

THE FOS FILES. Part 2.

Inside the Financial Ombudsman Service — Decisions, Patterns, and Questions of Consistency.

Case Overview.

Ombudsman: Fiona Mallinson

Claim Type: Consumer Credit Claim

Lenders: Shawbrook Bank / Hitachi (Novuna Personal Finance)

Supplier: Club La Costa

About this Featured Article.

Inconsistent Application of Systemic Evidence by the Financial Ombudsman Service

This article forms part of The FOS Files — an ongoing investigative series examining decision-making within the Financial Ombudsman Service and the consistency with which consumer credit complaints are assessed.

The case explored here centres on complaints arising from the sale of timeshare products by Club La Costa, financed through major lenders including Shawbrook Bank and Hitachi Consumer Finance (now trading as Novuna).

At its core lies a simple but significant question:

Are similar cases being decided in fundamentally different ways — and if so, why?

Both complaints examined involve:

- The same product
- The same supplier
- The same sales company and location
- And the same legal framework

Yet the outcomes diverge.

One consumer succeeds.

Another does not.

This article examines whether that divergence reflects legitimate case-by-case assessment — or a deeper inconsistency in how systemic sales evidence is applied.

Across The FOS Files, each case is analysed on its own merits. But taken together, they begin to reveal patterns that raise broader questions about:

- Consistency

- Evidential standards
- And the delivery of fairness within the Ombudsman system

This is one case.

The question is how many more follow the same pattern.

Case Overview.

“Same Product, Same Sales Pitch — So Why Opposite Decisions?”

Questions grow over consistency at the Financial Ombudsman Service.

- Two consumers.
- The same timeshare product.
- The same sales company.
- The same location.
- The same legal framework.

Yet within weeks, the Financial Ombudsman Service reached completely opposite conclusions.

One complaint was upheld.

The other was rejected.

At first glance, this might appear to be routine case-by-case decision-making. But a closer examination raises a more troubling question:

Is the Ombudsman applying consistent standards — or quietly shifting its approach?

A Tale of Two Decisions.

Both cases concern the sale of “Fractional Club” timeshare products — a model already scrutinised in the High Court in:

R (Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd.

In that case, Mrs Justice Collins Rice highlighted the inherent difficulty in marketing such products without them appearing to consumers as investments — noting they may “taste and feel like an investment”.

That observation goes to the heart of these complaints.

Because in one Ombudsman decision, the sales process is found to have crossed the line.

In the other, it is not.

The Crucial Difference — or Is There One?

In the upheld complaint, the Ombudsman relies heavily on internal sales training materials.

These show that sales staff were trained to emphasise:

- “ownership”
- “building equity”
- “getting money back”
- “returns at the end”

From this, the Ombudsman concludes the product was effectively sold as an investment — in breach of regulations.

No detailed recollection from the consumer was required.

Instead, the decision rests on a broader conclusion:

- **That this is how the product was generally sold.**

But in the rejected case — involving the same product, same sales company, and same location — the approach changes.

- **Here, the absence of detailed, specific recollection becomes decisive.**

The complaint fails because the consumer cannot precisely describe what was said during the sales presentation.

The systemic evidence?

Barely applied.

A Question of Method — Not Law.

The legal test is identical in both cases.

Both rely on the Consumer Credit Act and the same regulatory framework.

Both are assessed on the “balance of probabilities”.

And under DISP 3.6.4R, the Ombudsman is required to consider all the circumstances of the case — including how products are sold in practice.

So, the question is not whether the law has changed.

It hasn't.

The question is:

Why the same evidence is treated as decisive in one case — and insufficient in another.

The Inconsistency at the Core.

- If sales staff were trained to present the product in a particular way...
- If those methods were standardised...
- If both consumers were exposed to the same environment...

Then logically:

- What happened in one case is likely to have happened in the other.

Yet that inference is only drawn once.

In the other case, the burden shifts back onto the consumer — years after the event — to recall the detail of a scripted sales pitch.

Why This Matters.

The Financial Ombudsman Service is not a court — but it is expected to act fairly, consistently, and transparently.

That expectation is built into its own rules.

When similar cases produce opposite outcomes, confidence in the system begins to erode.

