DRN-3091142

The complaint

1. Mr H has complained that Clydesdale Financial Services Limited, trading as Barclays Partner Finance ("BPF"), has unfairly turned down his claim under sections 75 and 140A of the Consumer Credit Act 1974 ("CCA").

The background

2. In April 2011 Mr H, alongside his wife, entered into an agreement for a trial membership with Club La Costa ("CLC"). CLC is a business that operates international holiday resorts and hotels and provides its customers with different types of holiday products, including timeshares and forms of property ownership. The trial membership let Mr and Mrs H take five weeks of holidays at CLC resorts (plus an additional 'prelude' week) over a period of just under three years. This cost £3,995, which was paid for by a loan provided by a business other than BPF.

3. In October 2011 Mr and Mrs H were staying at a CLC property overseas when they attended a sales meeting, during which they upgraded their trial membership. Mr and Mrs H joined CLC's Fractional Points Owners' Club ("FPOC") which, amongst other things, provided them with points they could exchange for holiday accommodation, but also with an interest in a property overseas, known as the allocated property. Their membership was set to run for 16 years, after which the allocated property would be sold and they would be entitled to a share of the proceeds of sale.

4. Mr and Mrs H's membership of the FPOC was agreed in a Purchase Agreement dated 4 October 2011 ('the Purchase Agreement'), which they jointly and severally entered into with a CLC sales company, Club La Costa Leisure Limited. That sales company had the right to promote and sell fractional rights in the FPOC and was the 'supplier' for the purposes of the CCA. Under the Purchase Agreement, Mr and Mrs H agreed to be bound by the rules of the FPOC ('the Rules') and by the management agreement relating to the club ('the Management Agreement').

5. The FPOC membership cost £18,899. Mr and Mrs H were given a £3,000 trade in value for their trial membership and the balance, £15,899, was paid for using an interest bearing loan taken out with BPF in Mr H's sole name. The rate of interest was 17.6% per year and the term was 15 years, so if the loan ran to term it would have cost £42,845.40. Mr H paid off the loan in full on 31 August 2012.

6. Mr and Mrs H have said it was important to them at the time they took out FPOC membership that they could holiday in Jerusalem and that they were told by CLC representatives that it had access to apartments there. They also said CLC presented FPOC as an investment, as they would become joint owners of a property which would be sold later at a profit, and that CLC told them the annual

maintenance fees would remain at the same level during the time they were FPOC members.

7. Mr and Mrs H say what they were told turned out not to be true. In particular, CLC was not able to provide them with holiday accommodation in Jerusalem as promised. In 2016, Mr and Mrs H attempted to give up their FPOC membership and they did not get any money back, so it did not work as an investment[1] – they were concerned that they did not actually have an interest in a property as promised. And the cost of the maintenance fees did rise over the years. Unhappy with the FPOC, they raised a complaint.

8. The complaint was made to BPF, so was brought in Mr H's name only as the credit agreement was in his name.[2] He said that BPF was liable to him under the CCA for the things he said CLC did wrong. BPF responded to Mr H's complaint, but did not uphold it. It said, in short, that CLC had told Mr and Mrs H that it did not have apartments in Jerusalem, but they could use their FPOC points in a third party points exchange scheme to book apartments there. And since then Mr and Mrs H had used their membership on several occasions, so BPF thought they must have been happy with what they bought.

9. BPF also said the documents available from the time of sale make clear that the FPOC was not sold as an investment, in fact the documents made plain that membership was for the sole purpose of taking holidays and not an investment vehicle. The documents also showed that CLC did not offer any 'buy back' scheme for their points and that the maintenance fees could go up or down over time.

10. Unhappy with BPF's response, Mr H brought his complaint to our service. Initially he was represented by a professional claim management company ("CMC"), but he now represents himself. In addition to what had been said before, it was pointed out that Mr and Mrs H had to pay to join the points exchange scheme every year after the first year of membership. They said this was not made clear to them when they were told they would have access to accommodation in Jerusalem. And when they tried to book there, the points exchange scheme could only find accommodation in Tel Aviv, which was not what they wanted. They accepted they used the FPOC membership to go on holiday, but this was because they had paid a lot of money for it and wanted to make some use of it.

11. Mr and Mrs H said that they had not read the documents at the time they took out FPOC membership as Mrs H, who dealt with the documents, did not have her reading glasses with her and could not read the information. Also, the CLC customer compliance officer did not read aloud the member's declaration to them, so they were not aware of what it contained when it was signed.

12. One of our adjudicators considered the complaint and did not think BPF needed to do anything further. He considered the evidence provided by Mr and Mrs H and BPF and in summary he thought:

    - Mr and Mrs H ended up buying the product they thought they were buying and they did have an interest in the property set out on their FPOC agreement.

[1] In response to my provisional decision, BPF has explained that Mr and Mrs H did not in fact give up their membership as they thought they had. I will deal with this issue later on in my decision.
[2] In this decision I will refer to Mr and Mrs H as both were present at the sale, but the complaint brought is in Mr H's name only.

- The contract makes clear that the product was to be bought for the purposes of going on holiday and not as an investment, so he did not think the FPOC was sold as an investment.
- The contract states that the maintenance fees can go up, so there was no breach of contract or misrepresentation when they were later increased.
- The evidence suggests that a number of different holiday destinations were discussed, not only in Jerusalem, and the adjudicator would not have expected someone to take out FPOC membership if they only wanted to go to one place for holiday.

13. Mr H did not agree with what our adjudicator said, so asked for the complaint to be looked at again by an ombudsman.

14. But before that happened a new investigator looked at the complaint again. He considered everything Mr and Mrs H and BPF had told us, as well as a sales presentation that CLC had used around the same time the FPOC product was sold to Mr and Mrs H. He thought this was a complaint that should be upheld. In summary, he said:

    - Based on the sales process, it is likely the resale value of the FPOC was presented as an important feature of the club. So it is likely FPOC membership was presented as an investment.
    - CLC did not provide sufficient information to Mr and Mrs H about the scheme so they could make a balanced and informed assessment of the transaction they were entering.
    - The sales process was geared toward highlighting the positives of the scheme and little information was given about the negatives. It was also front loaded, so more time was spent giving presentations and talking about the scheme than was given to read the paperwork.
    - Based on the available evidence, it is likely a court would find there was an unfair debtor-creditor relationship under s.140A CCA. He suggested a remedy was for BPF to refund what Mr H paid toward the loan, with interest.

15. BPF disagreed with the investigator's view. It provided lengthy submissions setting out its position, along with six witness statements to support what it was saying. Those witnesses were:

    - PR – CLC's Group Sales Operation Director
    - DF – CLC's Sales Administration Director
    - NW – One of CLC's Customer Liaison Officers
    - MB – CLC's Signature Concierge Manager and the Sales Representative who sold FPOC membership to Mr and Mrs H
    - PB – the Legal Services Director at the trustee that had legal title to the properties that backed the FPOC
    - MO – a solicitor in private practice, who undertook work for CLC

16. BPF said, in summary:

    - FPOC was not sold to Mr and Mrs H as an investment – this was specifically banned by the rules and regulations that govern the sales of timeshares.
    - The documents available from the time of sale show that this was not an investment – they make it clear the purpose of membership was to take holidays.

- Mr and Mrs H were not given the sort of information they would get if they were taking out an investment, for example the value of the property interest they were buying or the potential growth they could expect to see.
- The evidence suggests that Mr and Mrs H were not pressured into taking out FPOC membership – they were given time to think about everything and in fact Mr H returned the day after the presentation to finish signing all of the documents.
- There is evidence that Mr and Mrs H's CMC encouraged a different client of theirs to make false claims in a court case, so this service should treat Mr and Mrs H's claim with caution.
- This service has no jurisdiction to make an order under s.140A CCA, only a court can do that.

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

18. Having considered the complaint, I concluded that it was one that should be upheld in Mr H's favour. But the reasons I came to that conclusion, and the suggested remedy, differed from what our investigator thought, so I issued a provisional decision setting out my provisional findings and inviting both parties to let me have any further evidence or arguments they wished me to consider.

19. My provisional findings were:

    - BPF were concerned that Mr and Mrs H's CMC had behaved poorly in the past in relation to another consumer's claim and I should treat Mr and Mrs H's claims with scepticism. I thought I was able to properly weigh up all of the evidence available to come to a fair and reasonable answer to the complaint.
    - I thought the evidence available suggested that Mr and Mrs H did not only wish to holiday in Jerusalem, and I did not think that the availably of holidays there was misrepresented to them.
    - I thought that FPOC membership was sold to Mr and Mrs H as an investment, but I did not think this amounted to a false representation as there was indeed an investment element.
    - I did not think the evidence suggested that Mr and Mrs H would have been told that the maintenance fees would not change over time. So in conclusion I did not think BPF acted unfairly in turning down the claim under s.75 CCA.
    - I went on to look at the claim under s.140A CCA and I explained that it was relevant law that I had to take into account, and I had to consider whether I thought it was likely a court would find the relationship unfair.
    - Having considered the evidence available from the time of sale, I did not think there was sufficient information to conclude that Mr and Mrs H had been unduly pressured into taking out FPOC membership.
    - I looked at the contractual terms that set out the fees and charges that could have been levied against Mr and Mrs H, as well as the consequences of not making the demanded payments. Having done so, I concluded that a court would likely find those terms were unfair.
    - I thought that CLC did not provide sufficient information to Mr and Mrs H in contravention of the Timeshare Regulations meaning they could not properly weigh up the cost and benefit of taking out FPOC membership.
    - In light of the provisional findings I made, I thought it was likely a court would have found that the debtor-creditor relationship was unfair.

- I thought that, had there not been breaches of the various regulations and an imbalance of knowledge, Mr and Mrs H would not have bought FPOC membership. So to remedy the unfairness I thought BPF needed to refund the payments Mr H made under the loan, with interest, and to pay back some of the maintenance fees Mr and Mrs H paid, with interest, but not all of them to reflect that they had used FPOC membership to take some holidays.

20. Mr H responded to my provisional decision to say he agreed with my findings and had nothing further to add.

21. BPF responded to say it disagreed with my provisional decision. It provided two further witness statements from:

    - EM – CLC's Group General Counsel
    - JL – a CLC Project Director

22. In addition to what it had said before, BPF set out further submissions. They were:

    - From the available material, the courts would not reach the decision I thought they would, and I had erred in this regard.
    - It was a perverse conclusion, on the evidence before me, that CLC sold or marketed the product as an investment.
    - I had variously erred in law, erred in fact and reached an irrational conclusion in finding that CLC failed to provide sufficient information.
    - I had erred in law in concluding that the terms of the Fractional Product relating to ongoing charges are unfair.
    - I had erred in law and reached a perverse conclusion in finding that the purported failure to provide information and the inclusion of the supposedly unfair terms gave rise to unfairness under s.140A CCA.
    - Even if the relationship was unfair (which BPF denied) the suggested redress was inappropriate and irrational and contrary to the spirit of s.140B CCA.

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

My findings

24. I have again read and considered all the available evidence and arguments to decide what is, in my opinion, fair and reasonable in the circumstances of this complaint. When doing that, I am required by DISP 3.6.4 R of the Financial Conduct Authority's ("FCA") Handbook to take into account:

    '(1) relevant:

        (a) law and regulations;
        (b) regulators' rules, guidance and standards;
        (c) codes of practice; and

    (2) (where appropriate) what [the ombudsman] considers to have been good industry practice at the relevant time.'

25. Where I have needed to make a finding of fact based on the evidence, I have made my decision on the balance of probabilities – which, in other words, means when I make a finding that something has happened, that is because I think it is more likely than not that that thing did happen.

26. As set out above, I have to take into account the relevant law and regulations. So it is necessary that I set out the legal framework behind Mr H's complaint.

The legal framework

Consumer Credit Act 1974

27. Mr H paid for the FPOC membership by giving up trial membership and with a £15,899 BPF loan. The proceeds of the loan were not paid to Mr H for him to choose what to do with them, but they were paid to CLC directly. This was known as a 'restricted-use' credit agreement, which meant certain parts of the CCA apply. The relevant sections read:

28. Section 11: **Restricted-Use Credit and Unrestricted-Use Credit**

(1) A restricted-use credit agreement is a regulated consumer credit agreement -
…
(b) to finance a transaction between the debtor and a person (the "supplier") other than the creditor…

29. Section 12: **Debtor-Creditor-Supplier Agreements**

A debtor-creditor-supplier agreement is a regulated consumer credit agreement being -
…
(b) a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier…

30. Section 19: **Linked Transactions**

(1) A transaction entered into by the debtor or hirer, or a relative of his, with any other person ("the other party"), except one for the provision of security, is a linked transaction in relation to an actual or prospective regulated agreement (the "principal agreement") of which it does not form part if -
…
(b) the principal agreement is a debtor-creditor-supplier agreement and the transaction is financed, or to be financed, by the principal agreement…

31. Section 56: **Antecedent Negotiations**

(1) In this Act "antecedent negotiations" means any negotiations with the debtor or hirer -
…
(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.

…

(4) For the purposes of this Act, antecedent negotiations shall be taken to begin when the negotiator and the debtor or hirer first enter into communication (including communication by advertisement), and to include any representations made by the negotiator to the debtor or hirer and any other dealings between them.

32. Section 75: **Liability of Creditor for Breaches by Supplier**

(1) If the debtor under a debtor-creditor-supplier agreement falling within section 12(b) or (c) has, in relation to a transaction financed by the agreement, any claim against the supplier in respect of a misrepresentation or breach of contract, he shall have a like claim against the creditor, who, with the supplier, shall accordingly be jointly and severally liable to the debtor…

33. Section 140A: **Unfair 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).

(3) For the purposes of this section the court shall (except to the extent that it is not appropriate to do so) treat anything done (or not done) by, or on behalf of, or in relation to, an associate or a former associate of the creditor as if done (or not done) by, or on behalf of, or in relation to, the creditor.

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

34. Section 140B: **Powers 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.

(2) An order under this section may be made in connection with a credit agreement only -

(a) on an application made by the debtor or by a surety…

(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.

(4) An application under subsection (2)(a) may only be made -

(a) in England and Wales, to the county court…

(9) If, in any such proceedings, the debtor or a surety alleges that the relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary.

35. Section 140C: **Interpretation of Sections 140A and 140B**

…

(4) References in sections 140A and 140B to an agreement related to a credit agreement (the 'main agreement') are references to -

(a) a credit agreement consolidated by the main agreement;

(b) a linked transaction in relation to the main agreement or to a credit agreement within paragraph (a)…

36. In addition to the CCA, there are several regulations that I need to consider. Most of these regulations apply primarily to CLC, rather than BPF. In my provisional decision I explained that it is not my role to decide what CLC's liability, if any, would be for any breaches of the regulations set out below. But it is important to consider whether there are likely to have been breaches as, in my view, the regulations set out the reasonable standard of conduct expected of CLC in dealing with Mr and Mrs H. And it is possible that if CLC's conduct fell below the standards expected, that could lead to unfairness as per s.140A CCA. BPF has not disagreed with this approach.

Unfair Terms in Consumer Contracts Regulations 1999

37. The Unfair Terms in Consumer Contracts Regulations 1999 ("UTCCR") covered Mr and Mrs H's agreement with CLC at the time of sale. The relevant regulations read:

38. Regulation 5: **Unfair terms**

(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.

…

(5) *Schedule 2 to these Regulations contains an indicative and non-exhaustive list of the terms which may be regarded as unfair.*

39. Regulation 6: **Assessment of unfair terms**

(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.

40. Regulation 7: **Written contracts**

(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.

41. Regulation 8: **Effect of unfair term**

(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.

42. Schedule 2: **INDICATIVE AND NON-EXHAUSTIVE LIST OF TERMS WHICH MAY BE REGARDED AS UNFAIR**

1. Terms which have the object or effect of -

…

(d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;
(e) requiring any consumer who fails to fulfil his obligation to pay a

disproportionately high sum in compensation;

(f) authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;

…

(l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;

Consumer Protection from Unfair Trading Regulations 2008

43. There are also the Consumer Protection from Unfair Trading Regulations 2008 ("CPR") that again applied to Mr and Mrs H's contract with CLC. The relevant regulations read:

44. Regulation 3: **Prohibition of unfair commercial practices**

(1) Unfair commercial practices are prohibited.

(2) Paragraphs (3) and (4) set out the circumstances when a commercial practice is unfair.

(3) A commercial practice is unfair if—

(a) it contravenes the requirements of professional diligence; and
(b) it materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product.

(4) A commercial practice is unfair if—

(a) it is a misleading action under the provisions of regulation 5;
(b) it is a misleading omission under the provisions of regulation 6;
(c) it is aggressive under the provisions of regulation 7; or
(d) it is listed in Schedule 1.

45. Regulation 7: **Aggressive commercial practices**

(1) A commercial practice is aggressive if, in its factual context, taking account of all of its features and circumstances -

(a) it significantly impairs or is likely significantly to impair the average consumer's freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion or undue influence; and
(b) it thereby causes or is likely to cause him to take a transactional decision he would not have taken otherwise.

(2) In determining whether a commercial practice uses harassment, coercion or undue influence account shall be taken of -

(a) its timing, location, nature or persistence;
(b) the use of threatening or abusive language or behaviour;

(c) *the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgment, of which the trader is aware, to influence the consumer's decision with regard to the product;*
(d) *any onerous or disproportionate non-contractual barrier imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader; and*
(e) *any threat to take any action which cannot legally be taken...*

Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010

46. The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("Timeshare Regulations") came into effect shortly before Mr and Mrs H bought FPOC membership. They cover the sale of holiday accommodation contracts, including timeshares, long-term holiday products and exchange contracts, so apply to Mr and Mrs H's agreement with CLC. The relevant regulations read:

47. Regulation 12: **Key information**

(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…*

48. Regulation 13: **Completing the standard information form**

(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…

49. Regulation 14: **Marketing and sales**

(1) Any advertising related to a regulated contract must indicate how the key information in relation to the contract can be obtained.

(2) A trader must not offer an opportunity to enter into a regulated contract to a consumer at a promotion or sales event unless -

(a) the invitation to the event clearly indicates the commercial purpose and nature of the event, and
(b) the key information in relation to the proposed regulated contract is made available to the consumer for the duration of the event.

(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.

(4) The references to key information in this regulation are references to key information which meets the requirements of regulations 12(4) to (7)…

50. Regulation 15: **Form of contract**

(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.

…
(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.

51. 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 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:
…
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…

Relevant Case Law

52. There are a number of relevant cases that set out how the courts have approached the issues in Mr and Mrs H's complaint, in particular the interpretation of s.140A CCA.

53. Some general principles were set out by Hamblen J in the judgment in the case of *Deutsche Bank (Suisse) SA v. Khan and other* [2013] EWHC 482 ("*DB v. Khan*"). At paragraph 346, the judge set out a summary of how the test of unfairness had been considered in other cases:

> *"These authorities suggest that the matters likely to be of relevance include the following:*
>
> *(1) In relation to the fairness of the terms themselves:*
>
> *a. whether the term is commonplace and/or in the nature of the product in question (Rahman [277]);*
> *b. whether there are sound commercial reasons for the term (Rahman [278]);*
> *c. whether it represents a legitimate and proportionate attempt by the creditor to protect its position (Maple Leaf [288]);*
> *d. to the extent that a term is solely for the benefit of the lender, whether it exists to protect him from a risk which the debtor does not face (Maple Leaf [289]);*
> *e. the scale of the lending and whether it was commercial or quasi-commercial in nature (Rahman [275]) (a court is likely to be slower to find unfairness in high value lending arrangements between commercial parties than in credit agreements affecting consumers); and*
> *f. the strength (or otherwise) of the debtors bargaining position (Rahman [275]);*
> *g. whether the terms have been individually negotiated or are pro forma terms and, if so, whether they have been presented on a "take it or leave it" basis (Rahman [275]);*
>
> *(2) In relation to the creditor's conduct before and at the time of formation:*
>
> *a. whether the creditor applied any pressure on the borrowers to execute*

the agreement (if an agreement has been entered into with a sense of urgency it will be relevant to consider to what extent responsibility for this lay with the debtor, as distinct from the creditor) (Maple Leaf [274]);

b. whether the creditor understood and had reasonable grounds to believe that the borrower had experience of the relevant arrangements and had available to him the advice of solicitors (Maple Leaf [274]);

c. whether the creditor had any reason to think that the debtor had not read or understood the terms (Maple Leaf [274]); and

d. whether the debtor demurred at the time of formation over the terms he now suggests are unfair (this point has particular force if he did complain over other terms) (Maple Leaf [274]; Rahman [276]).

