Complaints Commissioner

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FINAL DECISION

1. Background

1.1 Under Paragraphs 7 and 8 of Schedule 1 to the Financial Services and Markets Act 2000 (the Act), the Financial Services Authority (FSA) is required to maintain a complaints scheme for the investigation of complaints arising in connection with the exercise of, or failure to exercise, any of its functions under the Act other than its legislative function. The complaints scheme must be designed so that, as far as reasonably practicable, complaints are investigated quickly.

1.2 The implication of that provision is that the design of the scheme is fit for purpose, which I believe it to be, and has, so far as is practicable, features such that the complaints design should not impair or slow down the entire process of complaints investigation. Finally, the complaints scheme provides that an independent person is appointed as Complaints Commissioner with the task of investigating those complaints made about the way the FSA has itself carried out its own investigation of a complaint. I currently hold that role.

1.3 The complaints scheme goes onto provide that there are two distinct stages which I hereafter refer to as Stage One and Stage Two.

1.4 Stage One is the investigation carried out by the FSA itself and Stage Two is the investigation that I carry out when the complainant is dissatisfied with the outcome of Stage One or where the FSA has refused to carry out the Stage One process.

1.5 The Stage Two investigations I undertake are conducted under the rules of the complaints scheme (Complaints against the FSA - known as COAF). I have no power to enforce any decision or action upon the FSA. My power is limited to setting out my position on a complaint based on its merits and then, if I deem it necessary, I can make recommendations to the FSA. Such recommendations are not binding on the FSA and the FSA is at liberty not to accept them. It is rare for the FSA not to accept any recommendation that I may make. Full details of the complaints scheme can be found on the internet at the following website; http://fsahandbook.info/FSA/html/handbook/COAF.

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2. The Complaint

2.1 Under paragraph 1.4.1 of COAF the complaints scheme provides a way of reviewing the FSA's actions and, if necessary addressing allegations of misconduct in the manner on which it has carried out, or has failed to carry out, its regulatory functions. The complainant is unhappy with the FSA's actions and the outcome of the FSA's own investigation into his complaint. I have been asked to review the FSA's actions in accordance with the rules of the complaints scheme.

2.2 I understand the complaint relates to the following issues:

- The complainant had sought financial advice from Firm A, a firm of financial advisers, authorised and regulated by the FSA. The complainant had complained about the advice he received and he eventually issued a writ against the Firm A.

- Following the issue of the writ, but not immediately, Firm A went into administration. A settlement figure of £243,511 (the settlement) was eventually agreed with Firm A's administrators.

- The complainant subsequently became aware that Firm A had submitted an application to the FSA to cancel its Part IV Permissions and to transfer its remaining assets to Firm B. Although the complainant's solicitors (the Solicitors) contacted the FSA about this development by email, the FSA misplaced the email and allowed Firm A to cancel its Part IV Permissions and to transfer its remaining assets to Firm B. The complainant describes the transfer of Firm A's assets to Firm B as 'phoenixing' (that description means a firm with the same personnel re-emerges in substance and form replicating what went before as the former firm). The complainant alleges that, as a result of the FSA's maladministration in losing the email and the FSA's subsequent decision to allow Firm A to close, he was unable to 'recover' the monies he was entitled to as a result of the settlement.

- The complainant raised this with the FSA but he was told the FSA had produced a standardised deed poll which it asked the directors of Firm B to sign. By signing this deed poll the directors of Firm A agreed that any liabilities arising from Firm A would pass to their new entity Firm B.

- The complainant states that he sought to enforce the deed poll against Firm B by way of a summary procedure. The Solicitors decided that that procedure was the most cost effective way of enforcing the settlement.

- The complainant initially obtained judgment in the High Court against Firm B (in respect of the liabilities it had accepted from Firm A under the deed poll), but upon appeal by Firm B to the Court of Appeal that judgment was overturned and judgment was given in favour of Firm B. In the Court of Appeal's judgment it was held that the terminology used in the construction of the deed poll was "*susceptible to argument* [as to the enforcement against Firm B by summary procedure] *and* [therefore] *should be matters for proper argument in front of a chancery judge at the appropriate time and should not be dealt with by the kind of side wind that the Companies Court operates by way of its jurisdiction in setting aside statutory demands or granting injunctions to restrain petitions for winding up*".

- Given the Court of Appeal's comments the complainant feels that the deed poll the FSA constructed in this case is ineffective and, as a result, feels that he has been unable to obtain the settlement he believes he should be entitled to recover from Firm B.
- The complainant adds that as a result of the FSA's failures to construct the deed poll in an effective manner (and which is enforceable by way of a summary procedure) he has incurred substantial third party costs (as a result of the Court of Appeal hearing) of £66,479.46.

