

THE FOS FILES – WEEK 4

The Anatomy of a Flawed Ombudsman Decision

When acknowledged regulatory breaches somehow cease to matter

A legal and regulatory commentary on the interpretation and practical application of Regulation 14(3) and section 140A within the Financial Ombudsman framework.

Certain evidential materials referred to within this commentary, including prior Ombudsman decisions and supplier training documentation, are held and available for review upon reasonable request.

There are weak decisions.

There are controversial decisions.

And then there are decisions which reveal something more troubling: a framework capable of acknowledging possible unlawful conduct while simultaneously depriving it of meaningful consequence.

A recent Financial Ombudsman Service decision issued by Ombudsman Richard Wood falls into that category.

The decision concerns the sale of a fractional ownership timeshare financed by Shawbrook Bank. It is detailed, legally literate and carefully structured. It engages extensively with section 140A of the Consumer Credit Act 1974, Regulation 14(3) of the Timeshare Regulations 2010, and the developing authorities concerning investment-style timeshare sales.

It also relies heavily upon the judgment of Mrs Justice Collins Rice in *Shawbrook & BPF v FOS* — the leading High Court authority concerning fractional ownership complaints and the interpretation of Regulation 14(3).

That the decision comes from a legally trained former barrister does not make the criticism personal. It sharpens the analytical question.

Yet despite that legal architecture, the reasoning ultimately arrives at a striking proposition:

that even where unlawful investment-style marketing may have occurred, the resulting debtor-creditor relationship may nevertheless remain fair unless the consumer can retrospectively demonstrate that the prohibited conduct materially motivated their purchasing decision.

That proposition deserves scrutiny.

Because it risks transforming a statutory prohibition designed to prevent investment-style inducement into a hindsight exercise in psychological reconstruction.

That is a materially different thing.

The Statutory Context

Regulation 14(3) prohibits the marketing or sale of a regulated timeshare product “as an investment.”

Its importance has already been recognised judicially.

In *Shawbrook & BPF v FOS*, Mrs Justice Collins Rice described Regulation 14(3) as the:

“Principal legal consumer-protection control”

governing the sale of fractional ownership products.

That observation matters.

The regulation was plainly intended to address a recognised commercial danger: that consumers might be induced into long-term liabilities through representations concerning:

- future value;
- resale potential;
- retirement benefit;
- inheritance;
- or financial return.

The prohibition is therefore not merely technical in character.

It is a substantive consumer-protection safeguard.

The Ombudsman’s Findings

What makes the present decision notable is the extent to which the ombudsman accepts the possibility that the prohibition may have been breached.

The decision states:

“I accept that it’s equally possible that Fractional Club membership was marketed and sold to Ms O as an investment in breach of regulation 14(3).”

The ombudsman further accepts that:

- the sales process “left open the possibility” that the product was positioned as an investment;
- the product contained an investment element;
- the consumer acquired a share linked to real property;
- and the product offered “the prospect of a financial return.”

These are substantial findings.

Importantly, the decision does not reject the possibility of unlawful investment-style marketing. Nor does it suggest the regulatory concerns advanced by the complainant were fanciful or unsupported.

Instead, the reasoning proceeds on a different basis.

The ombudsman concludes that, even if such a breach occurred, he was not persuaded that the prospect of financial gain was an “important and motivating factor” in the consumer’s decision to purchase the product.

It is this aspect of the reasoning which creates the central analytical difficulty.

Retrospective Motivational Analysis

The essential question raised by the decision is whether Regulation 14(3) is intended:

- to prevent investment-style inducement at the point of sale;
or:
- to require consumers, years later, to prove the precise subjective influence such representations had upon their decision-making.

The distinction matters.

The apparent logic of the decision is that a breach of Regulation 14(3) is insufficient to render the relationship unfair unless the complainant can demonstrate that the prohibited conduct materially affected their purchasing decision.

The difficulty with that approach is that it places considerable weight upon retrospective evidential reconstruction in circumstances where:

- sales occurred many years earlier;
- memories have faded;
- records are incomplete;

- and the supplier’s own sales process is acknowledged to have potentially involved investment-style positioning.

One of the central purposes of consumer-protection legislation is to address precisely these forms of imbalance.

None of this is to suggest that causation or materiality are irrelevant. Authorities such as *Carney* and *Kerrigan* plainly establish that section 140A requires a broad evaluative assessment of fairness.

But there remains an important distinction between:

- recognising that unfairness analysis is fact-sensitive;
and:
- reducing the practical significance of a statutory prohibition to a question of whether the consumer can later prove the exact psychological effect of the prohibited conduct.

The present decision moves uncomfortably close to the latter.

The Refusal to Make Findings

Another notable feature of the decision is the repeated conclusion that formal findings were “not necessary.”

Despite accepting the possibility of unlawful investment-style marketing, the ombudsman declines to determine whether a breach of Regulation 14(3) actually occurred.

The decision states:

“Whether or not there was a breach... is not ultimately determinative of the outcome.”

That approach itself invites scrutiny.