(3) In relation to the creditor's conduct following formation and leading up to enforcement:

a. whether any demand was prompted by an "improper motive" or was the consequence of an "arbitrary decision" (Paragon Mortgages [54(b)]);

b. whether the creditor has shown patience and, before leaping to enforcement, has taken steps in the hope of reaching some form of accommodation (for example by attending meetings, engaging in correspondence and/or inviting proposals) (Rahman [280-281]); and

c. whether the debtor has resisted attempts at accommodation by raising unfounded claims against the creditor (Rahman [280-281]).”

54. The Supreme Court considered s.140A CCA in *Plevin v. Paragon Personal Finance Ltd* [2014] UKSC 61 (“*Plevin*”). This case concerned the sale of a payment protection insurance (“PPI”) policy alongside a loan where a significant part of the PPI policy cost was made up of commission. The issue for the court to decide was to what extend the failure to disclose the level of commission could render the credit agreement unfair. There are a number of important passages in the judgment that I will refer to throughout this decision.

55. The Court of Appeal also considered s.140A CCA in *Scotland and Reast v. British Credit Trust Limited* [2014] EWCA Civ 790 (“*Scotland and Reast*”). This judgment considered, amongst other things, the interaction between s.140A and s.56 CCA.

56. The High Court considered both s.140A CCA and the interaction with the UTCCR in the case of *Link Financial v. Wilson* [2014] EWHC 252 (Ch). This case concerned the operation of a term in a timeshare agreement that the court determined breached the UTCCR. It was held that unfairness of the contractual term gave rise to an unfairness under s.140A CCA.

57. In response to my provisional decision BPF gave me details of four other County Court cases concerning timeshares. BPF said it was only aware of four such cases reaching trial in recent years and these outcomes demonstrate both courts’ approaches to timeshare cases, as well as the need to property test consumers’ evidence through cross-examination. I have considered these cases and, where provided, the relevant judgments.

58. One of these was *Hitachi v. Topping* (20 June 2018, Nottingham County Court, HHJ Owen QC) (*unreported*). BPF has explained that in this case, Mr Topping had initially been represented by the same CMC that initially represented Mr H. Under cross-examination, Mr Topping conceded that the majority of allegations he had made in his signed Deed/Power of Attorney did not relate to his claim and were

inaccurate, that this was prepared by the CMC and he did what the CMC told him to do to get out of the timeshare agreement. After he gave evidence, and following a steer from the trial judge, Mr Topping discontinued his claim. No judgment was given on the merits of this claim and I have not seen a transcript of the cross-examination or what the judge said. But I do have the recollections of MO, who was present in court, in his witness statement. This case was referred to by BPF before I issued my provisional decision and I considered what I had been told about it in that decision.

59. I have been provided with an approved transcript of the judgment in *Brown v. Shawbrook* (18 June 2020, Wrexham County Court, HHJ Howells) (*unreported*). This claim considered a fractional ownership model from a different provider from CLC. BPF has drawn my attention to two particular passages, one where the judge questioned the role that the CMC involved in that case had in persuading the Claimants that something had gone wrong and one passage where the judge held that a technical breach of the Timeshare Regulations may not have given rise to an unfair relationship.

60. BPF has also provided an approved transcript of the judgment in *Wilson v. Clydesdale Financial Services Limited (t/a Barclays Partner Finance)* (19 July 2021, Portsmouth County Court, DDJ Pain) (*unreported*). In this case the judge rejected the Claimant's claim under s.140A CCA, finding that the representations alleged to have been made by the timeshare provider were not made out on the evidence. The judge went on to say that even if the representations had been made and gave rise to an unfair relationship, he would not have exercised his discretion to make an order under s.140B CCA.

61. Finally, BPF provided the approved judgment in *Gallagher v. Diamond Resorts (Europe) Limited* (21 July 2021, The County Court at Lancaster, HHJ Beech) (unreported). This claim was brought by Mr Gallagher to rescind a timeshare agreement due to alleged misrepresentations – the timeshare was not provided by CLC. The judge found that Mr Gallagher's allegations were not proven, so his claim did not succeed. This case did not concern the operation of the CCA.

Other relevant information

62. As set out above, the rules that explain how I must consider complaints say I need to take into account what I consider good industry practice at the relevant time, where that is appropriate. I think the following industry codes are relevant when considering CLC's agreement with Mr and Mrs H. And, if CLC breached these codes, I think this would be relevant when deciding whether the relationship between BPF and Mr H was unfair.

63. In his witness statement, DF pointed to two industry codes that CLC had voluntarily signed up to. The first of those was the Organisation for Timeshare in Europe ("OTE") Code of Ethics from March 2005. DF has explained that this code of ethics prohibited the sale of timeshares as an investment, so that had been standard industry practice from at least 2005.

64. DF has explained that the European Commission adopted OTE's ban on marketing timeshares as investments when it banned that practice in the Timeshare, Long-Term Holiday Product, Resale and Exchange Contracts Directive 2008/122/EC, which was implemented in UK law in the Timeshare Regulations as set out above. So this aspect of the voluntary code from 2005 had legal effect from the implementation of the Timeshare Regulations in February 2011.

65. In 2009, the OTE became the Resort Development Organisation ("RDO"). It describes itself as "*the trade association for vacation ownership across Europe*" and issued its own code of conduct in January 2010 – this was the code in force at the time of Mr and
Mrs H's sale. The relevant sections read: "*PART I: GENERAL*

> *1. OBJECTIVE*
> *…*
> *The Code is designed to complement and reinforce all applicable laws as well as to establish RDO and industry "best practice" standards.*
> *…*
> *PART II: PRINCIPLES*
>
> ***1. Trading Principles***
> *1.1 RDO's Members will ensure that consumers can make informed purchase decisions when contracting with a RDO Member.*
> *1.2 RDO Members in particular will ensure:*
> *1.2.1 Appropriate disclosure of all elements of the product and/or service to the consumer and in a manner the consumer fully understands;*
> *1.2.2 Adequate delivery of the contracted products and/or services to the consumer;*
> *and*
> *1.2.3 Adequate treatment of any complaints by the consumer.*
>
> ***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 threat 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…"*

66. In response to my provisional decision, other than mentioning the four County Court decisions referred to above, BPF did not make any submissions on the legal framework that I need to consider. BPF has set out its position on how that framework should be applied to Mr and Mrs H's complaint, so I will consider those submissions. But I do not think it is in dispute that the framework identified above applies to this complaint.

How the complaint was brought

67. In my provisional decision, before I set out how the legal and regulatory framework applied to the facts of Mr H's complaint, I dealt first with the concerns BPF had about how the complaint was brought to our service.

68. When Mr and Mrs H first raised a complaint with BPF they were represented by a CMC. It was based in Spain and sent a number of documents setting out the complaint. Those included a letter setting out on broad terms the nature of the

complaint, a one page statement signed by Mr and Mrs H giving their version of events and a power of attorney that gave the CMC power to act for them in legal proceedings in Spain.

69. MO, a solicitor who has acted for CLC in the past, explained that a similar claim brought by a consumer was dismissed by a County Court (*Hitachi v. Topping*). In that case the consumer had initially brought a complaint using the same CMC as Mr and Mrs H used. Under cross-examination, the consumer confirmed that the power of attorney had been prepared for him by the CMC, that the details contained in it were inaccurate and did not relate to his claim and he did what the CMC told him to do to get out of the timeshare agreement.

70. BPF said that this CMC's conduct had been so poor that we should treat any allegations it makes on behalf of its clients with significant scepticism. In particular BPF said that Mr and Mrs H's power of attorney closely resembled the one used in the court case that was dismissed. It was also pointed out that the particular CMC was wound up by the High Court following a petition issued by two clients that had successfully brought a claim against the CMC for misrepresentation and breach of contract.

71. BPF also asked me to consider case law that explained how a court should place weight on a witness' recollections and evidence. It pointed to the judgment in *Gestmin SGPC S.A. v. Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm), where it was held (at paragraph 22):

> "*the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts.*"

BPF has noted that this approach has been adopted in non-commercial cases too.

72. I looked at the power of attorney that Mr and Mrs H signed alongside the one from the court case MO referred to. I saw that the documents followed the same format and were similar. I thought that unsurprising as both documents were drafted by the CMC to give them power to conduct litigation on their client's behalf, so I would expect a 'standard template' to be used.

73. Both documents had a section titled "***Statement (Misrepresentation or unfulfilled promises during the sales presentation)***" which contained details of the actual complaint brought. A lot of the wording was similar, but had been altered to reflect the circumstances of each case – for example, both documents say there was a pressured sales meeting, but neither gave any specific examples of the pressure and Mr and
Mrs H's document says the meeting lasted over six hours and the other documents says the meeting lasted over eight hours.

74. Both documents contained the same wording in parts, for example both say:

> "*We were told that our purchase would be an investment but which in reality is a liability*."

75. But both documents also contained specific, and differently worded, allegations, for example only Mr and Mrs H's power of attorney document set out what they say

they were told about holidaying in Jerusalem.

76. In many of the complaints brought to our service, consumers have used the services of professional CMCs. Many of the complaint points raised on behalf of consumers are often set out in standard form documents. I stated in my provisional decision that I did not think this was surprising given that the complaints tend to be about similar problems and I would expect CMCs to express the same concerns in broadly the same terms.

77. I explained that my role is to determine what I think on balance happened, based on the evidence available to me. And I do so in a similar manner to the approach set out in the judgment to which BPF referred me. Here, I looked into the concerns raised by Mr and Mrs H, but their recollections were far from the only evidence I considered. Instead I had to weigh up what they said alongside the evidence available, including all of the documents from the time of sale, to see what I thought was most likely to have happened.

78. So although I considered BPF's concerns over the way the CMC has presented other cases in the past, I thought there was sufficient evidence available for me to properly consider Mr H's complaint in addition to what the CMC said had happened.

79. In response to my provisional decision, BPF raised some further concerns. It said a large number of complaints are driven by CMCs and the County Court cases referred to demonstrate that allegations are found to be groundless when the Claimants are cross-examined on their evidence. In Mr and Mrs H's case, these concerns are greater due to the involvement of their particular CMC following the outcome of *Hitachi v. Topping*. BPF were also concerned that, as I had not accepted all of the allegations Mr and Mrs H raised or all of their recollections, their claim would likely not succeed if it was heard by a court.

80. In light of that, BPF requested that I hold a hearing under DISP 3.5.6 R so that Mr and Mrs H could give oral evidence and for that evidence to be tested. In the alternative, it asked me to dismiss this complaint without considering the merits under DISP 3.3.4A R. It said this as a court would be able to properly test the evidence and if I made a final decision without an oral hearing, I would deprive BPF the opportunity to cross-examining Mr and Mrs H.

81. I responded to BPF to explain that I did not think I needed to hold an oral hearing to fairly determine this complaint. I thought BPF's concerns appeared to be about claims brought by CMCs in general and did not appear to be specific to Mr and Mrs H's actual complaint. I noted that I had the benefits of statements and recollections from Mr and Mrs H as well as from BPF's witnesses alongside a number of documents relevant to the sale. BPF had access to all of this evidence and has provided significant submissions on it.

82. I should also explain that the Financial Ombudsman Service is set up to decide complaints informally and we do not have an adversarial approach, so we do not normally hear oral or sworn evidence from complainants, nor do parties normally cross-examine each other. I am mindful that the findings I reached in my provisional decision are not simply based on Mr and Mrs H's recollections, but I have looked at all of the evidence available, including the documents that relate to the sale, to decide what I think was most likely to have happened. And I have voluminous submissions and witness evidence from BPF to explain those documents and how I should assess them. It follows, I think I am able to fairly

determine this complaint without the need for an oral hearing.

83. I have also considered whether to dismiss this complaint without considering the merits. DISP 3.3.4A R gives me the power to dismiss a complaint for a number of reasons, including if I thought a complaint was more suitable to be decided by a court. BPF has said that only a court has the power to make an order under s.140B CCA, and to try to predict what a court would do deprives BPF the chance to test the evidence. It has said that the Financial Ombudsman Service is an inappropriate jurisdiction for these types of claims and the procedure is manifestly unfair.

84. The Financial Ombudsman Service is asked to consider many complaints that could be dealt with either by our service or by a court. Our service is different to a court, without the same formal rules of evidence and procedure. I am required to determine complaints by reference to what is, in my option, fair and reasonable in all the circumstances of the case (DISP 3.6.1 R). And, as explained above, I must take into account relevant law when considering what is fair and reasonable (DISP 3.6.4 R). In Mr and Mrs H's complaint, that means I must consider the legal framework set out above and in doing so I think it is helpful to determine what I think a court would likely decide if it considered their complaint.

85. Mr and Mrs H have asked this service to determine their complaint and, for the reasons set out in the decision, I think I am able to do so based on the evidence and arguments before me. In the circumstances I do not think it is more suitable for a court to determine this complaint, so I will not dismiss this complaint without considering its merits.

The claim under s.75 CCA

86. As set out above, because of the way FPOC membership was financed, BPF can be held jointly and severally liable under s.75 for a claim for breach of contract or misrepresentation that Mr H may have against the supplier.

87. For any claim for misrepresentation to be successful, Mr H would need to demonstrate that there was a representation of fact made to him by the supplier, that the representation was untrue and that representation induced him to take out FPOC membership. Or for a breach of contract, that the supplier failed to abide by the terms of the agreement.

88. Mr and Mrs H's specific allegations are:

    - They only wished to go on holiday to Jerusalem and CLC said it had apartments available there.
    - They were told that FPOC membership was an investment that could be sold at any time or they could wait for 16 years and it would be sold at a profit.
    - They were told they were buying an interest in property, but they actually only bought a timeshare right.
    - They were told that the maintenance fees would not rise over the term of the agreement.

    I will deal with each in turn.

    Did CLC say it had accommodation in Jerusalem

89. Mr and Mrs H said that they made it clear to CLC that they only wished to go on

holiday to Jerusalem and CLC mislead them when they were told apartments were available there. But when they tried to make a reservation they were told they could get a booking in Tel Aviv, using the third party holiday points exchange company.

90. It was not a term of the contract that CLC would always be able to provide accommodation wherever a customer wished to stay – plainly that would not be possible. But saying that it had access to accommodation at a specific location could amount to a misrepresentation if that was not true.

91. In my provisional decision I said, having seen the documents available at the time of sale, I saw there was some discussion about holidaying in Jerusalem. There is a form filled out titled "*HOLIDAY PLANNER*" that appeared to show examples of the types of holidays Mr and Mrs H could have taken with their FPOC points. For 2012 it showed possible holidays in Florida for two weeks (I said that I understood this was booked under Mr and Mrs H's trial membership) and for two weeks in Jerusalem. For 2013 it showed a possible holiday in Turkey. So I thought holidays in both Jerusalem and at other destinations were discussed at the time of sale. And when I looked at the holidays Mr and Mrs H actually took between 2011 and 2016, they visited Spain, Florida, Tenerife, Turkey, the UK and Mexico.

92. I had also seen an email from Mr H to CLC Central Reservations dated 6 October 2011. In the email he enquired whether CLC would be able to arrange flights for him and his wife to Florida for the following June. The email is jovial in tone and I could not see Mr H had expressed any disappointment at holidaying somewhere other than Jerusalem.

93. Although I had no doubt Mr and Mrs H were interested in taking a holiday in Jerusalem, as it was discussed, I said I would be surprised if they were told by a CLC representative that it had apartments there. I said that as CLC has never had its own properties in Israel and that was easily verifiable. But I thought it was more likely that they were told they could book there using the third party exchange programme. BPF provided screenshots to show that there was accommodation available through the exchange programme, so I did not think BPF mislead them about this.

94. After taking out FPOC membership, it did not appear that Mr and Mrs H actually booked to go to Jerusalem, so it was possible that they tried to book accommodation in Jerusalem, but none was available as they said happened. But CLC would not be responsible if accommodation was not available at the time Mr and Mrs H wished to stay in Jerusalem as it was dependent on other timeshare owners depositing their rights into the exchange scheme. I did not think this could amount to a breach of contract.

95. I also did not think Mr and Mrs H's actions were consistent with them only wanting to stay in Jerusalem. They had already taken out CLC trial membership and upgraded to FPOC membership, both being schemes that were designed to allow people to stay at multiple resorts. And they had booked to go to Florida before they joined the FPOC, so I did not think they only wished to visit Jerusalem. I said this did not fit with what Mr and Mrs H had said, but I thought memories can and do fade with time. So it was possible they were mistaken in their recollections of the conversation that took place around ten years ago.

96. Neither party asked me to reconsider this part of the findings, so for the reasons I have given I do not uphold this part of the complaint.

What was the nature of FPOC membership and were they told it was an investment?

97. Mr and Mrs H have said that they were told FPOC membership was an investment (and it was sold to them as such) and that they were told they could sell it at any time or wait for 16 years, when it would be sold at a profit. They say they were also told that they would be joint owners of a property, but they found out they only had a timeshare right. But BPF do not accept this was the case. Having reviewed everything, in my provisional decision I said I thought Mr and Mrs H were told FPOC membership was an investment and they did buy an interest in real property, so I did not think this was misrepresented to them. However, although it was not a misrepresentation for CLC to sell Mr and Mrs H FPOC membership as an investment, by doing so it may have breached Regulation 14(3) of the Timeshare Regulations, which prohibits the marketing or selling of timeshares as investments.

98. The nature of FPOC membership and how Mr and Mrs H had an interest in a property is set out across a number of different documents.

99. There is a "***FRACTIONAL PROPERTY OWNERS CLUB APPLICATION AND PURCHASE AGREEMENT***" dated 4 October 2011. It is between Mr and Mrs H and CLC Leisure Limited. Under the agreement, it says:

> "*I/We apply to purchase from the Sales Company the exclusive rights of use (Fractional Rights) for the number of Weekly Periods in the Allocated Property and I/we agree to deposit these Fractional Rights in return for a number of Fractional Points to use in the Exchange Facility all as detailed below at the price stated and according to the conditions of this Agreement. I/We agree to be bound by the Rules and Project Regulations.*"

100. It sets out that the Allocated Property is "*MDS 3-C-3 Marina Del Sol*" for 2 weeks from 2012. It says that there were 1,290 points and the total due was £15,899, made up of the £18,899 purchase price and a £3,000 trade in for their trial membership.

101. Attached to the application and Purchase Agreement is the "***FRACTIONAL PURCHASE AGREEMENT TERMS AND CONDITIONS***". They are two pages long and are also dated 4 October 2011. Extracts of them read:

A. *"Purchase agreement: this is a Purchase Agreement as defined in the Rules and in the Project Regulations. The Applicant hereby agrees to be bound by the Rules, and in addition the management agreement (entered into between CLC Resort Developments Limited and CLC Resort Management Limited (Manager) (Management Agreement)), copies of which have been given to the Applicant.*
Except as defined herein and where the contact otherwise requires, the meaning and interpretation of all words and phrases in this Agreement shall be as defined and interpreted in the Rules…

D. *Default: in the event of the Applicant failing to make any payment due within 14 days of being given written notice to that effect by the Sales Company or on its behalf, the Sales Company may, at the Sales Company's option, rescind this Agreement whereupon all monies paid by the Applicant will be forfeited to the Sales Company and the Sales Company shall be under no further liability to*

the Applicant…

E. Fractional Rights deposit: the Applicant agrees to release to and deposit with the Manager until the Sale Date all the Owner's rights to use his Fractional Rights in Weekly Periods in the Allocated Property or other Properties in return for an annual number of Points to be used as a currency to redeem against holidays in the Exchange Facility, or for other Benefits, all as detailed in the Project Regulations. The Applicant confirms that he has all rights, privileges and entitlement in the Fractional Rights, that they are not charged as any form of security and that they have not been deposited anywhere else…

G. Ownership: an Applicants Fractional Rights and Points arising shall continue until the Sale Date when the Allocated Property is sold or when he sells or transfers his Fractional Rights or ceases to be an Owner, whichever happens sooner…

H. Management charge: the Applicant hereby agrees to pay the Management Charge together with any Value Added Tax or other similar tax thereon. The Management Charge for the first year is due and payable on receipt of a statement in respect of that charge by the Applicant. Management Charges are thereafter due on demand in each year in accordance with the Rules. Failure to pay Management Charges when due will lead to suspension of rights and may lead to the sale of the Fractional Rights…

102. There is also a "***MEMBER'S DECLARATION***", also dated 4 October 2011 and signed by Mr and Mrs H. It runs to one page and relevant parts read:

1. "We understand that we will have Membership of Club La Costa Fractional Property Owners Club (Project) for fractional rights (Fractions) as detailed on the Purchase Agreement (Agreement), subject to item 2 below.

2. We understand that our Fractional Rights will be deposited for the duration of the scheme in return for 1290 Points to use in the Club La Costa Vacation Club Exchange Facility as detailed in the Agreement which may be used each year for Vacation Club accommodation provided that all annual fees are paid up to date, as detailed below.

3. We understand that currently the annual Management Charge is £898.00 for 2012 and that an invoice will be sent for this within 3 months of full payment of the Agreement and thereafter by 1st January each year. In addition the Vacation Club transaction fee is 10p per point used up to a maximum of £200, per week. The basis of these dues is set out in the Rules and Project Regulations.