Because outcomes should not depend on:

- How well a consumer remembers a sales script.
- Or how their evidence is framed years later.
- Especially where there is evidence of a repeatable, standardised sales process.

A Shift Behind the Scenes?

There is no explicit statement of a policy change.

But the pattern raises a legitimate question:

- Has the evidential threshold quietly shifted?
- In earlier decisions, systemic sales practices appear sufficient to establish what “likely happened”.
- In others, that same approach is absent — replaced by a demand for detailed individual proof.

For consumers, the difference is decisive.

For lenders, the implications are significant.

The Bigger Picture.

At stake is more than two complaints.

It is the integrity of a system designed to deliver fair and consistent outcomes.

If identical sales practices can lead to opposite conclusions, the issue is no longer individual — it is structural.

And that invites a broader question:

Is the Ombudsman still applying a stable and consistent approach — or responding to wider pressures shaping its decisions?

What Comes Next.

The detailed legal analysis [below] accompanying this article examines these decisions in depth.

It identifies:

- a failure to apply a consistent evidential methodology
- tension with High Court observations
- and potential issues of rationality and consistency in decision-making

These are not minor technical points.

They go to the heart of how fairness is delivered — or denied — in practice.

Final Thought.

Two cases.

Same facts.

Different outcomes.

At some point, coincidence stops being a convincing explanation.

And the question becomes unavoidable:

If this is happening here — how often is it happening elsewhere?

Detailed legal analysis

Inconsistent Application of Systemic Sales Evidence in Timeshare Finance Complaints

1. Executive Summary

This paper examines two provisional decisions issued by the same Ombudsman within a short period, concerning:

- the same supplier
- the same product (“Fractional Club”)
- the same regulatory prohibition (Regulation 14(3), Timeshare Regulations 2010)
- the same statutory framework (Sections 75 and 140A Consumer Credit Act 1974)
- the same sales company operating the sales process
- the same physical sales location at which the transactions took place

Despite these shared features, the outcomes diverge:

- one complaint is upheld
- the other is rejected

The divergence arises not from differing legal principles, but from inconsistent treatment of systemic sales evidence.

2. Legal Framework

Both decisions correctly identify the governing principles:

- Section 140A Consumer Credit Act 1974 (CCA): fairness assessed having regard to all the circumstances
- Section 56 CCA: the supplier acts as a statutory agent of the lender in pre-contractual negotiations
- Regulation 14(3), Timeshare Regulations 2010: prohibition on marketing timeshare products as investments

Determinations are made on the balance of probabilities

The Ombudsman also recognises that:

- supplier conduct during sales presentations is attributable to the lender
- unfairness may arise from pre-contractual representations

These principles are applied in both decisions.

2.1 Regulatory Requirement: Consistency of Approach

Under DISP 3.6.4R, the Ombudsman is required to determine complaints by reference to what is fair and reasonable in all the circumstances of the case.

Where those circumstances include:

- standardised sales processes

- training materials
- and systemic sales practices

such factors form part of the evidential landscape and must be consistently evaluated across materially similar cases.

In addition, DISP 3.5.2R reflects the broader expectation that complaints are handled fairly and consistently.

Divergent treatment of the same category of evidence raises a question as to whether these requirements are being applied in a coherent and consistent manner.

3. High Court Context

In R (Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd,

Mrs Justice Collins Rice observed:

At [77]–[78]: the practical difficulty of marketing fractional ownership products without invoking investment concepts

At [99]–[100]: that such products may “taste and feel like an investment” to consumers

The Court’s analysis indicates that the risk of investment-style presentation is inherent and systemic, rather than dependent solely on individual interactions.

This reinforces that:

the issue is not confined to individual recollection, but arises from the structure and presentation of the product itself

4. Findings in the Upheld Decision

In the upheld case, the Ombudsman makes the following key findings:

4.1 Acceptance of Standardised Sales Process

The Ombudsman relies on supplier training material as:

“Reasonably indicative of... how the sales representatives would have framed [the presentation]”

This establishes that:

- sales were conducted using structured and repeatable methods
- training material reflects real-world customer interactions

4.2 Systemic Nature of Representations

The Ombudsman identifies consistent sales messaging, including:

- “ownership of bricks and mortar”
- “building equity”
- “return at the end”
- “get money back”

These are treated not as isolated statements, but as elements of a coherent and repeatable sales model.

