaded that 'capable' in that sentence signals anything other than that the full circumstances of the finding of breach justified the finding of unfairness in the case.)

185. Challenges are made in these proceedings to the adequacy of the evaluation by which the ombudsmen reached their final conclusions of unfairness –in particular to whether they had regard to *all* relevant matters within the terms of s.140A(2). But the ombudsmen had the full facts and circumstances, as they had found them, firmly in

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

186. In the circumstances, the additional matters in fact taken into account by the ombudsmen in reaching their decisions on unfairness need not be considered in any detail. So I confine myself to the following. In the first case, the ombudsman also found a contractual term reserving to Diamond the contractual ability to cancel for non-payment unfair. The sustainability of that view, and whether any of the contract terms in the second case were unfair in their own right, are not matters which need be determined. These are fact or contract specific points. The ombudsman in the second case reviewed a suite of contractual documentation he plainly considered daunting for consumers to read and understand in relation to important matters, and has given some pointers to improvement. The primary protection the UTCCR provide for unfair contract terms is unenforceability *of those terms* (Reg.8). That is perhaps something a court contemplating its powers under s.140B on this ground alone might have kept in mind. It would also have had to consider matters such as whether any unfair terms had in fact been exercised to the detriment of a complainant. The more extensive remedies the consumers wanted, and the ombudsmen provided, might or might not have been warranted by adverse conclusions on the fairness of some or all of these provisions alone.

187. However, I have no hesitation in concluding that the remedies the ombudsmen provided were within the range of decisions a court could properly have made on the facts, as being appropriate to a finding of mis-selling a fractional ownership timeshare contract as an investment. The mis-selling was properly capable of being regarded as a fundamental vitiation of the fairness of the whole arrangement, for which nothing short of unwinding was reasonable and fair to the consumer. The detail of the unwinding was for each ombudsman to evaluate on the facts of the case, including by carefully accounting for such benefits and value as the consumer had received. I cannot see any error of law in what the ombudsmen decided in these cases by way of remedy.

SECTION H

Conclusions and Decision

(a) Conclusions

188. The individual conclusions which make up my decision in this case are as follows:

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

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

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

189. This adds up to a decision which does involve a point of law about statutory deemed agency - a point which has already been considered at Court of Appeal and Supreme Court level. The decision's premise, however, is the fundamental case-by-case evaluative task of an ombudsman considering whether any timeshare has, as a matter of fact and evidence, been mis-sold as an investment. A reviewing court has a limited function in relation to such ombudsman decisions; and in this regard, at least, this decision reflects that high degree of fact-sensitivity, albeit recognising the factors particular to fractional ownership timeshares which may elevate the risk of mis-selling as an investment. It also engages the respect a reviewing court must give to the evaluation an ombudsman has to make about the ultimate fairness or unfairness of the resulting relationship in any given set of circumstances, and the ombudsman's decision about what is in the end a '*fair and reasonable*' outcome.

190. I also reached the following conclusions which are not, however, determinative of these proceedings:

(4) The ombudsman in the first case erred in law in deciding a fractional ownership timeshare contract did not fall within the terms of Reg.7 of the Timeshare Regulations, but was instead one or more CISs.

(5) Both ombudsmen erred in law in finding a breach of Reg.12 of the Timeshare Regulations constituted by a failure pre-contractually to provide 'valuation information' to timeshare customers. There is no such legal obligation.

(6) The ombudsman in the first case erred in law in misstating and misapplying the requirements of Reg.6 of the CPUT Regulations.

(7) Both ombudsmen did not err in law in their construction of and approach to the RDO Code.

(8) The ombudsman in the second case did not err in law in his general approach to construction of the contractual terms nor in the application of Regulation 7(1) UTCCR.

191. Finally, some further brief observations on the *lawful* sale and marketing of fractional ownership timeshares. I have observed a number of times now that doing so in proximity to Reg.14(3) may be a difficult legal undertaking in practice. The present cases illustrate that. I detect in the ombudsmen's determinations, and in some of the submissions made by the FOS in these proceedings, a degree of scepticism about its ultimate achievability in any case. I say nothing about that beyond what I have already said, including about the elusiveness of a clear articulation of the benefit to an individual consumer of a fractional ownership timeshare rather than any other sort. I have, however, indicated that if the FOS is of the view that more should be done, as a matter of industry good practice, than is routinely being done by timeshare companies to provide 'necessary assistance' to help consumers make their own minds up about that, then I am of the view that the sector would benefit from more developed and structured help than has yet been provided by way of these individual decisions in understanding what it is they are being expected to do and how it is to be reconciled with the Reg.14(3) prohibition, before being exposed to findings of unfairness for failure to do so.

(b) Decision

192. Both claims for judicial review are dismissed.