4. We understand that Club La Costa does not and will not run any resale or rental programs and will not repurchase Fractions (or Vacation Club Points) other than as a trade in against future property purchases (see Paragraph 5 below)…

6. We understand that the purchase of our Fraction is for the primary purpose of holidays and is not specifically for direct purposes of a trade in and that CLC makes no representation as to the future price or value of the Fraction…

8. We understand that we have access to RCI for the first year of membership and as referred to in the Agreement and within the Information Statement a fee

will be charged for using the RCI exchange system. Membership after one year will be at the then applicable rates and membership conditions…

12. We understand that this Member's Declaration, together with the Agreement, is the entire written contract between the parties, anything additional shall only be valid if signed and stamped on behalf of the Company…

14. We have received a copy of our Agreement together with the notices and Information Sheet (which we have had adequate time to review before signing) required under the EU Timeshare Directive 2008/122/EC.

15. We have fully read and fully understand all of the above."

There is a signature next to each of the numbered paragraphs.

103. I have read the witness statement of PB, who was the Legal Services Director at the trustee that held legal title to the properties that backed the FPOC. He has explained how the membership worked and the role of the trustee who, amongst other things, was to safeguard the interests of the consumers. In summary, the freehold title to the properties CLC used as allocated properties in the FPOC scheme were transferred to a company controlled by the trustee. Once a customer decided to take out FPOC membership they were matched to an allocated property and that was recorded on the trustee's systems – this was done after a customer indicated they wished to purchase membership, but before they signed the agreement. The trustee's role included being able to step in and run the FPOC if for some reason CLC was unable to do so. But it was also responsible for marketing and selling the properties at the appropriate time. It then distributed the net proceeds of sale to the FPOC members, following the payments of all legal and contractual disbursements.

104. Having read PB's statement alongside the attached deed of trust and other sale documents, I thought Mr and Mrs H had an interest in the net sale proceeds of their allocated property. So they did have an interest over and above a standard timeshare right to use a timeshare company's accommodation for periods of occupation. Mr and Mrs H were concerned that they thought they were buying an interest in property and this was not the case, but I thought they were mistaken in their concerns. Although I said that I had no doubt they did not fully appreciate the exact legal nature under which they held such an interest.

105. In summary, Mr and Mrs H bought an interest in the sale proceeds of a defined property, but they gave up any rights to occupy it in exchange for points. They had an obligation to pay maintenance fees on the upkeep of the property and they would receive a payment when it was eventually sold. I said that on the face of it, that looks like an investment. So I looked at all of the available evidence to see whether I thought CLC described it as such.

106. BPF referred me to the point-of-sale documents that appear to show FPOC membership was not sold as an investment, for example there is a document titled *"CLUB LA COASTA FRACTIONAL PROPERTY OWNERS CLUB INFORMATION SHEET"*. It is twelve pages long and contains some details about Mr and Mrs H's specific purchase, including the price paid, as well as 'standard' information that applies to FPOC purchases more generally. It has been signed by Mr and Mrs H. The following are extracts from the information sheet:

"6. ADDITIONAL INFORMATION

1. Title

The title to an Allocated Property is held by First National Trustee Company ("FNTC"), a professional, independent trustee company…

5. Primary Purpose

The purchase of Fractional Rights is for the primary purchase of holidays and is neither specifically for direct purposes of a trade in nor as an investment in real estate. CLC makes no representation as to the future price or value of the Allocated Property or any Fractional rights…"

107. Taken on its own, the primary purpose paragraph makes it clear that the FPOC is not intended as an investment in real estate. But on the same page it says:

"11. ***Investment advice***

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

So although CLC say the membership is not an investment, it is suggesting its clients take independent legal and investment advice about the product. I thought that suggested it recognised FPOC membership looked like an investment or had features of an investment.

108. Mr and Mrs H said they were told FPOC membership was an investment that they could sell at any time or wait for 16 years when the property was sold and they would make a profit. This does not fit with what was set out in the point of sale documents they signed, so I thought it was important to consider how FPOC membership was presented to Mr and Mrs H before they saw those documents.

109. I saw a series of slides that CLC used to market FPOC membership. PR, CLC's Group Sales Operations Director, has said that he was responsible for overseeing the development of product and sales materials. In response to our investigator's view, he said:

"In the View, [the investigator] cites paragraphs from the slides that he notes may have been used by the sales representative at the sales presentation with Mr and Mrs [H]. All of the information in the slides was accurate."

And in DF's witness statement, he said:

"[The investigator] chooses to rely on the copy of the presentation provided by CLC, which is referred to the 'Slides' and annexed to the View. However, there is nothing in the Slides which could be said to be false or misleading given the purpose and nature of the [FPOC] product."

I took it from this CLC accepted that either these slides were the ones used in Mr

and Mrs H's sale, or they were very similar to the ones used.

110. PR has said he does not think any of the promotional material created an expectation that a customer would get their money back at the time of sale, rather the purpose of membership was for holiday experiences. He thought that only 5-10% of the presentation was focused on the ownership structure and the rest was focused on the holidays customers could take. PR said, "*the return the customers receive at the end of the fixed term when the property is sold is a further benefit of the particular type of timeshare ownership"*, but he said the amount received is likely to be less than the money paid for CLC membership. He also said if a customer wanted to invest in property, CLC had a real estate department that could offer apartments for purchase.

111. Having seen the promotional slides used, I said I disagreed with how PR thinks FPOC was presented. The first slide shows that CLC trial members can upgrade to two other CLC products, "*Destinations Club*" and FPOC. The second slide it titled "*Why Fractional?*" and presents three choices. Choice 1 is "*RENT YOUR HOLIDAYS*" and presents three positives and three negatives. The positives are ""*Choice, Flexibility and Convenient*", the negatives are "*Quality – hit and miss, Dead Money and 100% Loss*". Choice 2 is "*BUY A HOLIDAY HOME*" and the positives are "*Investment, Quality Guarantee, Use/Enjoy/Sell and Money Back*", the negatives are "*Large Capital Outlay, Fixed Location, Not Flexible and May be Unused*". Choice 3 is FPOC and it says, "*Have the BEST OF BOTH WORLD'S*".

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

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

114. In his statement PR said all presentations followed a prescribed series of steps, including using a multimedia presentation to show the basis of FPOC membership and how it works. So in Mr and Mrs H's case, I thought it was likely that the sales presentation followed the lines set out in the slides, in other words the presentation started with the ownership model being explained before discussing how to take holidays. From those slides, I thought buying a fraction of a property and having an interest in a sum of money at the end was central to the way the product was sold. And DF, CLC's Sales Administration Director, said "*it is correct to say that receiving the net proceeds of sale is presented as an important feature of the club. It is plainly one of the distinguishing features of the product.*" I also noted that the word '*investment*' was used in the slides when discussing the positives of owning a holiday home, so I thought that word was used in the presentation Mr and Mrs H would have attended when discussing the positives of FPOC membership.

115. Mr and Mrs H have also provided a two page document they say was from the time of sale and written by a CLC representative. It is on CLC headed paper, but the contents are handwritten. It appeared to me that this was used to compare the difference between the two forms of membership as set out in the slides – "*Destinations Club*" and FPOC. There is a comparison in the cost, the number of weeks holidays available as well as the number of available resorts and duration of the contract. But in the column for "*Destinations Club*" it says "*£0 Return*" and next to it, in the column for FPOC, it says "*£MONEY BACK".*

116. In his witness statement PR says the written note shows the difference between the two products CLC offered. He thought the parts I referred to above were simply that the FPOC product would provide members with the proceeds of sale of the allocated property at the end. And DF thought in his witness statement that the reference to 'money back' meant that at the end of the 16 year period they would receive a share of the sale proceeds, but he noted there was no written suggestion that they would receive a profit.

117. Mr and Mrs H say this document was produced by a CLC representative and BPF has not argued otherwise, so I thought it was likely that was the case. This handwritten document does talk about the holiday based benefits of membership, but as with the slides, I thought the possibility of a financial return was presented as an important selling point of the product.

118. I saw a witness statement from MB who was the CLC Sales Representative who dealt with Mr and Mrs H's sale. She said that she does not remember the sale itself, but describes how she normally sold FPOC membership. I was not surprised that she did not recall Mr and Mrs H's sale as it happened nearly ten years before she was asked to provide a statement and it was likely she dealt with many customers during that time. But she had helpfully set out her normal sales process.

119. MB said that she would not have referred to membership as an investment and she had specific training relating to that. But I could not reconcile what MB said with the content of the slides referred to above, where the word "investment" was used. I also thought about the investment elements of FPOC membership as well as Mr and Mrs H's memories of the sale. On balance, I preferred the evidence of Mr and Mrs H on this point. I thought the sales information shows it is more likely than not that FPOC membership was presented as an investment – in fact I thought MB would have found it hard to present membership in any other way.

120. PR explained that the sales process was such that a Sales Representative (that was MB in Mr and Mrs H's sale) went through the oral sale process and then, if a customer showed an interest, documents would be drawn up. The customer was then taken though the documents separately by a Customer Liaison Officer. In Mr and Mrs H's sale that was NW. NW does not specifically recall Mr and Mrs H's sale, and for the same reasons that MB did not recall the sale, I was not surprised by that.

121. NW has said he would have gone through the documents that Mr and Mrs H needed to read and sign, and he would have explained them all. He says he would have asked questions to find out why Mr and Mrs H were joining the FPOC and if he thought it was for an investment, he would have made it clear that it was not a financial investment and he would not have allowed them to complete the sale. I looked at the documents to see what they say about FPOC membership being an investment.

122. As set out above, I thought the information sheet is ambiguous on the matter. On one hand it states that the primary purpose is for the purchase of holidays and membership is not "*specifically for direct purposes of a trade in nor as an investment in real estate"*. But on the same page CLC feel the need to explicitly state that any information given by its sales staff was done so using their own experience as investors and customers are advised to seek their own investment advice. I failed to see the need to spell this out if FPOC membership was not presented as an investment.

123. In the members declaration set out above it says a similar thing:

> "*6. We understand that the purchase of our Fraction is for the primary purpose of holidays and is not specifically for direct purposes of a trade in and that CLC makes no representation as to the future price or value of the Fraction…*"

This states that the primary purpose was for holidays, but I did not think this was to the exclusion of FPOC membership being an investment or having investment elements.

124. Having looked at the sales documentation, I did not think it was explicit that FPOC membership was not an investment. Instead I thought the documentation was trying to position the main purpose for membership as the taking of holidays and that the product was not primarily an investment. But I did not think the documentation went as far as saying that it has no investment element. And I did not think the documentation could have gone that far as Mr and Mrs H were buying an interest in a property they could not use, but they would get some return on later when the property was sold. I failed to see when making my provisional decision how this element of FPOC membership could be described as anything other than an investment.[3] So although I read what NW had said about the sales process, I did not think it fit with the other available information from the time of sale. I thought part of the membership was presented as an investment in the sales process prior to the documents being drawn up and NW's involvement. So I did not think it was likely that the sale would have been stopped if Mr and Mrs H thought there was an investment element to membership as it had already been presented that way.

125. But I could not see anything in the sales slides or handwritten note to give the impression that FPOC membership would generate a profit. And I thought the written documentation was sufficiently clear to say the CLC do not give any indication of the future value of Mr and Mrs H's interest. So, although I agreed with them that it is most likely that the membership was presented as an investment, I did not think there was sufficient evidence for me to say there was any promise of a profit.

126. Similarly I could not see anything in any of the slides, hand written note or sale documents that suggests Mr and Mrs H would have been able to sell the points back to CLC or 'cash in' their investment early. The slides make clear that the property would be sold after 16 years and that is when Mr and Mrs H would get their share of the proceeds of sale. And point 4 of the members' declaration set out above makes it clear that CLC did not run a resale programme or buy back the FPOC membership.[4] The slides do say, when setting out the positives of holiday home ownership, "*Use/Enjoy/Sell and Money Back*", so I thought it was possible Mr

[3] On reflection, I disagree with my provisional finding on this point and will address it later on in this decision

[4] This is also referred to in the Information Sheet

and Mrs H had an impression that they could sell FPOC membership in the future. I said that would be understandable as they were buying an interest in an allocated property, so they may have assumed FPOC membership had some intrinsic value. But I did not think there was sufficient information for me to conclude that Mr and Mrs H were explicitly told they would be able to sell FPOC membership before the 16 years was up.

127. Having decided that FPOC membership was presented as an investment, I thought about whether that was a misrepresentation – in other words, was it an investment?

128. I thought FPOC membership has many of the characteristics of an investment. Mr and Mrs H bought an interest in an underlying asset, here the allocated property. The nature of that interest was financial: a right to receive an agreed share of its net proceeds of sale. There was a risk associated with it as they would not know what the sale proceeds would be when the property was sold in the future. And they did not have instant access to the money they had put in as they were not able to just take it out when they wanted. So I did not think CLC misrepresented the nature of FPOC membership when it was presented as an investment.

BPF's response to my provisional findings

129. In my provisional decision I explained how it appeared to me that membership was presented, taking into account Mr and Mrs H's recollections, the witness statements provided by PR, DF, MB and NW, the slides used by CLC at or around the time of sale, the note written on CLC headed paper, as well as the other documentation available relating to the sale. In response BPF provided two further witness statements, as well as setting out its arguments why it disagreed with my findings. So I need to consider whether the new information provided changes my thoughts on this issue.

130. EM has said that Mr and Mrs H did not refer to the slides when bringing their complaint and I have made an error in placing significant reliance on those slides. EM has said that the slides are only a part of the presentation which would have been used.

131. JL has provided a witness statement giving more information about how the slides were presented to customers. He is currently a project manager for CLC, but he joined CLC around three months before Mr and Mrs H made their purchase and at the time was a sales representative. He has clarified that the slides I referred to were print outs of slides contained within a manual produced for the training of sales managers. The slides were part of what was displayed in an '*Electronic Sales Aid*' ("ESA") and were presented to all customers, including Mr and Mrs H. JL has explained that the slides do not contain the entirety of the sales presentation, for example at stages throughout the presentation a sales manager would join in the presentation and answer questions from consumer and ensure the presentation was proceedings as intended.

132. It is JL's view (as it is PR's too) that only 5-10% of the sales presentation focused on the ownership structure. JL has explained that topics were discussed within the ESA presentation that were not necessarily covered in the slides that I had seen. For example, JL explained that at the start of the presentation a video was shown and information was given about CLC's various divisions, including CLC Estates that offered freehold investments. If a customer expressed an interest

in investing in a property, a real estate consultant would have discussed that with them. I note that JL has said a customer would have been asked if they wanted to buy a property "*which would provide them with an investment and rental income*", which is different to FPOC membership which was not set up to provide a rental income. So I think the types of investments sold by CLC Estates were of a different nature to the sale I am considering.

133. JL has explained that at various points in the ESA presentation the sales representative would break off and discuss matters outside of the slides. For example, at one stage in the presentation, 20 to 30 minutes would be spent going through the locations CLC offered as holiday destinations and how customers could use their FPOC points to stay there – this information was not contained in the slides.

134. I accept what JL has said about the length of the presentation and that the slides I have seen did not cover the entirety of what was discussed. But that does not change what I had previously said about the slides. I thought there was a fairly even split *at the start* of the slide presentation between presenting FPOC membership as a way of buying an interest in a property and a way of taking holidays. But I do accept that other matters were discussed after this, including the variety of holidays available and parts of the role of the scheme trustee.

135. But the question I have to consider is whether CLC presented FPOC membership to Mr and Mrs H as an investment. And I have not seen anything to change my findings from my provisional decision. PR said in his statement "*the return the customers receive at the end of the fixed term when the property is sold is a further benefit of the particular type of timeshare ownership"*, and I think it was the way in which this benefit was presented that meant FPOC membership as a whole was presented as an investment. DF said in his statement, "*it is correct to say that receiving the net proceeds of sale is presented as an important feature of the club. It is plainly one of the distinguishing features of the product"*. The highlighting of the net proceeds of sale as a feature of FPOC membership, along with the use of the word "*investment*" in the way set out above and the contents of the handwritten note, persuaded me that it is more likely than not that FPOC membership was presented as an investment.

136. I have also considered what EM has said about Mr and Mrs H not referring to the slides in their complaint. But I have seen from the witness statements of PR and JL that it is not in dispute that they would have been shown these slides, so it is appropriate to look at the contents of the slides when considering what Mr and Mrs H say they were told – that FPOC membership was presented as an investment – even if they did not specify the precise medium in which that representation was communicated.

137. In conclusion, I find that Mr and Mrs H were told that FPOC membership was an investment, but I do not find they were told it could be sold at any time or after 16 years for a profit. I also find they were told they were buying an interest in property. For the reasons set out above, I do not find those statements were untrue.

Were Mr and Mrs H told the management fees would not rise over the term of the agreement?

138. Mr and Mrs H's recollections are that they were told the maintenance fees would not rise over the 16 years they were due to have FPOC membership. As with the evidence of what they were told about membership being an investment, I have looked at the information available at the time to see what I think they were told.

139. On the slides referred to above there are some details of the management fees that were charged. On one slide it says, "*Management fees from £399 to £749 per week share owned*". This slide does not state that the costs could go up from this and appears to be a fixed price. And on the "HOLIDAY PLANNER" form the CLC costs are at £898 for both 2012 and 2013. Finally, on the hand written note it just says "*£898 maintenance*".

140. The contractual documents have some information on the maintenance fees, but I said in my provisional decision that I did not think they were as clear as they could have been. The purchase agreement states, at paragraph H:

> "*Management charge: the Applicant hereby agrees to pay the Management Charge together with any Value Added Tax or other similar tax thereon. The Management Charge for the first year is due and payable on receipt of a statement in respect of that charge by the Applicant. Management Charges are thereafter due on demand in each year in accordance with the Rules. Failure to pay Management Charges when due will lead to suspension of rights and may lead to the sale of the Fractional Rights…*

But this does not make clear what the charge would be or how it was worked out. Similarly, the member's declaration only sets out the charge for 2012 and does not say it could increase the following year. But in the Information Sheet it says:

> "**4. *INFORMATION ON THE COSTS***
> ***Management and fees***
>
> *The Manager…entered into an agreement with the Vendor (Management Agreement) to manage and administer the Project, the Property and generally the arrangements and relationship with the Fractional Rights as set out in the Management Agreement.*
>
> *The Manager is responsible for providing management, repair and maintenance of the Property. Owners will be required to contribute to those charges by means of an annual charge called a "Management Charge" (Charges), payable whether weeks are used or not. These Charges will be allocated among Owners in a particular Allocated Property in a fair and equitable manner, decided by the Manager, and in proportion to the number of weekly periods an Owner is entitled to use each year according to his Fractional Rights Certificate (the Charges will also include an element for managing and administering the Trustee).*
>
> *In addition as with any apartment or community there are provisions for a sinking fund to be established for major refurbishments of the Allocated Property during the term of the Project. In exceptional circumstances special charges may be needed as with any property.*

Full details are contained in the Rules and Management Agreement. Charges will be budgeted annually and will be subject to increase or decrease as determined by the costs of managing the Project and are payable annually in advance each year. Non- payment will result in suspension and may eventually lead to the permanent loss of the Fractional Rights.

…Other than the expenses, fees , Charges and the costs set out in the Agreement there are no other costs involved in the purchase other than those taxes imposed by law…"

141. That information was on page seven of twelve, so it is possible Mr and Mrs H did not fully understand that the fees could increase, but I thought that information was contained in the documentary evidence they had at the time of sale. I also noted they signed the document to say they had received this information.

142. Based on the information available I thought it was possible they were told that the maintenance fees were £898 and it was not made clear they could increase over time. But I did not think it was likely they were told the fees would not increase at all. I said that because the fees were set up in such a way that they were likely to increase and I thought the documents Mr and Mrs H signed say that the fees could increase. So although I thought this could have been made clearer to them, I could not say they were actually given false information that the fees would remain static. It follows I did not think there was a misrepresentation about this made to them. Neither Mr and Mrs H nor BPF asked me to reconsider these findings.

Conclusion

143. My provisional conclusion on the s.75 CCA claim was that there was insufficient evidence that CLC misrepresented the agreement to Mr and Mrs H, nor had they pointed to any terms of the agreement that they say had been broken.

144. Having considered the further evidence and arguments supplied by BPF, for the reasons set out above, I still think BPF acted fairly in turning down the claim under s.75 CCA.

The claim under s.140A CCA

145. BPF has argued that this service has no jurisdiction to make a finding of unfairness under s.140A CCA as only a court can do so. It is correct that it is for a court to exercise the discretion under s.140A and 140B CCA, but it is relevant law that I must consider when coming to my decision about what is fair and reasonable in all the circumstances of this complaint. It follows I need to consider whether I think it is likely a court would find the relationship between Mr H and BPF unfair and, if it did, what the possible legal remedies would be.