4.3 Inference Drawn

On that basis, the Ombudsman concludes that:

the product was marketed and/or sold as an investment, in breach of Regulation 14(3)

Importantly:

this conclusion is reached without requiring precise recall of wording by the consumer

the finding is based on systemic inference derived from training and practice

4.4 Additional Common Features of the Transactions

It is also material that both complaints arise from:

- the same sales company acting as the supplier’s representative
- the same sales location at which the presentations were conducted

These factors reinforce that the sales process was:

not merely similar in principle, but

operationally identical in practice, involving:

- the same environment
- the same presentation structure
- and the same trained personnel or team

Implication

Where:

- the same product
- is sold by the same sales company
- at the same location
- using standardised training materials

it becomes increasingly difficult to distinguish between cases based on:

- what is said to have occurred during the sales presentation.

Evidential Consequence

These shared features support the inference that:

the representations made to consumers were likely to have been materially the same across transactions.

5. Findings in the Rejected Decision

In the rejected case, the Ombudsman:

accepts it is “possible” that the product was marketed as an investment

acknowledges the same product characteristics (including asset-backed features and share in proceeds)

However, the complaint is rejected on the basis that:

- witness evidence lacks sufficient “detail” or “context”
- the consumer has not demonstrated with sufficient specificity what was said

No equivalent consideration is given to the supplier’s training materials or systemic sales approach, despite their acceptance in other decisions concerning the same product.

6. Core Analytical Inconsistency

The divergence arises in the treatment of systemic evidence.

6.1 Principle Established (Upheld Case)

Training materials and structured sales frameworks are reliable indicators of what was likely said to consumers.

6.2 Principle Applied (Rejected Case)

In the absence of detailed individual recollection, it cannot be established what was said.

6.3 Logical Conflict

These positions cannot comfortably coexist.

If:

- the supplier operated a standardised sales process,
- training materials are accepted as indicative of actual sales conduct,
- the same sales company delivered that process, and
- the same location was used for the presentations

then:

it is logically inconsistent to require materially different evidential standards across consumers exposed to that same process.

7. Evidential Standard and the Balance of Probabilities

Both decisions apply the civil standard:

- what is more likely than not

Where a supplier:

- trains representatives using consistent messaging
- deploys structured presentations
- emphasises financial return and ownership
- delivers those presentations through the same sales company at the same location

it follows that:

it is more likely than not that such representations were made across sales generally.

Requiring:

- detailed, verbatim recollection from individual consumers

is difficult to reconcile with:

the acceptance of systemic sales methodology.

8. Consequences of Divergent Approach

The current approach produces:

- Outcome variability between materially similar cases
- A shifting evidential burden:
- sometimes satisfied by systemic inference
- sometimes requiring direct individual proof

This introduces:

- unpredictability in the application of Section 140A
- potential inequity between consumers subject to identical practices

Such variability risks undermining confidence in the predictability and coherence of outcomes within the scheme.

8.1 Predictability and Fairness

A scheme which applies materially different evidential standards to consumers exposed to the same sales process risks producing outcomes that depend less on underlying facts and more on the presentation of evidence.

This raises a question as to whether the scheme delivers outcomes that are not only fair, but consistently fair.

9. Central Issue

The issue is not whether:

- the product could be presented as an investment
- or whether such presentations occurred

Both are, to an extent, acknowledged.

The issue is:

whether systemic evidence of how a product was sold is being applied consistently when determining what is more likely than not to have occurred.

10. Conclusion

The divergence between the two decisions arises from:

- not the legal framework
- not the nature of the product
- not the regulatory context

but from:

- inconsistent weighting of systemic sales evidence

Where one decision:

- treats training materials as determinative of likely conduct

and the other:

- treats individual recollection as decisive

the resulting outcomes cannot be reconciled without addressing that inconsistency.

Supplemental Legal Analysis

Consistency, Rationality, and Evidential Methodology.

11. High Court Authority – Pinpoint Citations

Further support is found in

R (Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd.