Where the existence of prohibited representations and regulatory compliance form part of the wider section 140A fairness analysis, there is a legitimate argument that declining to determine whether a breach occurred weakens the analytical foundation of the decision itself.

This is particularly so where the possible breach concerns what Collins Rice J described as the “principal legal consumer-protection control” applicable to the product.

The concern is not merely procedural.

It is whether acknowledged regulatory concerns become diluted by being left unresolved.

Indeed, the decision creates the unusual position whereby:

- a possible breach is acknowledged;
- the regulatory importance of the prohibition is accepted;
- the commercial reality of investment-style positioning is recognised;
- yet the question of breach itself becomes functionally secondary.

That analytical sequence is difficult to ignore.

Evidential Inconsistency

The analytical difficulties raised by the present decision become materially sharper when earlier Ombudsman determinations involving the same supplier and substantially similar allegations are examined in detail.

In a separate fractional ownership complaint, Ombudsman Fiona Mallinson relied extensively upon internal sales training material provided by the supplier itself in order to assess how the product was intended to be positioned and sold to consumers in practice.

That material was not treated as peripheral.

Nor was it approached as speculative or anecdotal evidence of isolated sales conduct.

Rather, it was treated as probative of the supplier's wider sales methodology and structured presentation framework.

The training material analysed within that decision contained repeated references to:

- “ownership of bricks and mortar”;
- “building equity”;
- “return at the end of that period”;
- consumers “getting money back”;
- maximising “return”;
- and direct comparisons between “renting” and “owning”.

Those concepts are not commercially neutral.

Nor are they easily divorced from the very type of investment-style positioning Regulation 14(3) was enacted to prevent.

Indeed, the significance of the material within the earlier Ombudsman decision is unmistakable.

Having reviewed the training documentation alongside the surrounding evidence, Ombudsman Mallinson concluded that the supplier's sales representatives were likely to have led consumers to believe that membership:

“Was an investment that may lead to a financial gain.”

That conclusion is important for present purposes for several reasons.

First, it demonstrates that the Ombudsman Service itself previously regarded internal sales training material as highly relevant evidence when determining whether fractional ownership products had been marketed in a manner inconsistent with Regulation 14(3).

Second, it illustrates recognition within the Ombudsman framework that systemic sales methodology may carry substantial evidential significance beyond the recollection of any individual complainant years after the relevant sales process occurred.

Third, it materially undermines any suggestion that concerns regarding investment-style positioning are merely abstract or theoretical in nature.

The present decision repeatedly acknowledges the possibility that unlawful investment-style marketing may have occurred. It accepts that the product offered the prospect of financial return, that investment-style positioning may have formed part of the sales process, and that Regulation 14(3) may potentially have been breached.

Yet despite those acknowledgements, the practical significance of those matters is ultimately reduced on the basis that the complainant could not sufficiently establish the subjective motivational impact of the prohibited conduct upon her decision-making.

That contrast is difficult to ignore.

Particularly where earlier Ombudsman reasoning treated systemic training material itself as capable of illuminating how the product was intended to be sold to consumers irrespective of the precision of later recollection.

The issue is not whether every complaint must inevitably produce the same outcome.

Different evidential matrices may properly lead to different conclusions.

Nor is the concern merely that different ombudsmen may place different weight upon particular pieces of evidence.

The more difficult question is whether evidential material previously treated by the Ombudsman Service itself as probative of systemic investment-style marketing is now being afforded materially diminished analytical significance within later section 140A assessments.

That question becomes sharper where later decisions simultaneously:

- acknowledge the possibility of regulatory breach;
- accept the existence of investment-style positioning;
- yet nevertheless conclude that such matters ultimately carry limited consequence within the fairness analysis itself.

At that stage, the issue ceases to concern disagreement over outcome alone.

It becomes a question of evidential consistency, methodological coherence and the practical operation of consumer-protection safeguards within the Ombudsman framework itself.

Because consumer-protection legislation does not lose force only through repeal or judicial reversal.

Its practical effect may also be narrowed incrementally where acknowledged regulatory concerns repeatedly fail to translate into meaningful consequence in application.

And where materially similar evidence appears, over time, to attract materially different analytical treatment, scrutiny of the underlying methodology becomes not merely legitimate, but necessary.

The Ombudsman's Investigative Function

These issues also raise a broader question concerning the statutory role of the Financial Ombudsman Service itself.

Under the framework established by the Financial Services and Markets Act 2000, complaints are to be determined by reference to what is “fair and reasonable in all the circumstances of the case.”

That role necessarily carries with it an investigative responsibility.

Particularly in historic disputes involving alleged regulatory breach and oral sales practices, the integrity of the process depends upon the fair and consistent evaluation of relevant evidential material capable of illuminating how products were marketed and sold in practice.

This is especially important where:

- direct recollection may be incomplete;
- consumers face inherent evidential disadvantage;
- and internal sales methodology may only be ascertainable through wider documentary material, including training documentation and structured sales guidance.