146. It is not in dispute that the BPF loan was a regulated restricted-use credit agreement that gave rise to a debtor-creditor-supplier agreement under s.11 and 12 CCA. I explained in my provisional decision that means there are further consequences for Mr H's complaint. It means the Purchase Agreement was a linked transaction under s.19 CCA, and therefore a "related agreement" under s.140C(4)(b). And it means that things said or done by the supplier in relation to selling FPOC membership form antecedent negotiations for the purposes of s.56 CCA, which mean they are deemed to have been conducted by the supplier in the capacity of BPF's agent. BPF did not question my findings on this part of the legal

framework.

147. This was considered by the Supreme Court in the *Plevin* case. In his judgement, Lord Sumption held, at paragraphs 29-31:

> *"29…Section 140A was undoubtedly intended to introduce a broad definition of unfairness, in place of the narrowly framed provisions which had previously governed extortionate credit bargains. That much is clear from section 140A(1)(c), whose effect is to extend the concept of unfairness beyond cases where the terms or the way that the creditor applied them makes the relationship unfair. 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". Putting the matter at its very lowest, those words envisage a relationship between the creditor and the person whose acts or omissions have made the relationship unfair. If it had been intended to extend the sub-paragraph to any conduct beneficial to the creditor or contributing to bringing about the transaction, irrespective of that person's relationship with the creditor, it would have been easy enough to say so, and very strange to use the language which the legislator actually employed.*
>
> *30. In their ordinary and natural meaning the words "on behalf of" import agency, which is how the courts have ordinarily construed them...I would accept that a special statutory or contractual context may require the phrase "on behalf of" to be read more widely as meaning "in the place of", or "for the benefit of" or "in the interests of"…But there is nothing in the present statutory context to suggest any of these wider meanings, and much that is inconsistent with them. In the first place, the full phrase is "by or on behalf of the creditor". In other words, acts or omissions "on behalf of" the creditor are treated as equivalent to acts or omissions "by" the creditor. They refer to things done or not done either by the creditor itself, or by someone else whose acts or omissions engaged the creditor's responsibility as if the creditor had done or not done it itself. They indicate as clearly as language can do that sub-paragraph (c) applies only where the "thing" is done or not done by someone whose acts or omissions engage the responsibility of the creditor. They are used in the same sense throughout the Consumer Credit Act whenever it refers to some act such as the execution of a document or the receipt of a notice or the occurrence of any other act which the legislator intends to engage the responsibility of the creditor.*
>
> *31. Secondly, the Consumer Credit Act makes extensive use of the technique of imputing responsibility to the creditor for the acts or omissions of other parties who are not (or not necessarily) the creditor's agents. But when it does this it invariably does it in express and clear terms. A notable example appears in section 140A itself. Subsection (3) is ancillary to subsection (1)(c). It provides that things done or not done by an associate or former associate of the creditor are to be treated as if they were done or not done "by, or on behalf of, or in relation to, the creditor". An "associate" includes certain categories of relative or, in relation to a body corporate, its controller or another body corporate under common control: see section 184. This provision is pointless except on the footing that otherwise subsection (1)(c) would have been confined to the acts of the creditor or his agents. More generally, section 56 provides that where antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to*

be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor's agent: see sections 57, 67, 69, 73 and 102. Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. Section 75 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. These provisions are there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents. None of them is applicable to the present case. Sections 56 and 75 apply only to debtor-creditor-supplier agreements, and not to agreements for unrestricted use credit like the one that Mrs Plevin entered into. Nor has any remotely comparable legislative technique been adopted in section 140A, except for the acts or omissions of "associates" or agents of associates, a category which does not include LLP."

148. This was also considered by the Court of Appeal in the *Scotland and Reast* case. Lord Justice Kitchin held, at paragraph 74:

"I accept that there is no reference in s.140A to s.56(2). On the other hand, 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. In expressing this view I recognise that s.140A(3) makes specific provision in respect of the activities of associates or former associates of the creditor but, as Mr Butters submitted, s.140A(1)(c) shows that this is clearly not exhaustive of the circumstances in which responsibility may be attributed to a creditor for the conduct of others."

149. In summary s.140A contains "*a broad definition of unfairness*", and it extended the concept of unfairness from how the creditor applies its own terms to "*any case whatever in which human action (or inaction) produces unfairness.*" So far as pre-contractual dealings are concerned the action or inaction must be by or on behalf of the creditor and, in Mr H's complaint, the operation of s.56 CCA means CLC are deemed to be acting as BPF's agents during the antecedent negotiations. The judgment in the *Scotland and Reast* case makes plain that acts or omissions of CLC done on behalf of BPF under s.56 CCA should be taken into account when considering s.140A CCA.

150. When considering how the acts or omissions of CLC could render the agreement with BPF unfair, the case of *Link Financial v. Wilson* is of assistance. There the court considered a claim brought by a consumer who had purchased a timeshare (provided by CLC, but not FPOC membership) using a loan. Under the terms of the timeshare agreement, the provider was entitled to rescind the contract and keep all monies paid by the consumer, if the consumer failed to pay any management charges within 14 days of the sums falling due. It was found that happened, and the consumer claimed that there was an unfair credit relationship

between herself and Link Financial because of the effect of the clause.[5] David Railton QC, sitting as a Deputy High Court Judge, held that the term that allowed CLC to rescind the agreement on the non-payment of maintenance fees was unfair for the purposes of the UTCCR. He held:

> *"70. In these circumstances it is necessary for me to make a fresh determination under s.140A of the Act. In my view the relationship between GE (and hence Link) as creditor, and Mrs North Wilson as debtor, arising out of the credit agreement, taken with the Acquisition Agreement (as a related agreement), is unfair to Mrs North Wilson. In view of the discussion set out above, I can express my reasons comparatively shortly.*
>
> *71. In my view the unfairness created by the operation of clause D[6] is such that it gives rise to an unfair relationship. This is not offset, either individually or cumulatively, by the matters which have been relied on by Link, including the facts (as found by the Judge) concerning the circumstances in which the arrangements were entered into, or the fact that there has been no breach of the Timeshare Act, 1992…"*

151. Having considered the legislation and the case law, I thought it was appropriate to consider the conduct of CLC to see whether they were likely to have breached any of the regulations I set out above or otherwise behaved unacceptably. In doing so I looked at the terms of FPOC membership to see whether any of the terms could be considered unfair or in breach of any of the regulations. I also considered how FPOC membership was sold to Mr and Mrs H, in particular whether CLC did what it was supposed to under the regulations and industry standards set out above. I explained that if I found there were likely to have been breaches or other unacceptable conduct, I would consider whether those could render the relationship with BPF unfair.

The terms of FPOC membership

152. Mr and Mrs H raised a concern about the increases in their annual maintenance fees. I considered these concerns, but as detailed above, I did not think they were falsely told that the annual costs would not rise over time. But I set out in my provisional decision some of the concerns I had about the way CLC set up the fee structure, such that I did not think Mr and Mrs H would have been aware of by how much the costs could have risen.

153. The documents that Mr and Mrs H signed set out some information about the ongoing charges that were due. In particular, as set out above, there is paragraph H of the Purchase Agreement, paragraph 3 of the Member's Declaration and Part 3, section 4 of the Information Sheet.

154. I thought these three documents show that there was a management charge to be paid, the cost of that charge in 2011 when Mr and Mrs H entered into the agreement and that there could also be a sinking fund or special charges to be paid on top of the management charge. But I said these documents do not set out how those charges were to be calculated or full details of them. Instead Mr and Mrs H were directed to other documents.

---

[5] In his witness statement EM states this was factually incorrect, and Mrs Wilson's membership had been suspended and not terminated. He says this information was not put before the court at trial.
[6] The clause that entitled CLC to rescind the contract on the non-payment of maintenance fees.

155. The charges that Mr and Mrs H were liable to pay were set out across several documents, which Mr and Mrs H agreed to be bound by as a term of the Purchase Agreement. I was provided with a document titled "*RULES-DEED OF TRUST-MANAGEMENT AGREEMENT PROJECT REGULATIONS"* that runs to 40 pages. On page 6 of that document, in a section titled RULES, it reads:

> *"**4. OWNER RESPONSIBILITIES***
>
> *Each Owner hereby undertakes with each other, and as a separate obligation, with the Vendor and the Manager as set out below. Unless specified to the contrary, the following provisions relating to any accommodation occupied by the Owner or his guests in exercising Fractional Rights and the Exchange Facility ("Accommodation") apply equally to the Allocated Property.*
> *…*
> 4.4 *To pay within 30 days of the date of the demand by the Manager, the Owner's share of the Management Charges as stated in the budget for the forthcoming year, including any shortfall in respect of the accounts of Management Charges relating to the expenses of the Property and the Vendor for the previous year and including any contribution towards any sinking fund which is established, or any special charge which is requested by the Manager in exceptional circumstances, and further to pay any shortfall in the Owner's individual account relating to amounts payable by the Owner for specific services provided to him by the Manager and/or the Vendor. Any contribution to the sinking fund shall not be refundable to an Owner upon ceasing to own the Fractional Rights. Further, the Owner will pay for the Management Charges due on any Weekly Periods he is permitted to use before the actual First Year of Occupation…"*

Here, the "Vendor" and the "Manager" refer to two separate companies, both of which are part of the CLC group of companies.

156. And on page 8 it said:

> **"*5. MANAGEMENT CHARGE***
> *…*
> *5.3 In addition to the Management Charge, each Owner shall pay to the Manager such special management charge and additional charges (including, without prejudice to the generality, contributions towards any sinking fund established by the Vendor and/or the Manager in respect of any capital expenditure on a Property, default charges for non or late payment of the Management Charge and any shortfall in respect of such Management Charges for the previous year) as may be levied on him by the Manager pursuant to and in accordance with the Management Agreement.*
> *…*
> *5.5 Failure to pay:*
>
> *5.5.1 In particular, if an Owner has not paid his annual Management Charges (including any special or additional charges) within 30 days of the date of despatch of invoice, the Owner's Fractional Rights (including any rights to use the Exchange Facility) shall be suspended until such default is remedied. The Manager may charge interest on the amount outstanding at the rate of 2 per cent per month above Bank of England base rate, or such other reasonable amount as the Manager shall determine. During such period of suspension the Manager may use or rent out the Fractional Rights for such time and on such terms in its absolute discretion to recover all or part of the monies due. If such default is not remedied*

within 30 days, the Manager shall send a final invoice to the Owner advising that failure to discharge in full the arrears (including any arrears and interest that have arisen since the date of invoice) within 30 days will result in permanent cancellation of the Owner's Fractional Rights and no further correspondence shall be entered into. If the arrears as specified are not discharged within that period of notice, the Owner's Fractional Rights shall be cancelled and shall revert to the Manager who shall give the Vendor first option to make good the arrears and on the exercising thereof those Fractional Rights shall be transferred to the Vendor.

5.5.2 In addition to any remedies in the previous sub-clause, in the event that any Owner has failed to pay any amount due in respect of the Management Charges or additional charges within 30 days of demand, the Manager shall be entitled to require the Owner to provide payment in advance in respect of future Management Charges as deemed by the Manager as appropriate in its reasonable discretion, before reinstatement of the relevant Owner's Fractional Rights.

…

5.7 If Management Charges (other than any special or additional management charges as described in Rule 5.3) are increased by more than inflation (as set out in clause 4.5 in the Management Agreement) and the Owner considers any increase to be unjustified he must notify the Manager in writing within 30 days of the date of invoicing. If the number of Owners giving such notification exceeds 15% of all Fractional Rights Certificates, the Manager shall either (a) refer their calculation of the Management Charge to an independent firm of auditors nominated by the Trustee, whose decision as to whether the proposed Membership Fee has been calculated in accordance with these Rules shall be final or (b) the Manager may accept the Management Charge increased only in accordance with the rate of inflation and accordingly reducing services provided to the Owners.

5.8 Notwithstanding the above, the proposed Management Charge shall still be payable in its entirety in accordance with the Management Agreement and any excess collected shall be credited against the Owner's Management Charge for the following year…"

157. Under rule 5.3 set out in the Rules, it appeared that there were a number of different possible charges Mr and Mrs H could be liable to pay. They were:

- the management charge;
- the special management charge;
- additional charges including -
  - contributions to the sinking fund;
  - default charges, and;
  - any shortfall in Management Charges from previous years.

158. To understand what each of these five different charges covered and how much they could be (or how the cost could be calculated), I had to read a number of different documents. In my provisional decision I dealt with each charge in turn, considering in particular whether the terms were sufficiently transparent to comply with Regulation 7 of the UTCCR, which requires terms to be in plain, intelligible language.

159. In approaching that question I had to bear in mind that the Court of Justice of the European Union ("CJEU") has explained the requirement of transparency found in Regulation 7 consistently with its consumer protection purpose.

160. As regards the importance of the requirement that terms be in plain intelligible language (which is to be judged from the perspective of the 'average consumer' who is reasonably well-informed and reasonably observant and circumspect) the CJEU has said:

> *"Information, before concluding a contract, on the terms of the contract and the consequences of concluding it is of fundamental importance for a consumer. It is on the basis of that information in particular that he decides whether he wishes to be bound by the terms previously drawn up by the seller or supplier."* (*Case C-92/11,* at paragraph 44).
>
> And also:
>
> *"The requirement of transparency of contractual terms laid down by Directive 93/13 cannot therefore be reduced merely to their being formally and grammatically intelligible."* (*Case C-26,* at paragraph 71).

161. CJEU case law has also emphasised the importance of the transparency of a term as part of an assessment of whether a term is fair or not. This requires the term to set out clearly and intelligibly how it operates, so that the consumer can foresee how it will work in practice. For example, on terms that allow the seller or supplier to change its charges under the contract, the CJEU has said:

> *"Consequently, in the assessment of the 'unfair' nature of a term, within the meaning of Article 3 of the Directive, the possibility for the consumer to foresee, on the basis of clear, intelligible criteria, the amendments, by a seller or supplier, of the [contract] with regard to the fees connected to the service to be provided is of fundamental importance."* (*C-472/10*, at paragraph 28)

And similarly:

> *"As regards the assessment of a term that allows the supplier to alter unilaterally the charges for the service to be supplied, the Court has previously stated that … it is of fundamental importance for that purpose, first, whether the contract sets out in transparent fashion the reason for and method of the variation of the charges for the service to be provided, so that the consumer can foresee, on the basis of clear, intelligible criteria, the alterations that may be made to those charges and, secondly, whether consumers have the right to terminate the contract if the charges are in fact altered."* (*C-92/11,* at paragraph 49)

(1) the management charge

162. The first of the five types of charge which Mr and Mrs H could be required to pay was the "management charge". In order to understand the contractual terms allowing the Manager to impose and increase the management charge, it is necessary to understand the meanings of some of the contracts' defined terms. In the FPOC Rules, there were a number of such defined terms, including:

> *"**Allocated Property***
>
> *means the individual Property which is allocated to an Owner pursuant to each Fractional Rights Certificate.*
>
> ***Management Charge***

means the annual charge payable by Owners in respect of the management and maintenance of the Property and administration of the Project, in accordance with Rules 4 and 5.

Project

means this shared ownership club constituted and governed by the Project Documentation relating to the Properties and Resorts.

Property

means the completed and furnished accommodation units at the Resorts where such units have been selected by the Vendor as Allocated Properties and are vested in the Trustee (or its wholly owned subsidiary) and are held in trust for the Vendor and the Owners, as the case may be. Any provisions relating to the term Property shall apply equally to the Allocated Property.

Resort

Means those resort operations which have been selected by the Vendor to participate in the Project and from which units become Allocated Properties to be vested in the Trustee."

163. It appeared to me from the above definitions that the management charge was designed to cover the management and maintenance of all of the allocated properties that formed part of the FPOC scheme, as well as the costs of running that scheme. So this charge covered all of the allocated properties, not just the property in which Mr and Mrs H had an interest.

164. Also in the "*RULES-DEED OF TRUST-MANAGEMENT AGREEMENT PROJECT REGULATIONS"* document was the Management Agreement and it said, at page 28:

"*4.1 Before the 31st October each year, the Manager shall supply to the Vendor a budget for the forthcoming year (and whilst not all of the Fractional Rights have been acquired, together with proposals for contributions, if any, to the Sinking Fund) including any adjustments to the Management Charges on a particular Allocated Property to reflect the direct costs of that Property and the accounts of the previous year relating to the expenses of the Property and the Vendor set out in clause 2 (above) which are not debited to the Owners' individual accounts under clause 3 (above) and the Manager's remuneration provided for by clause 6 (below).*"

165. I thought this implies that the management charge can be adjusted for owners of rights in an allocated property to reflect the direct costs associated with that specific property. It appeared this would be in addition to the charge also covering the cost of maintaining the entirety of the allocated properties and running the scheme.

166. The Information Sheet that Mr and Mrs H signed at the time of sale says that the "*management charge*" would be "*allocated among Owners in a particular Allocated Property in a fair and equitable manner*". I did not think this made it clear to Mr and Mrs H that they would be expected to contribute to the upkeep of allocated properties other than their own in addition to having the fee adjusted to

take into account direct costs related only to their allocated property. Or that the cost would be based on a budget prepared by the Manager without any say from FPOC members about the need for specific works to allocated properties.

167. I thought that none of the available documents, either individually or read together, explained how the management charge was to be divided between FPOC members. Plainly this could be important, for example, if one allocated property needed significant work, it is a reasonable question to ask whether the work was to be paid for by the membership as a whole or only the members who had been allocated an interest in that property. This could be particularly unfair as it appeared that CLC clients did not actually choose which property they were allocated nor did they stay in them, rather the properties were allocated at the point of sale based on which were available at the time. So I thought there was a tension between a member paying for possible significant work to properties that were not 'their own', but also having a significant charge to pay for work on 'their property' that in effect they had not specifically chosen to purchase, but in which they had an interest.

168. For Mr and Mrs H to have understood these issues, in addition to the documents they signed at the time of sale, they would have needed to read the 40 page "*RULES- DEED OF TRUST-MANAGEMENT AGREEMENT PROJECT REGULATIONS"* document, cross referencing sections and defined terms across a number of documents. Regulation 7 of the UTCCR requires written terms of contracts to be expressed in "*plain, intelligible language*" and I did not think that was the case here. I thought it more likely that not that a court would conclude CLC breached the requirements of Regulation 7 of the UTCCR.

169. Having identified what the management charge was said to cover, I also needed to consider how the cost could rise or fall. Some information is supplied in the Management Agreement at clause 4.5. It was fixed for the first two years at the amount set at the time of purchase (in Mr and Mrs H's case that was £898). But after then it was the initial fixed sum, plus:

> *(b) "an increment of such percentage of the Management Charge as is equal to the percentage increase in the figure at which the Spanish consumer prices index (or its nearest equivalent) is published at each last anniversary of the date of commencement of the Management Period over the Index figure of such Index at the 1 August 2011. No fall in the figure at which the said Index stands shall cause a variation to be made in the Management Charge or in the amount of any increment previously so determined. In the event of any change in the reference base used to compile the said Index, the figure taken to be shown in the said Index after such change shall be the figure which would have been shown in the said Index if the reference base current at 1 August 2011 had been retained PROVIDED THAT in the event of it becoming impossible by reason of any change after the date hereof in the method used to compile the said Index, or for any other reason whatsoever, to calculate the said additional sum payable in any year by reference to the said Index, or if any dispute or any difference whatsoever shall arise with respect to the amount of such additional sum, or with respect to the construction or effect of this Clause, the determination of the additional sum or other matter in difference shall be determined by an expert appointed in pursuance of the terms of this Agreement and he shall have full power to determine on such date, as he shall deem appropriate, what would have been the increase in the said Index had it continued on the same basis and given the information assumed to be available for the*

operation of this Clause.

(c) in exceptional circumstances the increase may be greater than described in clause 4.5 (b) above where any Sinking Fund already set aside is insufficient or there has been an extraordinary increase in costs directly related to the Project/Resort that could not have been contemplated at the date of entering into this Management Agreement."

170. From the above, it can be seen that any increase in the Spanish consumer prices index is to be passed on to FPOC members, but not any decrease. And it appeared that increases are cumulative and compounded, so a charge increase from one year will set the base level from which any increase is to be calculated in the following year. Also the management charge can be increased, irrespective of inflation, to cover "exceptional circumstances".