Mrs Justice Collins Rice observed:

At [77]–[78]:

the inherent difficulty in marketing fractional ownership products without engaging investment concepts

At [99]–[100]:

such products may “taste and feel like an investment” due to:

- property-linked returns
- deferred financial benefit
- expectation of “something back”

Relevance

These findings support the conclusion that:

systemic sales evidence is central to determining how such products were likely presented.

12. Public Law Principles – Consistency and Rationality

Although Ombudsman decisions are not binding precedents, they must comply with public law standards of rationality and consistency.

The relevant principle arises from

Associated Provincial Picture Houses Ltd v Wednesbury Corporation.

12.1 Wednesbury Rationality

A decision may be unlawful if it:

lacks a coherent reasoning process, or

applies standards inconsistently

12.2 Application

In these decisions:

systemic evidence is treated as sufficient in one case

but insufficient in another materially identical context

This creates a risk that:

the evidential threshold is not applied consistently across comparable cases.

13. Failure to Apply a Consistent Evidential Methodology

The issue can be characterised as:

a failure to apply a consistent evidential methodology

13.1 Upheld Decision

systemic sales evidence → primary basis of inference

13.2 Rejected Decision

individual recollection → decisive

systemic evidence → limited or no weight

13.3 Legal Consequence

Where:

materially identical factual matrices

are assessed using different evidential approaches

there is a risk that:

conclusions are not derived from a stable and consistently applied framework.

14. Final Observational Note

This analysis does not challenge:

- the legal framework applied
- or the statutory test

It identifies a narrower issue:

- whether evidential principles are being applied consistently across materially similar cases.

Where they are not:

- the integrity and predictability of the decision-making process may be called into question.

15. Consumer Detriment, Delay, and Systemic Risk.

The issues identified in this analysis are not merely technical or academic. They have direct and significant consequences for consumers. Many of the complaints considered by the Financial Ombudsman Service in this area relate to transactions that occurred more than a decade ago.

It is not uncommon for consumers to have waited several years, in some cases approaching eight years, for a final determination.

During that period: consumers remain liable for disputed credit agreements interest and financial obligations may continue uncertainty persists as to their legal and financial position

15.1 Impact of Inconsistent Outcomes.

Where: materially similar cases involving the same product, supplier, sales company, and location produce different outcomes due to differing evidential approaches, the effect is not neutral.

It creates a situation in which: consumers in comparable positions may receive materially different outcomes based not on underlying facts, but on how evidence is interpreted or weighted.

15.2 Compounding Effect of Delay.

Delay amplifies this issue. The longer a consumer waits: the harder it becomes to recall detailed evidence the greater the reliance on systemic inference should logically be the more significant the financial and personal impact of the decision

In such circumstances, a shift away from systemic evidence towards detailed individual recollection places an increasing burden on consumers that may be difficult, if not impossible, to meet.

15.3 Potential Wider Implications

The analysis of these two decisions raises a broader and more pressing question: Is this an isolated inconsistency, or indicative of a wider pattern? Where: systemic sales practices are known to exist similar complaints arise from the same product and supplier, and evidential approaches appear to vary there is a real possibility that: a larger number of consumers may be affected by the same divergence in approach.

This gives rise to a concern that: complaints may not always be assessed using a consistent evidential framework and that some consumers may leave the process without having had what they perceive to be a full or consistent evaluation of their case

15.4 Confidence in the Scheme

The Financial Ombudsman Service exists to provide: an accessible fair and consistent alternative to litigation Where outcomes appear inconsistent in materially similar cases,

particularly after prolonged delays, there is a risk that: confidence in the fairness and reliability of the scheme may be undermined.

15.5 Final Observation

This analysis does not seek to attribute motive. However, it highlights a structural concern: where prolonged timelines are combined with variable evidential approaches, the resulting decisions may give rise to a perception that outcomes are not being determined by a stable and consistently applied framework.

For consumers who have waited many years for resolution, the expectation is not simply a decision, but a decision that is: consistent reasoned and demonstrably fair when compared with similar cases.

After years of waiting, consumers are entitled not just to an answer, but to an answer that is consistent with how others in the same position have been treated.