Against that background, questions naturally arise where evidential material previously relied upon within the Ombudsman system itself appears to assume materially reduced significance in later complaints involving the same supplier, product structure and category of alleged misconduct.

The issue is not whether every complaint must produce the same outcome.

The issue is whether the investigative and evaluative process remains sufficiently robust, consistent and genuinely case-specific to maintain confidence that all relevant evidence capable of bearing upon the fairness of the relationship has been properly engaged with.

No Ombudsman system exercising substantial public authority can remain insulated from scrutiny on questions of evidential consistency, investigative rigor and statutory purpose.

Nor should it.

The Emergence of a Wider Pattern

Based upon a review of a growing body of fractional ownership decisions, materially similar reasoning appears increasingly visible across a substantial number of complaints determined within the Financial Ombudsman Service.

Those decisions repeatedly involve:

- Regulation 14(3);
- investment-style marketing allegations;
- retrospective inducement analysis;
- and the treatment of materiality within section 140A.

A recurring analytical structure is becoming difficult to ignore.

Care must plainly be taken before drawing broader conclusions from repeated adjudicative outcomes alone.

Similar facts may properly produce similar reasoning, and consistency of approach is not merely legitimate but often desirable within any system exercising substantial adjudicative responsibility.

However, where materially similar analytical structures repeatedly emerge across highly fact-sensitive disputes — particularly in circumstances involving acknowledged regulatory concerns and materially similar evidential frameworks — scrutiny of the underlying methodology becomes both legitimate and necessary.

That structure broadly involves:

- acknowledging the possibility of regulatory breach;
- accepting that investment-style representations may have occurred;
- recognising that products contained investment elements or the prospect of financial return;
- yet nevertheless concluding that the resulting relationship remained fair because the complainant could not sufficiently establish the subjective material effect of those matters upon their purchasing decision.

The concern is not merely consistency of reasoning.

It is whether repeated analytical structures are beginning, in practice, to narrow the range of outcomes realistically capable of emerging within Regulation 14(3) complaints before the individual facts of each case have been fully evaluated.

The Ombudsman system derives its authority not from strict precedent, but from public confidence in the quality, independence and fairness of its decision-making processes.

In any adjudicative system, consistency promotes confidence. But excessive analytical uniformity in highly fact-sensitive disputes may sometimes prompt the opposite concern.

That concern becomes sharper where decisions repeatedly:

- avoid determining whether breaches occurred;
- minimise the practical significance of acknowledged regulatory concerns;
- and focus instead upon retrospective proof of subjective inducement many years after the relevant sales process.

No adjudicative system is strengthened by avoiding scrutiny of its methodology.

Indeed, in systems exercising significant public authority, rigorous scrutiny is one of the mechanisms by which confidence is maintained.

Section 140A and the Nature of Fairness

It is important to recognise that the ombudsman is correct in one important respect.

Section 140A does not create automatic liability merely because a regulatory breach is identified.

Nor does *Plevin* suggest otherwise.

The authorities make clear that unfairness requires an evaluative judgment taking account of all relevant circumstances.

However, it does not necessarily follow that acknowledged breaches of a core consumer-protection prohibition should carry limited practical weight unless accompanied by highly specific evidence of subjective inducement.

That is where the present reasoning becomes difficult.

Because a prohibition designed to prevent investment-style inducement appears, in practice, to have been transformed into a requirement that the consumer later prove the precise psychological effect of the prohibited conduct upon their purchasing decision.

Consumer-protection legislation does not lose significance through formal repeal alone.

Its practical force may also be diminished incrementally, through repeated interpretive approaches which acknowledge regulatory concern in principle while systematically limiting its consequence in application.

If acknowledged regulatory concerns repeatedly fail to produce meaningful consequence within the fairness analysis itself, an obvious question arises as to **whether the practical operation of the framework remains fully aligned with the protective purpose Parliament intended Regulation 14(3) to serve.**

Conclusion

This decision matters beyond the facts of the individual complaint.

It matters because it illustrates a growing tension within the modern Ombudsman framework between:

- statutory consumer protection;
- evidential reconstruction;
- and the practical operation of section 140A fairness analysis.

The ombudsman accepts the possibility of unlawful investment-style marketing. He accepts the possibility of regulatory breach. He accepts that the product offered the prospect of financial return and may have been positioned accordingly.

Yet those matters ultimately carry limited consequence because the complainant could not sufficiently establish the subjective material effect of the prohibited conduct upon her purchasing decision many years later.

That reasoning may ultimately prove to be the most significant aspect of the decision.

Because Regulation 14(3) was enacted to prevent investment-style inducement from occurring in the first place. It was not designed merely to provide consumers with a prohibition which, years later, they may struggle evidentially to rely upon.

If the practical effect of the current analytical approach is that acknowledged regulatory concerns repeatedly become secondary to retrospective proof of subjective motivation, then an important question inevitably arises as to whether the **protective purpose of the regulation is being materially narrowed in application.**

That question extends well beyond this individual complaint.

And given the growing body of materially similar decisions now emerging within the Ombudsman system, it is unlikely to remain confined there.