171. If the management charge was increased by more than Spanish inflation, it was possible for FPOC members to challenge that, but only in specific circumstances as set out in the FPOC Rules at Rule 5.7:

"*If Management Charges (other than any special or additional management charges as described in Rule 5.3) are increased by more than inflation (as set out in clause 4.5 in the Management Agreement) and the Owner considers any increase to be unjustified he must notify the Manager in writing within 30 days of the date of invoicing. If the number of Owners giving such notification exceeds 15% of all Fractional Rights Certificates, the Manager shall either (a) refer their calculation of the Management Charge to an independent firm of auditors nominated by the Trustee, whose decision as to whether the proposed Membership Fee has been calculated in accordance with these Rules shall be final or (b) the Manager may accept the Management Charge increased only in accordance with the rate of inflation and accordingly reducing services provided to the Owners.*"

172. This could have some effect, but only if 15% of all FPOC members contacted CLC within 30 days of receiving their invoice, so Mr and Mrs H would have no power to question the charge on their own. And if any increase were to affect only one allocated property, it would still need 15% of all FPOC members to object, which may not be likely if the increase was not passed on more widely. This way of challenging the management charge was only applicable to that part of the overall management charges. So FPOC members could not use this provision to challenge any of the other charges that could be levied (that is the special management charges, sinking fund contributions, or charges in respect of management charge shortfalls) despite the potential uncapped increases that those charges could attract.

173. As set out above when I dealt with the claim under s.75 CCA, I thought the explanatory documents Mr and Mrs H signed at the time of sale were sufficient to show there may be an increase in the annual fees they would have to pay. But I did not think it was made clear to them what the increases could amount to or how they could go about challenging them. Again, the information they needed to know was set out over several other documents and was not made clear to them at the time they took out FPOC membership. I thought it was likely CLC breached Regulation 7 of the UTCCR in not setting out in plain, intelligible language how the management charge was to be calculated, increased, and apportioned between FPOC members and how they could challenge any increase.

(2) the special management charge

174. The second type of charge Mr and Mrs H could be made to pay was the "special management charge" or "special charge". This is referred to in parts 4 and 5 of the FPOC Rules, but I could not see that it was defined in those rules or any of the other documentation that I had seen. Part 2 of the Management Agreement reads:

> "***THE SERVICES***
>
> *The manager undertakes to provide or procure the following services:*
> *…*
> *2.14 the calculating and giving notice as necessary to each Owner of their share of expenses to be paid, including any special charge which may be necessary in exceptional circumstances, requesting them to pay such sum to the Manager…*"

From this and Rule 4.4 it appeared that the special management charge is something that can be invoiced as needed in "*exceptional circumstances*". "Exceptional circumstances" is not a defined term in any of the contractual documentation, so I looked at everything to see when I thought this charge could be levied.

175. Rule 5.3 set out that the special management charge was in addition to the management charge, which indicates it is something that covers something outside of the normal day to day budgeted expenditure. But clause 4.5(c) of the Management Agreement set out above indicates that the management charge itself could be increased in exceptional circumstances to cover "*an extraordinary increase in costs directly related to the Project/Resort that could not have been contemplated at the date of entering into this Management Agreement*". It also appears once an increase in costs had been added to the annual management charge, there was no provision to automatically remove that element of the management charge in the following years, so it may also have been rolled over from year to year and subject to any increases in the Spanish consumer prices index.

176. From these two provisions, it appeared to me that there are two types of 'special management charge' – one that gave rise to a charge over and above the management charge and one that was added to and included in the management charge. I thought that none of the documentation made clear how these work in practice and the charges appear to be largely at the discretion of the Manager and not capped in any way. I did not think the terms in the contract that dealt with special management charges were in plain, intelligible language, therefore I thought there was likely to have been a breach of Regulation 7 of the UTCCR.

(3) contributions to the sinking fund

177. The third type of charge for which Mr and Mrs H were potentially liable under Rule
5.3 were contributions towards a "sinking fund". FPOC members had to pay into a sinking fund if established by the Manager. More information about the sinking fund is set out in the Management Agreement, in particular under part 2:

> "*The manager undertakes to provide or procure the following services:*
> *…*

2.12 the establishment and maintenance of a Sinking Fund sufficient for the replacement of furniture, equipment, refurbishment, interior re-paintings at intervals to be decided by the Vendor in consultation with the Manager, and the external painting of the Allocated Property, having regard to the need to maintain the Property and its contents in good condition and repair at all times…"

178. I thought the wording of clause 2.14 of the Management Agreement meant that the sinking fund is linked to specific allocated properties, so FPOC members' payments would be held in a sinking fund earmarked to be used in the property allocated to them.

179. Part 3 of the Management Agreement made clear that the sinking fund is to be paid into an account to be maintained by the Manager and is to be kept separate from the Manager's other assets. Rule 4.4 made clear that this is not refundable if the member leaves the scheme before the allocated property is sold and the fund not used.

180. I felt this was somewhat confusing, as the management charge described in the Rules was an annual charge for the management *and maintenance* of the properties included in the FPOC, which would imply that the types of expenses detailed in clause 2.14 were already covered by the management charge. So it appeared to me that there was a risk of a member being charged for the same expenses in two different ways: once under the annual management charge for maintaining all the properties and once to create a sinking fund for maintaining their own allocated property. And, in Rule 4.5(c), it says the management charge can be increased in exceptional circumstances when any sinking fund is insufficient. As with the special management charge, it appeared that any increase for this reason could well form part of the ongoing overall management charges as there was no provision for it to be reduced the year after an extra demand.

181. I thought that the use of the word 'any' in Rule 4.5(c) within the phrase 'any sinking fund' implies that the management charge for all members could be increased due to the sinking fund for any given allocated property being insufficient. So, although the matter is left unclear, it appeared that one member could have their annual management charge increased to enhance the sinking fund for the refurbishment or repair of an allocated property that was not allocated to their membership.

182. I could not see anything in the contractual documents that set out when an expenditure should come out of a sinking fund or the general maintenance charge – as explained above, the stand-alone management charge appeared to cover the upkeep of the allocated properties. Given that, I thought it was unclear why Mr and Mrs H needed to pay into a separate sinking fund to cover future expenditure over and above the management charge that was designed to cover all allocated properties in any event.

183. If the sinking fund was not actually used, FPOC members could get a rebate of any unused part of the sinking fund. But that was only after the allocated property was sold. This was potentially unfair for people in Mr and Mrs H's position as they left the FPOC scheme early and therefore were not entitled to any refund from the sinking fund. So their unused sinking fund contributions would either be distributed to other members that subsequently bought their FPOC rights or to CLC if the rights remained unsold.

184. As with the management charge and special management charge, the details of how the sinking fund operated can only be seen from reading a number of documents and cross referencing parts of the text. I did not think this was clearly explained in the contractual documents, so I thought it is likely that this breached Regulation 7 of the UTCCR.

(4) default charges

185. The fourth category of charges were "default charges". Rule 5.2 states that members may have to pay default charges "*for non or late payment of the Management Charge*". Rule 5.5.1 set the charge as "*2 percent per month above the Bank of England base rate, or such other reasonable amount as the Manager shall determine*" if payments were outstanding after 30 days. These chares concerned me less than the others and I did not say anything more about them.

(5) any shortfall in management charges from previous years

186. The last of the five types of charge for which Mr and Mrs H could be liable under Rule 4.3 is the "shortfalls in management charges" from the previous year. I said that it is necessary to read the documents closely to understand the nature of the "shortfalls" that Mr and Mrs H might be required to make up, because these appear not to be confined, as might otherwise be expected, to their own past failures to meet the charges imposed on them (although those are also, separately covered).

187. Under Rule 4.4 members had to pay "*the Owner's share of the Management Charges as stated in the budget for the forthcoming year, including any shortfall in respect of the accounts of Management Charges relating to the expenses of the Property and the Vendor for the previous year".* I noted that the use of the words "*accounts of Management Charges*" implies that an individual member could be liable to pay for a share of any shortfall in all of the management charges that fell due from all FPOC members in the previous years. That is supported by the phrase "*relating to the expenses of the Property*", because "*Property*" includes all "*the completed and furnished accommodation units at the Resorts where such units have been selected by the Vendor as Allocated Properties and are vested in the Trustee (or its wholly owned subsidiary) and are held in trust for the Vendor and the Owners".* So, it seemed to me that shortfalls across the whole portfolio of properties are recoverable. Rule 4.4 also adds a requirement to pay the shortfall in any expenses of the Vendor from the previous year, which I found hard to understand because the Manager, not the Vendor, was made responsible for running the Resorts.

188. Similarly, Rule 5.1 states:

> "*The Owners shall be invoiced for the Management Charge by 30 November in each Year and each Owner shall pay his appropriate share, <u>any shortfall of the Management Charge</u> and/or any shortfall relating to any previous year on the Owner's individual account within 30 days of the date of the demand or 1st January, whichever is earlier.*" [<u>my emphasis</u>]

189. And clause 4.3 of the Management Agreement states:

> "*The Owners shall be invoiced for the Management Charge by 30 November in each Year and each Owner shall pay his appropriate share, <u>any shortfall of the Management Charge or sinking fund</u> and/or any shortfall relating to any*

previous year on the Owner's individual account within 30 days of the date of the demand or 1st January whichever is earlier." [my emphasis]

190. These clauses both draw a distinction between an individual member being asked to pay any shortfall on their individual account and being asked to pay the shortfall in management charges more generally, and say that the member can be required to pay either or both of these shortfalls. Which again means members could be asked to make up the shortfall in charges paid by other members of the FPOC.

191. I thought that the effect of this was for FPOC members to indemnify the Manager (and Vendor) for any shortfall in their recoveries against operating costs from previous years. It also meant that the inflation limit set on any increase in the management charge at clause 4.5 of the Management Agreement could be rendered ineffective, as a shortfall against the running costs in one year that could not have been covered by an increase in the basic management charge could be recovered the following year as a shortfall charge. And it meant it was not foreseeable by members what the charge in the following year could be, as that was dependant on both the actual operating costs of the FPOC and also the contribution history of their fellow members.

192. None of this was made clear in the explanatory documents presented to Mr and Mrs H at the time of the sale. I thought it was important to have this information clearly set out as this created an uncapped liability. And, unlike with the management charge, there did not appear to be any route to question the charge levied, such as the limited challenge available under Rule 5.7. It follows I thought there was likely to be a breach of Regulation 7 of the UTCCR.

could the obligations to pay charges amount to unfair terms?

193. Under the agreement, Mr and Mrs H had to pay any charges that fell due until the allocated property was sold. This was due to be 16 years after they purchased membership, but it could be delayed under certain provisions in the Rules for up to two years. And if the annual costs went up, Mr and Mrs H were not able to voluntarily end their FPOC membership and realise their interest in the allocated property.

194. I thought that meant Mr and Mrs H were tied into FPOC Membership for at least 16 years with an ongoing duty to pay charges which were likely to increase, at an uncapped amount. I thought Mr and Mrs H did not have any control over how the Manager and Vendor set the budgets or the size of any charges levied against them, save for the limited power to collectively question the management charge element as described above.

195. Regulation 5 of the UTCCR applies to the terms of the agreement relating to ongoing charges, as they were not individually negotiated by Mr and Mrs H, but formed part of a standard form agreement. For the reasons set out above, I thought the terms setting out the management charge, special management charge, sinking fund contribution, and shortfall payments did not meet the requirements of being in plain, intelligible language. The obscurity of the terms and their interaction was such that, even after a good deal of study, I was still uncertain how they were intended to operate and interact with each other, but I had done my best to set out my understanding. I explained that if I had misinterpreted any of them, I thought that was probably because their drafting and presentation made them so hard to understand. In any event, I did think under these terms there was

a significant imbalance in the rights and obligations of Mr and Mrs H and CLC, contrary to the requirements of good faith, meaning that I was of the view that it is a likely a court would conclude that the terms covering the ongoing charges were unfair.[7]

196. When assessing the unfairness of a contractual term, Regulation 6(1) of the UTCCR states that the court should take 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*".

197. Whilst I understood it is reasonable and necessary for the manager of a timeshare property or resort to charge the owners for the upkeep and management of the properties, in this case I found there were a number of different, but overlapping, charges for the maintenance of Allocated Properties and for all of the other Allocated Properties and resorts as a whole. With the exception of the default charges, as dealt with as the fourth type of charge above, I thought the charges were not clearly defined and were drafted in such a way as to make their respective effects difficult to understand or predict.

198. Further, the charges appeared to be capable of having consequences that I thought a FPOC member was likely to find surprising. They can make owners liable without limit for the Manager's (and even the Vendor's) past budgetary shortfalls and, via sinking fund contributions, for the future costs of maintaining their own Allocated Property, as well as for changes in expenditure across the resorts that are judged "exceptional".

199. Whilst there is a clause fixing increases to the first type of charge, the management charge, to the rate of Spanish inflation (unless prices fall), this restriction applied only to that element of the charges and appeared to be enforceable by owners only if they act on a collective basis. The other charges were not limited to inflation, or capped in any other way.

200. I thought the way these charges were presented to consumers before they entered into a contract with CLC, as well as in the actual agreements, was far from transparent. I said the average consumer might find it hard to understand the basis for each of the charges and the particular criteria for changing it and fixing its amount, let alone be able to foresee how it could operate.

---

[7] See the Judgment of Lord Bingham in *Director General of Fair Trading v. First National Bank plc* [2001] UKHL 52 when discussing at paragraph 17:

> "…The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Sch 2 of the regulations. Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice…"

Although this relates to The Unfair Terms in Consumer Contracts Regulations 1994, this is something to be considered when assessing 'good faith' under the UTCCR.

201. So I thought Mr and Mrs H were exposed to unforeseeable and largely unconstrained year-on-year increases throughout the term of the contract without enjoying any right when charges were increased to terminate, let alone recover an appropriate part of their initial investment or reduce the borrowing with which the purchase price was funded.

202. Schedule 2(1)(l) of the UTTCR states that a term that has the object or effect of "*providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded*" is an indicative unfair term. I thought the terms setting out the management charge, special management charge, sinking fund contribution, and shortfall payments were analogous to Schedule 2(1)(l) and that these terms caused a significant imbalance in the rights and obligations of Mr and Mrs H and CLC, contrary to the requirements of good faith. It follows, I thought it was likely a court would conclude that those terms were unfair.

203. That unfairness was, in my view, compounded by the operation of terms that set out what CLC can do if a FPOC member failed to pay the charges, which I went on to consider in my provisional decision. I thought that such failure could quickly lead to the forfeiture of all the owner's rights, without compensation, irrespective of the relation of the default to the amount paid for those rights or any investment value attached to them. So the consequences of being unable to pay any increased charges were significant.

what happened if a member did not pay the charges?

204. The consequence of failing to comply with a term can also have a bearing on whether the term is or is not unfair. Rules 5.5.1 and 5.5.2, as I have already set out above, covered what would happen if a member failed to pay their charges.

205. Under those rules, if Mr and Mrs H failed to pay the annual management charges, special management charges or additional charges within 30 days of the invoice date, their FPOC rights would initially be suspended. Default charges could be applied to the outstanding balance at the Manager's discretion.

206. If, after 30 days, Mr and Mrs H had still not paid, the Manager had the discretion to ask for future payments in advance before the FPOC rights were reinstated – in other words, Mr and Mrs H may have been required to pay more than their initial missed payment to have access to their holiday rights again. The Rules then state:

> *"… the Manager shall send a final invoice to the Owner advising that failure to discharge in full the arrears (including any arrears and interest that have arisen since the date of invoice) within 30 days will result in permanent cancellation of the Owner's Fractional Rights and no further correspondence shall be entered into. If the arrears as specified are not discharged within that period of notice, the Owner's Fractional Rights shall be cancelled and shall revert to the Manager who shall give the Vendor first option to make good the arrears and on the exercising thereof those Fractional Rights shall be transferred to the Vendor."*

207. I thought a term allowing the Manager to recover outstanding unpaid charges is

doubtless necessary, but it could become unfair if it allows for outcomes disproportionate to the harm suffered by the Manager. Here I thought the terms set out in Rules 5.5.1 caused a significant imbalance in the parties' rights under the contract, to the detriment of Mr and Mrs H, in contravention of Regulation 5 of the UTCCR.

208. Mr and Mrs H's FPOC rights costs £18,899 and, as set out above, had an investment element as they purchased an interest in the sale proceeds of a property. But they ran the risk of losing all of that by not paying the ongoing maintenance charges. I thought the outcome of permanently cancelling all FPOC rights, for which a large price was paid, was disproportionate, given that triggering their cancellation might bear no relation to the amount of charges outstanding.

209. In addition, Rule 5.5.1 appeared similar to the indicative unfair terms set out in Schedule 2(1)(e) and (f) to the UTCCR. Those paragraphs read:

> *(e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;*
> *(f) authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract…"*

210. Here, Rule 5.5.1 states that if charges remained unpaid, a FPOC member's rights would be lost and there was no provision for any credit to be given to a member for the lost rights. There was no provision for any refund out of the sinking fund if the agreement was cancelled under Rule 5.5.1, meaning that a member would effectively remain paying for future expenditure despite no longer having an interest in the sale proceeds of an allocated property. And if a member missed a payment, the Manager has a discretion to ask for future payments in advance for that member to access their FPOC rights. I thought these terms are analogous to the example unfair terms in Schedule 2(1)(d) and (e).

211. For the reasons set out above, I thought the terms in 5.5.1 would most likely fail a challenge in court under the UTCCR. I thought that forfeiting of FPOC rights without compensation was disproportionate and unfair. And, as set out above, this contributed to the unfairness of the terms setting out the management charge, special management charge, sinking fund contribution, and shortfall payments.

Did CLC comply with the Timeshare Regulations when providing information about the charges?

212. In addition to deciding whether I thought a court would find the terms on the ongoing charges unfair terms, I also considered if CLC met its obligations under the Timeshare Regulations.

213. Regulations 12 and 13 require information to be given to consumers in the form set out in Schedule 1 of the Timeshare Regulations. CLC provided Mr and Mrs H with a twelve page Information Statement that purported to comply with these obligations. But having considered everything, I thought it fell short in a number of areas.

214. Schedule 1 of the Timeshare Regulations sets out a standard format to be used that is separated into three parts, I will deal with each in turn.

215. Part 1, amongst other things, requires CLC to set out an outline of the additional obligatory costs, their types and indicative amounts. But I did not think it set those out in the way it needed to. In Part 1 CLC just referred Mr and Mrs H to what it said about costs in Part 3, Section 4 of the Information Sheet, but Regulations 12(3)(a), 12(5) and 13(1)(a) require Part 1 of the form to be completed. On the face of this, that could be said to be a technical breach, but I thought it was important. I said that as Part 1 presents information as a practical overview, designed to outline the costs, types and amounts. But Part 3 is designed to give a more in-depth description of the costs, how they are calculated and allocated.

216. Even if directing Mr and Mrs H to Part 3, Section 4 was a satisfactory way of complying with the duty in Part 1, what was presented in Part 3, Section 4 would have to be sufficient to cover the information required in Part 1. Having looked at the information CLC gave, I did not think it was. In particular it says "*Details of the first year's Fees as included in your Fractional Rights Agreement Terms and Conditions are £898 for 2012."* It does not make clear what is included or excluded in that amount, so Mr and Mrs H would not be aware of the types of charges being levied.

217. Additionally Part 3, Section 4 says "*Other than the expenses, fees, Charges and other costs set out in the Agreement there are no other costs involved in the purchase other than those taxes imposed by law.*" But this fails to provide an outline of those items that are set out in the Agreement or required by law, or any indication of their amounts as is required in Part 1.

218. The information in Part 3, Section 4 had also to meet the requirements for Part 3 itself. So, it should have given Mr and Mrs H the following information, or at least told them specifically where to find it:

> *"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),"*

219. Two of the five charges I had described were not mentioned in Part 3, Section 4: namely, default charges and the charges for the shortfall of management charges. So I did not think that section gave an "*accurate and appropriate description of all costs associated with the timeshare contract*".

220. I thought the management charge was described to some extent, but there was no accurate description of how it may increase. Instead, the information stated that the charge will be budgeted annually and will increase or decrease as determined by the costs of managing the Project. That failed to refer to the fact that the direct costs of Allocated Property (as opposed to the costs of running the entire project) could also add to the management charge, and it entirely ignored the provisions for automatic annual increases (but not decreases) to reflect Spanish inflation.

221. The only explanation about Sinking Fund contributions given in Part 3, Section 4 read:

> "*In addition as with any apartment or community there are provisions for a sinking fund to be established for major refurbishments of the Allocated Property during the term of the Project."*

But the sinking fund was not limited to "major refurbishments" of the Allocated Property, and went well beyond what might have been expected from that description. It could include such expenses as renewing the furniture and equipment inside the Allocated Property, and keeping the Allocated Property's contents in a good state of repair. No indication was given as to how the required size of the sinking fund was to be calculated, nor how much this might amount to in terms of contributions from Mr and Mrs H.

222. The only explanation of the special management charges read: "*In exceptional circumstances special charges may be needed as with any property*." But, paragraph 4.5(c) of the Management Agreement allowed for the exceptional costs of running the entire Project or Resort, not just of the Allocated Property, to give rise to an exceptional increase in the Management Charges; and I thought that was not explained as it should have been. The phrase "as with any property" seems particularly misleading, given that exceptional charges potentially extended to running and maintaining the resorts as a whole and the Manager could charge for providing a very wide range of services, as set out under clause 2 of the Management Agreement.

223. Part 3 required much more specific information but I did not think that was included in any meaningful sense. The description provided is not an accurate and appropriate description of all costs, as it does not set out any information about the five different types of costs that could be charged to members as I detailed above. There is no accurate description how each charge might increase, or how that charge was to be calculated. As set out above in greater detail, I thought many of these charges were problematic as they gave rise to potentially uncapped demands to cover the operating costs of both the allocated properties and the resorts more widely, as well as the need to cover shortfalls from previous years. I thought that needed to be explained to Mr and Mrs H.

224. Despite Part 3 requiring an accurate and appropriate description of all costs, CLC has said "[*f]ull details are contained in the Rules and Management Agreement.*" But CLC did not say in Part 3 where in the Rules and Management Agreement Mr and Mrs H could find the information they needed, which was itself a requirement set out in Part 3 of Schedule 1. In addition, as set out above, the potential costs are set out across a number of provisions in both the Rules and Management Agreement, needing cross referencing between multi-page documents and using separately defined terms. I thought it was likely an average consumer would not find it easy to fully understand how the charges were set to operate, even if they had access to the documents and sufficient time to read them.

225. I also considered the FPOC sales brochure to see whether that dealt with management or other charges in any detail that might mitigate any shortcoming with the Information Statement. I saw that the brochure ran to 46 pages and on page 42 the annual management charge and reservation fee were mentioned, but no information was given as to the likely cost or how these charges were calculated. There is no mention of the special management charge or any additional charges, such as the sinking fund.

226. In conclusion, I did not think CLC had complied with the Timeshare Regulations in relation to providing the required level of disclosure about the charges and fees members were required to pay.

227. In summary, I thought the ongoing costs were a significant obligation for Mr and Mrs H under the agreement and they needed to understand what they could have been asked to pay for and how much that was likely to be. They needed to be able to decide for themselves not only whether they could afford the costs at the time they took out FPOC membership, but also whether it was likely they could continue to afford them in the future and whether the membership was financially suitable for them. I thought the failures in disclosure I highlighted above meant Mr and Mrs H were not given the chance to make the informed decision to take out FPOC membership envisioned by the Timeshare Regulations.

BPF's response to my provisional findings

228. BPF did not agree with my provisional findings on this issue. BPF has made a number of submissions on this point and, in his witness statement, EM sets out CLC's position on its management charges.

229. BPF has argued that Mr and Mrs H did not complain about insufficient information being disclosed about the special management charge, sinking fund contribution, default charges or management charge shortfalls. In addition EM also pointed out that Mr and Mrs H made contradictory claims about their understanding of the management charges – in their CMC drafted Power of Attorney they said "*[w]e were told the maintenance fees would increase with the rate of inflation…*", but in a later statement sent to our service it was said "*[w]e were assured maintenance fees would not rise*".

230. Here Mr and Mrs H have raised the increase to the maintenance fees as part of their complaint, so I am satisfied it is proper for me to consider the fees and charges in the way I did in my provisional decision. I do not think it is necessary for a consumer to specify their complaint in the way a Claimant would be expected to set out their Particulars of Claim if starting litigation.

231. Schedule 17 of the Financial Services and Markets Act 2000 deals with the Financial Ombudsman Service and how the FCA sets its rules. Paragraph 13(3) reads:

> *"The FCA may make rules providing that a complaint is not to be entertained (except in specified circumstances) if the complainant has not previously communicated its substance to the respondent and given him a reasonable opportunity to deal with it."*

232. Here I think the word "substance" means that I can consider the subject matter of a complaint, rather than the precise way it is written, communicated or presented. And it was held in *R (Williams) v Financial Ombudsman Service* [2008] EWHC 2142, at paragraph 26:

> *"The ombudsman is dealing with complaints, not causes of action. His jurisdiction is inquisitorial not adversarial. There is a wide latitude within which the ombudsman can operate"*

So even if Mr and Mrs H, or their CMC, have not complained about the precise way in which fees and charges had been calculated, once they had raised the issue of

unexpected increases, I think it is proper of me to consider the effect of those terms.

233. I accept that Mr and Mrs H have given contradictory statements in the evidence I have seen, so I have placed little weight on their actual recollections of what they were told about the charges. EM has asked me to draw an adverse inference about Mr and Mrs H's evidence in general and exclude this element of the complaint. But I think what is important here is that Mr and Mrs H have complained about the way the management charges changed. And when looking at those charges, and the the terms setting out how they could be levied, I have looked at the contractual matrix to work out the way those terms operated and the way this was explained in the sale documentation. I do not think that the inconsistency in Mr and Mrs H's evidence about what they were told in 2011 should mean that I refuse to look into their complaint about the changes in management charges.

234. BPF has argued that the requirement in paragraph 4 of Part 3 of Schedule 1 of the Timeshare Regulations requires *"an accurate and appropriate description of all costs…"* [emphasis BPF's]. BPF accepts that whilst the requirement of Part 3 goes beyond the summary provided for in Part 1, it says it would be inappropriate to comprehensively reproduce the full terms governing all charges in the Information Statement. BPF has said that CLC provided an accurate description of the principal additional charge – the management charge – and a description of how that was calculated, as well cross referencing the Rules.

235. The Information Statement makes clear that there is a management charge and it was for contribution to the "*management, repair and maintenance of the Property*". With respect to how this was to be calculated, it said the charge "*will be allocated among Owners in a particular Allocated Property in a fair and equitable manner, decided by the Manager, and in proportion to the number of weekly periods an Owner is entitled to use each year…"*. The information statement also says there are provisions for a sinking fund to be established to cover "*major refurbishments of the Allocated Property*" and special charges may be needed in exceptional circumstances. It says full details were contained in the Rules and Management Agreement, but I cannot see Mr and Mrs H were pointed to a specific part of those documents.`

236. Having considered this part again, I still do not think sufficient information was given in the Information Statement. I note that the requirement BPF has highlighted requires *"an accurate and appropriate description of all costs…"*[emphasis my own]. BPF has accepted CLC gave a description of what it said was the principle charge, the management charge, but I cannot see that it gave a description of all of the costs. For example, neither the default charge nor the duty to pay shortfalls from the management charges from previous years was mentioned. Further, I do not think accurate or appropriate information was provided about the charges that were mentioned as I have already set out in detail above.

237. BPF has explained that members of Mr and Mrs H's FPOC have only ever been levied one special management charge, and that happened after they requested to surrender their membership, so they did not pay it. This was charge of £120 to cover a shortfall in income following an exchange rate change after the Brexit Referendum and was only charged after the owner members of the FPOC committee agreed to it. BPF has said this shows the type of unforeseeable situation in which a special management charge is designed to cover.

238. I do not think the fact that only one special management charge had been

levied alters my analysis of the unfairness of this charge. It was the potential exposure to large charges, coupled with the effect of non-payment, that I was concerned about. I do not think that these terms were fair simply because they were not used to Mr and Mrs H's detriment in the way they might have been. Similarly, just because a sinking fund was not set up, nor were any management charge shortfalls levied, that does not make the provisions surrounding those charges fair.

239. BPF has said that the management charge shortfall is "*simply a consequence of the inevitable budgeting exercise*" and any shortfall is made up the following year, but any surplus is applied to reduce the following year's contributions. But I fail to see why it is inevitable that FPOC members should have to pay for any overrun in the Manager's operating costs as against its income.

240. Under the Management Agreement, at clause 6, the Manager is entitled to include remuneration for its services of up to 15% of the annual expenses of the Property. So, despite what EM has said about FPOC being a not-for-profit, break even club, the Manager is contractually entitled to take remuneration in direct proportion to the overall sums charged. I fail to see why it is an inevitable consequence that FPOC members should cover any shortfall in the accounts rather than the Manager, which appears to be a profit making entity.

241. Additionally the management charge shortfall operates outside of the management charge, so it renders the policy of pegging raises to the management charge to Spanish inflation somewhat redundant. If the management shortfall charge is a consequence of the budgeting exercise as BPF has said, it means the FPOC members effectively indemnify the Manager for its costs, whether the over expenditure has gone over budget or if other owners do not pay their fees. This is not made clear in the Information Statement as is required.

242. BPF has said that I have conflated the position of CLC (as the counterparty to the FPOC membership agreement and the "trader" for the purposes of the UTCCR) with the position of the Manager of the club. In order to be unfair under the UTCCR, the terms must cause a significant imbalance in the parties' (being the consumer's and the trader's) rights and obligations arising under the contract, to the detriment of the consumer. The terms which I thought unfair do not affect the balance between CLC and Mr and Mrs H's rights at all: they affect the relationship between Mr and Mrs H and other FPOC members, and between FPOC members and the Manager. In fact, as EM confirms, CLC is responsible for the Management Charges on unsold allocated properties, so any fee increases adversely affect CLC in the same way that they would affect FPOC members.

243. Having considered the UTCCR, Regulation 4 makes clear that the UTCCR applies to contracts between a seller or supplier and a consumer. The Purchase Agreement was such a contract, and it incorporated all the terms I have referred to, because one CLC company (Club La Costa Leisure Limited), the supplier, bound Mr and Mrs H into a contract with itself and another CLC company, the Manager, by requiring them to agree to the FPOC Rules and Management Agreement. To the extent that the supplier bound Mr and Mrs H to terms that gave rise to a significant imbalance in favour of the Manager and to the detriment of Mr and Mrs H, those terms were also unbalanced in favour of the supplier, because those were the conditions upon which CLC offered to contract with Mr and Mrs H.

244. So I cannot see for the purposes of the UTCCR that it matters whether the terms that cause an imbalance to the detriment of Mr and Mrs H are in favour of

the CLC company that sold FPOC membership, or in favour of another CLC company. In any event, even if the UTCCR did not apply to these terms in the way I thought they did and the unfair term could not be challenged as it benefitted a different CLC company, I do not think that would prevent the term being considered unfair for the purposes of contributing to an unfair relationship under s.140A CCA. Where the UTCCR apply they can provide a yardstick for assessing whether a term of a related contract is unfair, but if for a technical reason the UTCCR do not apply to such a term, the term may still be considered unfair for much the same reasons and with a similar impact on the unfairness of the debtor-creditor relationship under s.140A. So, the technical issue that BPF raises strikes me as of academic interest.

245. BPF has said that the terms I criticised deal with the equitable division of ongoing cost liability between Mr and Mrs H and the other owners. But having looked at the terms in some detail, cross referencing several documents and with the assistance of EM's statement setting out how he says the terms operated in practice, it is still not clear to me how the costs are apportioned between FPOC members. Further, the terms allow for the Manager to be remunerated, for the Manager to increase charges with the associated increase in its own remuneration and for the Manager to recover any shortfalls in management charges from other FPOC members.

246. BPF has argued that CLC had a legitimate interest in including the charges to pay ongoing costs to maintain the Properties. It says this is an essential and core element of all timeshare club arrangements. I do accept that it is right that CLC did have a legitimate interest to charge FPOC members to cover costs, including its companies' own remuneration. But it does not follow that any charge must therefore be fair. It was the form of those charges, as detailed in my provisional decision that gave rise to the unfairness, not the fact that such a charge existed.

247. BPF said that I had overlooked that CLC ensured FPOC members were adequately protected from special levies and sinking fund charges by imposing an obligation on the Manager to arrange comprehensive insurance. In all the circumstances, no reasonable tribunal could conclude that the terms were contrary to the requirement of good faith and submitted that this ought to be a relevant consideration in my determination.

248. I do accept that a comprehensive insurance policy should cover the sorts of unforeseen events that are often insurable, but I do not think an insurance policy would cover the ongoing maintenance and upkeep of properties. For example, it was made clear in clause 2.12 of the Management Agreement that the sinking fund was for the "*replacement of furniture, equipment, refurbishment, interior re-paintings at intervals to be decided by the Vendor in consultation with the Manager, and the external painting of the Allocated Property*" – I do not think these were insurance events. Further, I do not think that the terms exhibited the fair and open dealing that is required by good faith.

249. BPF has said that I was wrong to suggest the clauses fall within paragraph 1(l) of Schedule 2 of the UTCCR. It said none of the charges allow CLC to change the amount of money it is charging Mr and Mrs H for their purchase of FPOC membership; the terms allow the Manager to levy fees on the FPOC members and CLC (who is responsible for charges on unsold inventory). In any event, under the Rules, the FPOC members could challenge the charges and FPOC members could sell or surrender their points.

250. I think this is essentially a repeat of the argument that the CLC company that actually sold membership was as a separate company to the Manager. Again, I think the UTCCR applied to these clauses, but in any event, a court could look at the intrinsic fairness of the terms in a very similar way when deciding s.140A CCA. Further, I do not think the clauses operate in the way BPF has suggested that they do. Clause 4.5 of the Management Agreement sates that *"[d]uring the first two (2) years of the Management Period …each Owner (other than the Vendor) shall pay the Manager by way of initial Management Charge…*" [emphasis added]. So the Vendor was not liable to pay fees in the same way as FPOC members on unsold properties.

251. BPF has said that FPOC members who were unhappy with the charges could sell or surrender their points. But BPF has not been able to point to any functioning market for the sale of these points, nor have I seen any term allowing FPOC members to voluntarily surrender their points without CLC's discretionary agreement. In practice, despite Mr and Mrs H having thought they had surrendered their points (without any accounting from CLC for the rights to the sale proceeds that they had given up), EM has made clear their rights were actually suspended. This has exposed them to potential liability for the unpaid management fees from 2017 onwards, so I do not think the is evidence to suggest FPOC members could effectively surrender their points.

252. BPF told me that the Rules in force at the time Mr and Mrs H took out FPOC membership were amended in March and June 2014 following Mr and Mrs H's purchase. One such amendment was the introduction of a committee to set the Management Charge. BPF has submitted that the committee was independent and consisted of an independent Chairman, two representatives appointed by CLC and two representatives appointed by the FPOC members.

253. This committee was described in clause 5.11 of the 2014 Rules. It read:

> *"For the purposes of determining the Management Charge only, a Committee of not more than five persons will be formed, consisting of a Chairman appointed by the Vendor, two representatives elected by the Owners from their number, one person appointed by the Vendor as its representative, and one person appointed by the Manager as its representative…*
>
> *The Chairman and the representatives appointed by the Vendor and Manager shall not be subject to retirement but shall serve at the pleasure of their respective appointers, who shall appoint a successor to fill any vacancy among their number…"*

254. So it is incorrect to say that the Chairman was independent, as they were to be appointed by the Vendor, a CLC company. And they served at the pleasure of the Vendor, who was able to appoint their successor if they were removed. It follows, given the Vendor and Manager each had a representative, that I think CLC had an inherent majority in this fee setting committee and it was not independent of CLC.

255. BPF has submitted that I placed too much reliance on rule 5.5.2 of the FPOC Rules as the Rules were amended in June 2014 to provide a right to reinstatement for a period of five years after a FPOC member defaulted. Consequently, initial defaults can only result in the suspension of a FPOC member's membership and permanent cancellation can only occur after the default has extended for a minimum of five years.

256. Having looked at the Rules, I take it BPF meant to refer to Rule 5.5.1, which deal with termination of rights after default. The July 2014 Rules were amended so the following was added to Rule 5.5.1:

> *"The Manager acknowledges that there can be various reasons why an Owner was unable to comply with the Management Charges payment obligations and therefore agrees to keep the status of the Owner in suspense for a period of 5 (five) years from the date of default during which period the Owner may apply to be reinstated to active status to be able to use Fractional Rights again subject to and provided that the Owner:*
>
> > *(a) makes good immediately the sum of arrears and any reinstatement fees as apply at that time outstanding on his account;*
> > *(b) agrees to continue to be bound by the Rules;*
> > *(c) agrees to pay Management Charges from the date of reinstatement onwards;*
> > *(d) complies with any "know your client" and similar information reasonably required by the Manager to comply with applicable laws and which would be requested from a new Owner; and*
> > *(e) acknowledges that (a) the Manager was under a duty to the other Owners, who are paying Management Charges, to sell or use the particular Fractional Rights which used to be available for the Owner, as described previously above, and (b) while the Manager will make all reasonable efforts to reinstate the Owner as he was entitled to previously, this cannot be guaranteed and where not available in the Manager´s opinion acting reasonably and in good faith, the Manager will allocate the nearest available, subject to unit size and week capacity.*
>
> *If an Owner requests reinstatement later than the five year period set out above, the Manager shall determine the request in its absolute discretion."*

257. I think this term lessens the impact of the previous Rule 5.5.1 which led to the termination of rights swiftly after management fees remained unpaid. But I do not think a five year suspension does anything to remedy the possible disproportionate remedy of extinguishing rights for missed payment of charges, it just gives more time to bring the account up to date. The real concern was that a FPOC member's interest in the proceeds of sale, something BPF itself has described as a "*valuable right*", could be lost for a shortfall in charges that may bear little relation to the value of the interest in the allocated property. I cannot see that the amendment to Rule 5.5.1 has done anything to alleviate that unfairness.

258. In conclusion, I am still of the view that a court would find that the terms setting out the charges and the effect of not paying those charges were unfair under the UTCCR. Further, I am also still of the view that a court would find that CLC did not meet its disclosure obligations under the Timeshare Regulations.

259. Additionally, in his witness statement, EM has shown the total amounts Mr and Mrs H were invoiced for their management charges (he said they did not pay any of the other charges I identified above). The costs were given as follows:

Year	Amount (Euros)	Percentage increase (%)
2012	898	-
2013	898	0
2014	1,006	12.03

2015	1,076	6.69
2016	1,106	2.79

260. I have looked at the Spanish CPI over the same period and I think these charges rose over and above that rate. Spanish CPI rose 1.41% in 2013, but then fell in 2014, 2015 and 2016. So I think the management charges increased over the rate set in clause 4.5 of the Management Agreement and I have not seen that Mr and Mrs H were told about this. It is also surprising that the increase in charges over the first three years where they were not contractually fixed went from €898 to €1,106, an increase of over 23%, which is a considerable rise over a relatively short period.

The effect of selling FPOC membership as an investment

261. Under Regulation 14(3) of the Timeshare Regulations, marketing or selling membership to FPOC as an investment was banned. I already said I thought Mr and Mrs H were told FPOC membership was an investment, so I need to consider whether CLC marketed or sold it in that way. Having considered everything, I thought it was likely that a court would conclude CLC breached this regulation. But I also needed to consider whether this could have led to any other regulations being breached.

262. As I have set out above, the Timeshare Regulations and the RDO Code contain provisions that are aimed at ensuring consumers are given the information they need to make an informed contractual decision. It appeared to me that CLC had a policy of avoiding disclosing relevant information that related to the actual or potential value of the investment in the allocated properties.

263. In his statement, DF said:

> "*I accept that if CLC was selling a product which promised profits (or the potential to make a profit), one would expect to see detailed information as to the potential return and the potential risks. However, that is not what was sold and no such promises were made.*"

264. I thought information about FPOC membership had not been made clear, including the value of Mr and Mrs H's interest in the allocated property at the time of sale or what they were likely to receive when it was sold, for example, by showing what they could get back at different sale amounts or what the property needed to sell at for Mr and Mrs H to get their initial investment back.

265. CLC has explained the lengths it went to in an attempt not to sell FPOC membership as an investment. In particular it said:

- it did not give its sale representatives information about the value of the 'fraction' its clients bought (witness statements of PR);
- it instructed its sales representatives not to give the impression that there was an investment element to membership and there were disciplinary consequences if its staff were found to have done so (witness statement of MB); and,
- the point of sale documents were clear that the primary purpose of membership was the enjoyment of holidays and no warranty was given about the likely sale values.

266. But although I accepted that CLC tried to comply with its duties under Regulation 14(3), for the reasons set out above, I thought it failed to do so. In my view, the problem CLC had is that its product, FPOC membership, inherently has an investment element to it – its clients purchase an interest in the proceeds of sale of a property that they have no preferential right to use – so it seemed that aspect of the membership, if used to persuade customers to purchase, created the risk that membership will be marketed or sold as an investment, contrary to Regulation 14(3). In Mr and Mrs H's case I thought the way CLC presented FPOC membership, in particular the prominence of the investment element, led to it being marketed and sold as an investment.

267. But CLC had to adhere not only to the requirements of Regulation 14(3) but also to the other parts of the Timeshare Regulations, in particular those requiring pre-contractual disclosure of key information. So I needed to consider how the membership was described and whether CLC breached any of the other regulations, as well as all of the other circumstances I am required to consider when thinking about s.140A CCA.

268. Regulation 12 states, in summary, that a timeshare supplier has to give customers the key information before they enter into a contract and that information must be clear, comprehensible and accurate so that the customer can make an informed decision about whether or not they should enter into the contract. Details of the key information needed to be given is in Schedule 1 as set out above.

269. Schedule 1 of the Timeshare Regulations sets out standard forms for information that needs to be disclosed. The things mentioned are geared toward the types of things a consumer would need to know when purchasing timeshare rights. So, for example, the price to be paid to acquire timeshare rights needs to be set out. But in Mr and Mrs H's case, the initial price they paid is clear (although in my provisional decision I also highlighted that I thought the ongoing charges were not adequately explained) – it is the value of the interest in property that they were buying that had not been disclosed.

270. In his witness statement, DF said:

> *"58…CLC accepts that the documentation which it is legally required to provide by the 2010 Regulations is not insubstantial. However, as this is a mandatory requirement, CLC cannot be criticised for the same. Nevertheless, to assist customers, CLC developed its own supplemental documentation (e.g. the Members Declaration) so that the most important features of the product were clearly brought to the customer's attention. These documents were emphasised and prioritised.*
>
> *59. A central part of [the investigator's] reasoning is that this significant documentation does not include the open market value of the Allocated Property and the fraction thereof and this renders the information "incomplete and misleading". However, despite extensive regulation, there is no requirement on the supplier to provide this information.*
>
> *60. In fact, the opposite is true. Regulation 14(3) and (5) of the 2010 Regulations state [EXTRACT SET OUT]*
>
> *61. In my view, providing the information which [the investigator] has concluded was necessary would have been in contravention of the law and a criminal*

offence…"

271. Having considered what DF said, I disagreed. Part 1 of Schedule 1 of the Timeshare Regulations requires CLC to set out the "*Exact nature and content of the right(s)*" that are being purchased. And under Regulation 12(4) the information provided needed to be sufficient to enable Mr and Mrs H to make an informed decision about taking out FPOC membership.

272. I did not think this provision related only to describing the holiday rights Mr and Mrs H acquired from CLC. And I thought it was clear CLC must have known that was the case as in the Information Statement, when dealing with the "*Exact nature and content of the right(s)"*, CLC included the following information:

- purchasing Fractional Rights gave Mr and Mrs H the rights and obligations of an Owner as defined in the Rules;
- the Fractional Rights expire when the allocation property is sold and there are provisions for the distribution of the sale proceeds;
- Mr and Mrs H were obliged to release to CLC their occupation rights in the allocated property until the date it was sold; and
- information on how the allocated property was legally held and to be sold by the trustee.

I thought this information went beyond CLC merely providing information about the rights to take holidays that Mr and Mrs H were buying. But crucially, the information given did not include details about the value of the interest Mr and Mrs H were buying at the time of sale. I thought they needed that to understand what they were paying for and how the value of their interest in the allocated property was calculated.

273. When selling FPOC membership, I thought there was a clear tension between the need to set out key information under Regulation 12(4) and the prohibition on selling a timeshare as an investment under Regulation 14(3). But I did not think that was caused by any inherent failings in the drafting of the Timeshare Regulations, in fact I thought the purpose of them was clear – to tell providers the types of information it needed to supply to consumers when timeshares were sold. The problem that had been caused was by CLC selling a product that, as core features and main selling points, had both the elements of a timeshare and an investment. I said that as I understood it, the product was designed after there was a prohibition on selling timeshares as an investment. But because of the way FPOC membership worked, CLC ran the risk of breaching either Regulations 12 or 14 (or both) once the key features of the product were explained.

274. In the Information Statement, CLC stated that "*The Vendor, the Trustee and the manager are unable to give any guarantee on the ultimate sales price as this depends on many factors including the state of the property market and supply and demand at the time of sale"*. But I thought CLC failed in its duty under Regulation 12(4) to go on to explain what some of those factors may be. Some of the basic information I would have expected to see would have been the market value of the allocated property, some information on the current market conditions at the location of the allocated property and information about any future plans or developments at that resort. I would have also expected CLC to have explained whether the allocated property was likely to be sold as an individual unit or part of a package of units within the resort location and how that affected its marketability and value. Additionally, I thought CLC should have set out some of the potential

risks of investment, such as how any changes in exchange rate could affect the levels of return.

275. In addition to information about the potential resale value of the allocated property, I thought Mr and Mrs H should have been made aware of how their interest in the sale proceeds was to be calculated. The Information Statement says there "*is a provision for distribution of funds after the payment of any taxes and all costs related to that Allocated Property as described in the Rules.*" But more details of that are not set out as I thought was required in Parts 1 and 3 of Schedule 1, read in conjunction with Regulation 12(4).

276. The Rules set out, at Rule 9.2.3.1, how the sale proceeds would be dealt with before they were distributed to the FPOC members. 7.5% of the proceeds were given to the Manager and Trustee in fees, before the sales agent's fees were also discharged. The remainder would be used first to pay any local taxes, legal fees or other costs of sale, but the Rules do not set out what those may amount to. But in addition to those, the proceeds would be used to discharge any debts or liabilities attributable to the allocated property, including any outstanding management charges, which were to be apportioned at the sole discretion of the Trustee. Only at that point would the remainder be distributed amongst members.

277. I thought it needed to be explained to Mr and Mrs H that there were a large number of potential deductions to be paid out of the sale proceeds and some indication of how this would work in practice. Without this having been highlighted to them, I did not think they would have had sufficient information needed to make an informed choice about taking out the FPOC membership as required under Regulation 12(4).

278. I did not think it was made clear to Mr and Mrs H the value of the interest in property they were buying, so they could work out how much of the purchase price went on that and whether it was good value for them. I thought this was a breach of Principles 1 and 2 of the RDO Code of Conduct as Mr and Mrs H were not given appropriate disclosure of the elements of the product to be able to make an informed purchase. I thought CLC should have made clear to Mr and Mrs H what the investment was actually worth at the time they bought it, so they knew how much was being invested in an interest in property and how much was for the other benefits of membership.

279. I thought it was clear that all of the regulations referred to, as well as the RDO Code of Conduct, were drafted with the purpose of ensuring consumers, such as Mr and Mrs H, have the right information available to them at the time they choose to enter into a contract. This was set out explicitly by the Government in the Department for Business Innovation & Skills paper of December 2010 that was published alongside the implementation of the Timeshare Regulations. It says, at paragraph 407 when looking at Regulation 12:

> "*It is essential, given the nature of the regulated contracts, which are often high value and very long term and sold in pressured circumstances, that the consumer is provided with the necessary information, and given sufficient time to consider the information before making a decision to buy. The Directive is very specific on the pre-contractual information that must be provided. Failure to provide this key information or failure to provide it in the language required, or providing false information on these matters is, in our view, likely to impact on the consumer's transactional decision. For example, information about the consumer's rights to use the timeshare, the price and any additional costs, and*

the right to withdraw are key information that the consumer needs to take into account when entering into a contract or when deciding whether or not to withdraw from it."

280. Mr and Mrs H were not given the information about how the purchase price for FPOC membership was worked out, how much of what they paid went into the investment element of membership and the amount they were likely to get back. So I thought they simply were not able to properly weigh up the cost and benefit of taking out FPOC membership. I thought they needed to have more information about the value of the beneficial interest they were buying at the time they took out membership.

BPF's response to my provisional findings

281. BPF disagreed with my provisional findings on this issue. It said my conclusions that FPOC membership was sold as an investment were driven by the fact FPOC membership had investment potential. But I failed to recognise that 'fractional' style products had been available and established prior to the drafting of the Timeshare Directive and subsequent Timeshare Regulations, and had been considered in the drafting of those provisions. BPF also said I did not properly appreciate the distinction between CLC describing, accurately and factually, a key feature of the product and CLC actively selling FPOC as an investment.

282. With regard to the standard information form under the Timeshare Regulations, BPF said it does not require the information I suggested ought to have been included. It said that Regulation 12(4) does not impose an additional, free standing obligation to provide further information to enable a consumer to make an informed decision. Rather the phrase "*the information*" in Regulation 12(4) refers to the "*key information*" defined in Regulation 12(3) and provides obligations in relation to each of those pieces of information. BPF said my provisional decision amounted to a finding that Regulation 12(4) requires further information that goes beyond the requirements of the standard information form in Schedule 1.

283. BPF has said that my provisional findings mean that it is impossible to lawfully sell a 'fractional' timeshare product as a supplier will either provide the information required, in breach of Regulation 14(3), or not provide the information, in breach of Regulation 12(4). BPF has directed me to a Government consultation paper from February 1996, when the first timeshare Directive was being considered, that shows that the Government thought the Directive was drafted to cover fractional ownership models. BPF has also noted that my finding that FPOC membership was sold as an investment meant CLC committed a breach of criminal law.

284. BPF has said that my reliance on the CPUT Regulations is wholly misguided in the context of there being specific sectoral regulation at an EU level. Recital 10 and article 3.4 of the Unfair Commercial Practices Directive (Directive 2005/29/EC) ("the UCPD") make this clear. As I have not relied on the CPUT Regulations, I have not considered this point further.

285. I have seen the witness statement of EM where he has set out some of the history of 'fractional' style products and how the Timeshare Directive came to be drafted. And I accept that the prohibition contained in the Timeshare Regulations is the marketing or selling of timeshares as investments, rather than there being a prohibition on marketing or selling 'fractional' style products at all. But I do not think that answers the question of whether Mr and Mrs H were sold their membership as an investment.

286. PR said in his statement "*the return the customers receive at the end of the fixed term when the property is sold is a further benefit of the particular type of timeshare ownership"*, and I think it was the way in which this benefit was presented that meant FPOC membership was sold as an investment[8]. DF said in his statement, "*it is correct to say that receiving the net proceeds of sale is presented as an important feature of the club. It is plainly one of the distinguishing features of the product"*. This, along with the use of the word "*investment*" in the way I found it was used when looking at the representations made, and the contents of the handwritten note, persuaded me that it was more likely than not that FPOC membership was presented as an investment.

287. In my provisional decision I said that I failed to see how buying an interest in an allocated property in the way FPOC membership enabled could be described as anything other than an investment. Having considered all of the evidence again, I do not think this was correct. For the avoidance of doubt, it was in the circumstances of Mr and Mrs H's complaint I think the evidence suggests it was sold in that manner. I think there is a difference between, on the one hand, providing information about the property ownership rights being offered (which enables an objective appraisal of the contract) and, on the other hand, using the existence of such rights as a selling point, i.e. as an inducement to purchase. It is only in the latter case that a supplier would be "*marketing or selling*" the contract "*as an investment*".

288. The structure of FPOC membership meant a customer was purchasing an interest in the sale proceeds of real property and would get a return, so it was a real possibility that potential customers would see an investment element to ownership. I think the sales process that Mr and Mrs H went through highlighted this feature of membership and presented it, in order to induce them to purchase, as having an investment element.

289. In his witness statement, DF has said that "*CLC went to great lengths to emphasise throughout the paperwork that the acquisition of a share in an Allocated Property should not be viewed as an investment.*" But having considered the paperwork, I do not think it was explicitly stated that FPOC membership was not an investment, rather it says the primary purpose of membership was the taking of holidays. Once FPOC membership was marketed and sold as an investment, as I have found happened to Mr and Mrs H during CLC's sales presentation, undoing that would require a very clear and unmistakable retraction, enabling Mr and Mrs H to consider afresh whether this was a contract they wished to enter into free from the effect of that irresponsible marketing. But, I don't think that CLC's including the disclaimers contained in its documentation was nearly enough to achieve that.

290. DF has noted that a distinguishing feature of FPOC membership was receiving the net proceeds of sale at the end of the term, in fact he said it was presented as "*an important feature of the club*". But BPF's arguments is that the Timeshare Regulations do not require a customer to be provided with the value of that important feature, nor any of the risks associated with it. BPF has also said CLC

[8] This differs from some of the older schemes described by EM in his statement where scheme members had a right to the share of the net sale proceeds of a property, but the scheme did not have a fixed term after which properties would be sold. Under these traditional schemes, there was no certainty of a distribution at any point in time and so the possibility that that might occur, say, within the owner's lifetime was not likely to provide a selling point for the timeshare. To me, the lack of a fixed term means these older schemes looked less like investments than the FPOC scheme.

were effectively prohibited with providing any information about this important feature, even though DF has accepted that the return was highlighted during the presentation of the product.

291. The Timeshare Regulations are designed as consumer protection legislation, with the aim that consumers have sufficient information with which to make an informed purchasing decision. BPF's position appears directly opposed to that aim and deprives customers, such as Mr and Mrs H, from having information about the product they are purchasing.

292. Schedule 1 to the Timeshare Regulations sets out, for Mr and Mrs H's agreement, the key information required to be disclosed. And it is right that the requirements are directed more toward the sorts of things expected in a timeshare agreement conferring the right to use holiday accommodation, over a contract to provide a financial return. But Part 1 of Schedule 1 does require the disclosure of the *"[e]xact nature and content of the right(s)*". What that disclosure means in practice must be decided on a case by case basis, taking into account the particular agreement requirement under Regulation 12(4) of the Timeshare Regulations that the information set out in Schedule 1 must 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.*"

293. In Mr and Mrs H's agreement, where the exact nature and content of the rights bought include an interest in the sale proceeds of real property, I think the key information needed to enable them to decide whether or not to enter into the contract must include information about the nature of that right. In this case, the matters I have set out in my provisional decision, including 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.

294. BPF has said that this interpretation means that it was not possible for CLC to market FPOC membership without breaching Regulation 14(3). I do not agree with that conclusion. Regulation 14(3) states that "*a trader must not market or sell a proposed timeshare contract…as an investment…*". So 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. But that does not mean the timeshare provider does not need to comply with the requirements of Regulation 12(4) to present key information in the way described above. From reading the Timeshare Regulations in totality, I cannot see anything that prohibits CLC from providing the information I think is required in selling FPOC membership as BPF has argued. In fact, to say there was a prohibition to provide that information would have been in direct conflict with Regulation 12(4) and the consumer protection purpose behind that provision.

295. If I am wrong that there is a requirement to provide this information under Regulation 12(4) and Schedule 1 of the Timeshares Regulations, I think there was anyway a requirement to do so in accordance with good industry practice at the time. CLC were members of the RDO and the RDO Code of Practice was designed to establish "*industry "best practice" standards*". Principle 2.2.3 reads:

> *"RDO Members will in particular ensure…The provision of any necessary assistance to consumer to enable them to make an informed decision."*

296. So it is my view that the Timeshare Regulations required the disclosure of the

information identified in my provisional decision. But if I am wrong about that, I think good industry practice demanded the same and I cannot see anything in the Timeshare Regulations that prohibit that information being given.

Were Mr and Mrs H pressured into taking out FPOC membership?

297. Mr and Mrs H said, through their representatives, that they were pressured into taking out FPOC membership. This was mentioned in the letter that their representative first sent to our service and in the power of attorney where it suggested that the sales meeting lasted over six hours and they were pressured into signing the purchase agreement. In both the original letter of complaint sent to BPF and in the statement produced by Mr and Mrs H to set out their memories of the sale, pressure was not mentioned as a concern. So it was not clear whether this allegation was a central part of their claim. But as it had been raised, I considered the evidence on this point.

298. I thought about the level of pressure that would be needed for me to think it crossed a line from being a 'hard sell' to being improper or undue pressure. Regulation 7 of the CPR is of assistance in setting out the standard for aggressive commercial practices. To be such a practice, it must significantly impair the average consumer's freedom of choice through the use of harassment, coercion or undue influence such as to cause the consumer to buy something they otherwise would not have done. This is a higher bar than simply applying an element of pressure during a sales presentation, and it may be possible that a lower level of pressure might render the underlying credit agreement unfair, given a particular consumer's circumstances.

299. Having considered the available evidence, I did not think there was sufficient evidence for me to say undue pressure was applied to Mr and Mrs H. In particular, the witness statements from the CLC employees, although not specific to Mr and Mrs H's sale, do set out how a normal sale would proceed. They suggest that clients would be taken through various presentations and discussions to see if they were interested in taking out FPOC membership. If they were interested, the contractual documents would be drawn up. It is clear from these descriptions that the sales process was lengthy, but the evidence was that clients were given breaks and time to read the information given to them. Against that Mr and Mrs H have not provided any substantive recollections of what they say was pressured about the sale. So I did not think there was sufficient evidence to say there was a pressured sale or that it is likely a court would find that this led to an unfair relationship with BPF under s.140A CCA.

300. But Mr and Mrs H did say Mrs H did not have her reading glasses, so was not able to read the documentation that they signed and I have been given a copy of her prescription to show she needed corrective lenses. The documents were prepared for Mr and Mrs H to sign after they indicated that they were interested in going ahead with the purchase after the initial sales presentation. So by this point CLC would have presented the main features of the product, including the investment element as set out above. I had already found that Mr and Mrs H were not given all of the information they needed in the written documents, so I did not think anything missed in the sales presentation would have been adequately remedied by them reading the sales documents. It follows I did not think it made a difference in this case whether or not Mrs H was actually able to read the sale documents as the information they needed was not contained within them.

301. It is also the case that Mrs H would have known at the time that she did not

have her glasses with her, and I could not see that this was raised with CLC. In any event, I was satisfied that Mr and Mrs H had an adequate chance to read the documents after they signed them during the fourteen day cancellation period and they did not express any concerns to CLC at that time. So I did not think Mr and Mrs H were prejudiced by Mrs H not being able to read the documents at the time of sale.

302. Neither Mr and Mrs H nor BPF had anything further to say about these issues, so I see no reason to depart from my provisional findings.

Would a court make a finding of unfairness under s.140A CCA?

303. Having considered all of the available evidence and arguments, I did not think CLC provided Mr and Mrs H with the information it needed to under the relevant Regulations, nor under the RDO Code. The lack of clear information meant Mr and Mrs H were unable to properly assess how the investment element of FPOC membership worked in practice by weighing up the potential risks against the potential returns. I also did not think the maintenance fees and other charges were properly explained. I thought Mr and Mrs H needed this information to properly decide whether FPOC membership was right for them, especially in light of the fact that they were paying for their purchase using an interest bearing loan.

304. So I had to consider whether a Court would think the debtor-creditor relationship arising out of the loan, when taken together with the Purchase Agreement, was unfair for the purposes of s.140A CCA.

305. In addition to the general principles set out in the judgment to the *Deutsche Bank v. Khan* case, the judgment in *Plevin* is also of assistance in setting out some of the things a court needs to consider when thinking about what could amount to 'unfairness' for the purposes of the CCA. Some general points were set out in paragraph 10 of the judgment, where Lord Sumption held:

> "*Section 140A is deliberately framed in wide terms with very little in the way of guidance about the criteria for its application, such as is to be found in other provisions of the Act conferring discretionary powers on the courts. It is not possible to state a precise or universal test for its application, which must depend on the court's judgment of all the relevant facts. Some general points may, however, be made. First, what must be unfair is the relationship between the debtor and the creditor. In a case like the present one, where the terms themselves are not intrinsically unfair, this will often be because the relationship is so one-sided as substantially to limit the debtor's ability to choose. Secondly, although the court is concerned with hardship to the debtor, subsection 140A(2) envisages that matters relating to the creditor or the debtor may also be relevant. There may be features of the transaction which operate harshly against the debtor but it does not necessarily follow that the relationship is unfair. These features may be required in order to protect what the court regards as a legitimate interest of the creditor. Thirdly, the alleged unfairness must arise from one of the three categories of cause listed at sub paras (a) to (c). Fourthly, the great majority of relationships between commercial lenders and private borrowers are probably characterised by large differences of financial knowledge and expertise. It is an inherently unequal relationship. But it cannot have been Parliament's intention that the generality of such relationships should be liable to be reopened for that reason alone.*"

306. In *Plevin*, the Court held that the standard of commercial conduct was

something to consider when determining the fairness of any debtor-creditor relationship, and relevant rules can be evidence of what that standard was. But whether a creditor (or someone acting on their behalf) has broken a rule is not determinative to the question asked by s.140A CCA. The Court held, at paragraph 17:

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

307. The *Plevin* case concerned the duty to disclose certain information under the Financial Services Authority's (as it was then) rules for financial firms conducting certain business, in particular the ICOB rules. The Court held, at paragraph 17:

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

308. It is apparent that the question of 'fairness' is broader than simply considering whether a lender (or its statutory agent) has breached a rule or other obligation during the course of relevant dealings. And in paragraph 18, the Court went on to hold:

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

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

310. In my provisional decision I set out my concerns with how the agreement between Mr and Mrs H and CLC was set up to work and with the way in which CLC provided Mr and Mrs H with information about the agreement. In addition to that, I explained that I was of the view that CLC committed a number of breaches of the

relevant regulations and the trading body code of conduct. In particular I thought Mr and Mrs H entered into an agreement to purchase FPOC membership, and the related credit agreement with BPF, without the required level of knowledge about:

- the value of their investment in the allocated property, either at the time of taking out membership or the possible amount they could realise when it was sold;
- the possible ongoing costs of FPOC membership and how they could be levied; and
- the risks of their investment compared to the possible benefits.

311. I thought all of that information would have been important to Mr and Mrs H in deciding whether to purchase FPOC membership. And without the information being provided, I did not think they had sufficient information from which to form a balanced decision. Without better knowledge of the potential ongoing costs and risks alongside the potential resale value, I did not think they were able to determine if FPOC membership would have been value for money for them.

312. I thought this lack of knowledge produced a sufficiently extreme inequality of knowledge and understanding that did give rise to the level of unfairness required under s.140A CCA. When considering the information as a whole, it was clear that the agreement between Mr and Mrs H and CLC was a complex and long-term product, involving significant financial commitments over a period of 16 years. It required ongoing payments to both BPF under the credit agreement and CLC under the FPOC membership agreement, and I did not think Mr and Mrs H were in a position to know what those costs could be.

313. In the *Plevin* judgment, at paragraphs 18 to 20, it was found that the evidence suggested the consumer would have questioned the level of commission had it been disclosed to her, and that any reasonable person would have asked whether the purchase represented good value for money. The fact that the consumer did not have that information made the relationship unfair and, had it been disclosed, that source of unfairness would have been removed. The Court did not make a finding on whether the consumer would have ultimately come to a different purchasing decision. So I considered whether Mr and Mrs H would have questioned their decision to take out FPOC membership if they had known more.

314. Mr and Mrs H have said they were led to believe they were purchasing an investment for themselves. At the time they bought this they were both in their mid-sixties and the 16 year membership term would have taken them to their eighties. In light of that I thought they placed significant weight on the investment element of FPOC membership as it was a real possibility, as indeed happened, that they would not be using the product solely for holidays given their ages. I thought, had CLC properly explained how the investment element worked and how it was dependant on maintaining the membership charges over the course of the membership term, most reasonable consumers would have questioned whether FPOC membership offered good value for money. And in Mr and Mrs H's case, I thought it is more likely than not that they would have questioned whether FPOC membership was right for them.

315. I thought Mr and Mrs H were interested in buying a holiday product as they had already taken out CLC trial membership. But they have been clear when bringing their complaint that they were interested in the investment element of FPOC membership too. And given their circumstances, with full disclosure of the information they needed, I thought they would have concluded buying into a long-

term product with such unclear prospects of return against potentially uncapped charges was not right for them.

316. In light of all of the breaches of the regulations identified above (both individually and collectively), and taking into account Mr and Mrs H's individual circumstances, I thought it is likely that a court would find that rendered the debtor-creditor relationship unfair.

317. Added to that was the unfairness of the contractual terms, by which Mr and Mrs H became bound under the Purchase Agreement. The terms in question concerned the ongoing charges and how they could be imposed and increased over time. These features of the purchase were very important to Mr and Mrs H, given the long-term nature of the contract and the fact that holding onto their investment would be contingent on them meeting the ongoing charges right through until their allocated property was sold. I thought the unfairness of those terms is another reason a court would consider the debtor-creditor relationship was unfair.

BPF's response to my provisional findings

318. BPF referred me to four county court cases as detailed above that it says indicated a court would not find s.140A CCA unfairness. I have carefully considered the cases that BPF has referred to and read the judgments where available. I note that none of those judgments suggest the legal framework, as set out above, is in any way incorrect. I have seen that in the three available judgments, the respective judges did not find that the consumers' claims were made out. In every case brought either to a court or to our service, the evidence available will of course differ. So although I have considered these court judgments, including the way the judges analysed the evidence available to them in course of the trials, I think the actual outcomes are specific to the respective facts of each case.

319. I have also noted that in the two available judgments that deal with the CCA, it was said that even if the evidence had been available to make out the consumers' claims, in one case the judge held they would not find unfairness under s.140A CCA and in the other the judge held they would have found unfairness, but not exercised their discretion under s140B CCA. But neither of those cases concerned the same FPOC agreement that Mr and Mrs H entered into and the claims were based on different facts. So I am not persuaded that these cases mean my provisional findings on this point were wrong.

320. BPF has submitted that even if I found FPOC membership had been sold as an investment, a breach of Regulation 14(3) of the Timeshare Regulations does not automatically give rise to an unfair relationship for the purposes of s.140A CCA. I agree with this, as I explained in detail when setting out the relevant parts of the *Plevin* judgement, in particular paragraph 17. But it was not simply the breach of Regulation 14(3) that led me to conclude a court would likely find an unfair relationship. 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 viewed in isolation. And the same can be said respectively of the breaches of Regulation 12 and the RDO Code, and of the unfair charging terms to which Mr and Mrs H were bound under the Purchase Agreement. Taken in combination, these deficiencies compound one another making the relationship still more unfair.

321. BPF has also submitted that even if it was the case that the FPOC was sold as an investment, that inadequate disclosure was provided and there were unfair contractual terms, there was no s.140A CCA unfair relationship for the following reasons (I will deal with each in turn):

- Mr and Mrs H got what they bargained for – significant holiday rights and investment potential
- None of the terms that I identified as being unfair have been operated against Mr and Mrs H and those terms were subsequentially amended to introduce an independent committee to set the management charge and stopping termination for small defaults in management fees.
- I have adopted a rigid 'but for' causation approach when determining whether certain matters gave rise to unfairness and what remedy should flow. This is wrong in law, see paragraph 214 of *Kerrigan & 11 ors v Elevate Credit International Limited (t/a Sunny) (in administration)* [2020] EWHC 2169 (Comm).
- My conclusion that Mr and Mrs H suffered financially fails to take into account the benefits they obtained, including annual holiday entitlement and a beneficial interest in an allocated property.

322. I do not think it is correct to say Mr and Mrs H 'got what they bargained for'. That would suggest that both parties to the transaction negotiated the terms of the agreement so that they both knew what each sides' obligations and benefits were under that transaction. And for the reasons I have set out above, I do not think they were in a position to make an informed decision about taking out FPOC membership. So I do not think Mr and Mrs H were aware, to the extent required, what they were buying.

323. I accept that if none of the terms that could have been considered unfair (specifically in relation to the management fees) were put into operation against Mr and Mrs H, that is something a court would take into account when deciding unfairness (up to the date the credit agreement ended) or (even thereafter) the appropriate redress. But EM has explained that Mr and Mrs H's membership has not been terminated, rather it has only been suspended. So those terms that I identified as being unfair could still have an adverse effect in the future. And I do not think the changes to the terms, as discussed in detail above, are sufficient to overcome that unfairness.

324. In the judgment BPF has referred to, HHJ Worster (sitting as a judge of the High Court) explained the process a court takes when looking at unfairness. It was held:

> "*Having determined that the relationship is unfair to the debtor, the court will look to relieve that unfairness by making an order or orders under section 140B(1). Whilst HHJ Platts emphasised that his decision as to remedy in Plevin turned on the particular facts of that case and was no precedent, it is a helpful illustration of how the jurisdiction works on well known facts. There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness.*"

That is the approach I have taken when analysing the evidence and determining what I think it is likely a court would do. The focus in such a case is the unfairness of the relationship, especially when determining the remedy to that unfairness under s.140B CCA, rather than working out causation of loss following a breach of a statutory duty.[9]

325. Finally, my provisional decision does take into account the benefits Mr and Mrs H obtained. I have taken that into account when proposing that the remedy makes allowance for the holidays that Mr and Mrs H took using their FPOC membership.

Did Mr and Mrs H suffer a loss?

326. In my provisional decision I said that, had there not been breaches of the various regulations and imbalance of knowledge, it was my view that Mr and Mrs H would not have bought FPOC membership. It follows I thought Mr H would not have borrowed money from BPF to purchase membership, nor would they have paid any ongoing membership fees and costs to CLC.

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

328. I explained that I must also take into account the law, in particular s.140B CCA which gives a court wide ranging powers once a finding of unfairness has been made under s.140A. In particular the court can set aside or alter a credit agreement, order a creditor to repay sums paid by a debtor or order a creditor to do or not do things related to the agreement. I considered the relevant case law on this point, including *Carney v. NM Rothschild & Sons Ltd* [2018] EWHC 958 where HHJ Waksman QC summarised the approach at paragraph 101:

> "*Finally, and as noted above, the Court has a wide discretion as to any relief to be ordered once the unfair relationship has been found. In that regard I adopt paragraph 71 of the Bank's written closing submissions which I did not understand to be challenged. This is that if the court decides to make an order, then it "should reflect and be proportionate to the nature and degree of unfairness which the court has found": Patel v Patel [2010] 1 All ER (Comm) 864 at [79]-[80]. It should not give the Claimant a windfall, but should approximate, as closely as possible, the overall position which would have applied had the matters giving rise to the perceived unfairness not taken place: Link Finance Limited v Wilson [2014] C.T.L.C. 145 at [77]; Chubb & Bruce v Dean.[2013] EWHC 1282 (Ch) at [24]; Nelmes v NRAM Pic [2006] EWCA Civ 491 at [116].*"

329. If Mr and Mrs H had not taken out FPOC membership, Mr H would not have taken out the BPF loan to pay for it. So I thought BPF needed to refund the payments he made, with interest to compensate him for the time he was out of pocket. And Mr and Mrs H would not have paid any annual maintenance fees, so I thought those should be refunded with interest. But Mr and Mrs H did have some

[9] See the judgment in *Kerrigan & 11 ors v Elevate Credit International Limited (t/a Sunny) (in administration)* [2020] EWHC 2169 (Comm), paragraphs 216 to 222

benefit under the agreement, namely the holidays they took. So I thought any sum due needed to be reduced to reflect this.

330. Mr and Mrs H had a CLC trial membership which entitled them to five weeks of holidays. So had they not taken out FPOC membership I think they would have used those five weeks to stay at CLC properties. They received credit for the trial membership when they purchased FPOC membership in the form of a price reduction. That did not mean they got anything back for cancelling their trial membership, but it meant they had to borrow less to take out FPOC membership, but they still had to pay for the trial membership.

331. Mr and Mrs H purchased FPOC membership during a week long holiday that was provided as part of a marketing strategy, so I did not think that week was one of the five weeks provided under the CLC trial membership. I saw that in 2012 they attended another week long marketing holiday, which again I did not think would have formed part of the five weeks. But between June 2012 and August 2016, they used a total of eight weeks of holidays and two nights in a hotel in the UK.

332. The first five weeks of holidays were taken between June 2012 and August 2014 and all at CLC properties, so I thought it was fair to assume they would have been entitled to these weeks under their CLC trial membership. The trial membership was due to expire in February 2014, so some of these weeks fell outside of that period, but I thought it was fair to treat these as weeks they would have been entitled to under the trial membership. I said that as I thought it is most likely that Mr and Mrs H would have used the five weeks of holidays available to them sooner if they had to under the terms of that trial membership.

333. On top of the five weeks taken to August 2014, in 2016 Mr and Mrs H used three weeks in a resort in Mexico as well as two nights in a hotel in London. They attempted to give up their FPOC membership at the end of 2016.

334. If Mr and Mrs H had taken holidays using the trial membership they would not have had to pay any management fees during that time. So I thought it was fair that any membership fees that were paid in 2011 to 2015 should be refunded as I thought they would have been entitled to take the holidays they took in that period without any further charge (they did not take a holiday in 2015).

335. In 2016 they took three weeks of holidays and a hotel stay. This was outside of the trial membership entitlement that I have described above, so I thought it was fair to attribute a cost to the holidays taken in 2016. Based on the evidence available I was unable to accurately work out the open market cost of their 2016 stays, so I invited both Mr and Mrs H and BPF to tell me if they disagreed with the basis I used to work out an approximate cost for these stays.

336. Mr and Mrs H's FPOC membership involved using their 'points' to purchase holidays. The annual cost to Mr and Mrs H of accessing those points was the maintenance fees paid to CLC each year. So, without further representations, I assumed that the cost of taking the holidays in 2016 that they took was the fees paid to CLC in 2016. So I thought any compensation due should reflect the cost of the holidays Mr and Mrs H took in 2016 and I did not intend to tell BPF to refund to Mr and Mrs H the 2016 maintenance fees.

337. My provisional decision was to tell BPF work out compensation in the following way:

(a) Work out the total of the repayments that Mr H made, less the monthly travel savings bonus he and Mrs H received for as long as it was paid ("the net repayments").
(b) Add simple interest to each of the net repayments from the date each one was made until the date BPF settles this complaint. The rate of interest is 8% per annum simple.
(c) Add the maintenance fees paid by Mr and Mrs H between 2011 and 2015 inclusive, plus interest to be calculated in the same way as the interest on the loan repayments.
(d) Pay the balance to Mr H.

BPF's response to my provisional findings

338. BPF disagreed with my proposed remedy. It said:

- When looking at the fairness, rather than a strict 'but for' causative approach to redress, I should conclude that any failures in relation to the charges have not caused significant unfairness to Mr and Mrs H.
- Any failure in providing information was a result of CLC's attempt to comply with Regulation 14(3) of the Timeshare Regulations, and Mr and Mrs H got what they bargained for.
- It is unjust to refund the maintenance fees paid as those fees enabled Mr and Mrs H to reserve holidays above and beyond the small number of weeks they were entitled to under their trial membership.
- The interest I suggested at 8% per annum, simple is an unjustified windfall and exceeds what Mr and Mrs H could have achieved in a deposit account. This is a higher rate than a court would award (although BPF has not provided any specific judgments on this point they wish me to consider or suggested an alternate rate).

339. The first two of these points were considered above, when I looked at BPF's response to my provisional finding on unfairness under s.140A CCA. But in summary, I agree that the correct approach to remedying any unfairness is to look at the nature and degree of that unfairness and deciding what is required to remedy that. I do not think Mr and Mrs H 'got what they bargained for' as I do not think they were in a position to make an informed decision about taking out FPOC membership. In any event, I think the question I must consider is whether CLC's decision to withhold information resulted in unfairness and, if it did, what is the appropriate and proportionate way to remedy that unfairness.

340. I have considered the level of unfairness caused by the increase in charges during the period Mr and Mrs H paid them, what happened after then and what could happen in the future.

341. Initially BPF submitted that I overlooked the consequences of Mr and Mrs H giving up their FPOC membership. It said they gave up a valuable beneficial interest and that should be factored into the fairness assessment, especially as the benefit was not received by BPF. But it later withdrew this point when it was confirmed that the membership was suspended, not surrendered. I note that Mr and Mrs H were not aware their membership had been suspended and BPF has provided sample letters CLC sent out to customers in default, but CLC could not confirm that these letters were sent to Mr and Mrs H.

342. But at the time of my provisional decision, both parties thought the FPOC

membership had been surrendered and my proposed remedy took that into account. EM has since confirmed that the membership was suspended and he set out the outstanding charges that Mr and Mrs H would have had to pay:

Year	Amount (Euros)
2017	1,124
2018	1,150
2019	1,178
2020	1,208
2021	1,308

343. From what I have seen, it appears that Mr and Mrs H are still liable for these charges and still liable for future charges until CLC chooses to terminate their agreement under Rule 5.5.1, albeit that it is not clear that Mr and Mrs H have been chased for payment since 2017. As with the charges Mr and Mrs H did pay, it appears that the charges levied between 2017 and 2021 increased in excess of the Spanish CPI. So there is still a risk that Mr and Mrs H could still be liable for future charges, which for the reasons set out above, I think could lead to further, future unfairness.

344. As it has now been confirmed that Mr and Mrs H's FPOC membership is suspended, to remedy the ongoing unfairness, I think there needs to be an amendment of my proposed remedy from my provisional decision. It appears that if Mr and Mrs H were to pay the outstanding fees and charges they could be reinstated to their FPOC membership and continue to be entitled to a share in the sale of the net sale proceeds of the allocated property. I now think that any payment of compensation should be conditional on Mr and Mrs H agreeing to assign their FPOC rights to BPF (or agreeing to hold those rights for BPF's benefit). Otherwise there is a risk of Mr and Mrs H benefitting from their FPOC rights, despite receiving compensation for having taken out the membership.

345. On the other hand, the fact that FPOC membership is still in existence means there is the risk that CLC could still pursue Mr and Mrs H for the non-payment of fees and charges incurred since 2017. So I think BPF needs to indemnify Mr H against any such continuing liabilities. This would put him in the position he would be in, so far as is possible, if he had not joined the FPOC.

346. I explained this to both Mr H and BFP. Mr H has said he is an agreement with my proposed amendment. BPF has said it stood by the position set out in its previous responses and said it would respond more fully to a second provisional decision, were I to issue one. I do not think I need to issue a second provisional decision to deal only with this point as I have already set out my proposed remedy to BPF and given it the opportunity to comment on my thoughts. So for the reasons set out above, I will make any direction against BPF conditional on Mr and Mrs H assigning their FPOC rights to BPF and, should they do so, I will direct BPF to indemnify Mr H against any liabilities he may have arising out of FPOC membership.

347. In my provisional decision I explained why I assumed that the cost of taking the holidays in 2016, that would have fallen outside of the trial membership, was the fees paid to CLC in 2016. I said this was because I was unable to accurately work out the open market cost of these holidays, but I invited BPF to tell me if it disagreed with his basis of working out costs.

348. In response BPF said "*it is unjust to order the return of maintenance fees paid by Mr and Mrs H: those fees enabled Mr and Mrs H to reserve holidays for 2011 to 2016 above and beyond the small number of weeks they were entitled to under their Trial Membership. It is wrong in principle to look only at the holidays taken rather than the valuable holiday rights provided.*"

349. I disagree that it is wrong to look at the holidays taken rather than the holiday rights Mr and Mrs H had. The purpose of the compensation I direct is to remedy the unfairness found and, in this case, I think that is to put Mr and Mrs H in the position they would have been in, so far as is possible, if they had not taken out FPOC membership. Central to that exercise is comparing what holidays they would have been entitled to take under the trial membership to what benefits they had under FPOC membership, accounting for fees and charges that Mr and Mrs H would not have paid under the trial membership and also for holidays they would not have been entitled to take.

350. As I set out in my provisional decision, I thought Mr and Mrs H would have been entitled to take the holidays they did between 2011 and 2015 under their trial membership without paying any further maintenance fees, so I thought it was fair that those fees and charges be refunded. The holidays taken in 2016 were taken over and above the trial membership entitlement, so it is fair that Mr and Mrs H pay something for them. Although BPF has said it disagrees with what I had said, it has not provided an alternate basis to work out the nominal cost of the holidays in 2016. Without a more specific submission to consider, I see no reason to depart from my provisional decision on this point.

351. I have also considered the appropriate rate of interest to award to Mr H. I accept that 8% simple is likely to be more than he would have earned in most deposit accounts during the period in question, but BPF has not explained why it thinks interest should be awarded at a rate available in a deposit account – there is no evidence to suggest that is what Mr H would have done with any money.

352. 8% per annum simple is the rate of interest this service normally awards when directing a business pays compensation. That is the current interest rate on judgment debts and Parliament has not seen fit to change it. In addition, that rate covers a range of possible things that a consumer could have done with money had they not been out of pocket. For example, if a consumer had to borrow money using a loan or credit card, it is likely they would have paid a higher rate of interest, but if they kept their monies in a deposit account it is likely they would have earned a lower rate. Often it is not possible to point to precisely what a given consumer would have done with their money, and so I think this rate is fair and I will not change it from my provisional decision.

353. In conclusion, I direct BPF work out compensation in the following way:

(a) Work out the total of the repayments that Mr H made, less the monthly travel savings bonus he and Mrs H received for as long as it was paid ("the net repayments").
(b) Add simple interest to each of the net repayments from the date each one was made until the date BPF settles this complaint. The rate of interest is 8% per annum simple[10].
(c) Add the maintenance fees paid by Mr and Mrs H between 2011 and

[10] HM Revenue & Customs may require BPF to take off tax from this interest. If that is the case, BPF must give Mr H a certificate setting out how much tax has been paid on his behalf.

2015 inclusive, plus interest to be calculated in the same way as the interest on the loan repayments.

(d) Pay the balance to Mr H.

354. I direct BFP to indemnify Mr H against any continuing liabilities he may have to CLC arising out of his FPOC membership, whether they be current or future liabilities that have not yet fallen due.

355. But the directions I have set out in the above two paragraphs only need take effect if Mr and Mrs H assign their rights under the FPOC membership to BPF (or agree to hold those rights for BPF's benefit if it is not possible to assign them). If BPF has a specific form of wording that it wishes to use to effect the assignment (or for Mr and Mrs H to hold the rights on its behalf), I direct that BPF provide that wording to Mr and Mrs H. Should Mr and Mrs H wish to take legal advice on the effect of that wording, I direct BPF to pay for any reasonable costs of that advice.

My final decision

I uphold Mr H's complaint against Clydesdale Financial Services Limited and direct it to pay compensation and indemnify Mr H as set out above.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr H to accept or reject my decision before 3 November 2021.

Mark Hutchings
Ombudsman