2.3 In a subsequent letter to my office from the Solicitors it is indicated that, as a resolution for the complaint, the complainant is *inter alia* looking for:

- Payment of the settlement;
- Payment of the costs of the Solicitors incurred as a result of the abortive summary procedure involving the deed poll;
- Obtaining a deed poll from the FSA which is enforceable against Firm B (in respect of the liabilities it has taken on from Firm A).
- The FSA to use its powers to instruct Firm B to discharge the judgment he obtained from Firm A's administrators.
- The FSA to use its powers to discharge the inter-party costs liability arising out of the Court of Appeal decision.
- The FSA to use its powers to prevent Firm B's continued trading which, he alleges in the circumstances, is wholly appropriate (and which could lead to him not having to pay the inter-party costs order).

3. The Complaints Scheme

3.1 COAF (1.4.1) provides as follows:

(1) The complaints scheme provides a procedure for enquiring into and, if necessary, addressing allegations of misconduct by the FSA arising from the way in which it has carried out or failed to carry out its functions. The complaints scheme covers complaints about the way in which the FSA has acted or omitted to act, including complaints alleging:

(a) mistakes and lack of care;

(b) unreasonable delay;

(c) unprofessional behaviour;

(d) bias; and

(e) lack of integrity.

(2) [deleted]

(3) To be eligible to make a complaint under the complaints scheme, a person (see COAF 1.2.1G) must be seeking a remedy (which for this purpose may include an apology, see COAF 1.5.5G) in respect of some inconvenience, distress or loss which the person has suffered as a result of being directly affected by the FSA's actions or inaction.

3.2 I should also make reference to the fact that my powers derived as they are, from statute contain clear limitations in the important area of liability in damages. The Act stipulates in Schedule One that the FSA is exempt from "liability in damages". It states:

"(1) Neither the Authority nor any person who is, or is acting as, a member , officer or member of staff of the Authority is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of the Authority's functions.

(2) (Irrelevant to this issue under investigation)

(3) Neither subparagraph (1) nor subparagraph (2) applies

(a) if the act or omission is shown to have been in bad faith; or

(b) so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of section 6(1) of the [1998 c.42] Human Rights Act 1998."

3.3 COAF nevertheless then goes on to provide in paragraph 1.5.5 that:

"Remedying a well founded complaint may include offering the complainant an apology, taking steps to rectify an error or, if appropriate, the offer of a compensatory payment on an ex-gratia basis. If the FSA decides not to uphold a complaint, it will give its reasons for doing so to the complainant, and will inform the complainant of his right to ask the Complaints Commissioner to review the FSA's decision."

3.4 If I find your complaint justified, it is to that paragraph that I must refer in order to decide any question of a remedy including an award of a "*compensatory payment on an ex-gratia basis*".

3.5 If I were to take the view that Schedule One referred to above in 3.2 was relevant in the context of the Human Rights Act 1998 I should explain that Section 6(1) of the Human Rights Act 1998 that is referred to, provides as follows:

"It is unlawful for a public authority to act in a way which is incompatible with a Convention right".

3.6 The only Convention rights that I consider may be relevant are contained in Article 1 of the First Protocol set out in the Human Rights Act of 1998.

3.7 Article 1 of the First Protocol provides:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

3.8 Having set out the structure of the scheme from which I obtain my jurisdiction and its limitations I need in this Final Decision to establish a number of parameters.

- I accept that the complainant has raised a number of complaints that I need to address in that those complaints clearly fall within the provisions of the scheme.
- Under the scheme provisions any compensatory payment is only on an *ex-gratia* basis and is subject to Schedule 1 of the Act exempting the FSA from any liability in damages but subject to the two provisions set out in 3.2 above (namely (3)(a) and (b)).
- In the context of 3.2 above (in relation to (3)(a)) the burden of proving bad faith lies upon the complainant.
- In addition to considering whether the FSA's actions fall within COAF (1.4.1) as set out in 3.1 above I also need to establish in due course whether the FSA's actions, in the complex scenario I will set out, bring into play Article 1 of the First Protocol contained in the Human Rights Act 1998. That will involve me in addressing firstly whether the settlement amounts to "possessions" as referred to in that First Protocol and secondly whether the FSA's actions amounted to "acts" which are "incompatible with a convention right", absence evidence of bad faith. It is those issues that I will need, in due course, to address.

4. The sequence of relevant events

4.1	17th October 2002	Firm A is incorporated.
4.2	20th August 2003	Firm A becomes an appointed representative of Network J.
4.3	3rd June 2004	Firm A becomes an appointed representative of Network K.
4.4	15th July 2004	The complainant met with Mr X of Firm A and discussed his desire to transfer his occupational scheme and section 226 plans to a self invested personal pension plan (SIPP). He set out that he wished to perform this transaction at the minimum cost to his retirement funds.
4.5	28th July 2004	Firm A's authorisation with Network J is cancelled by the FSA.

4.6	28th September 2004	Firm A recommends that a SIPP with Provider M SIPP would meet the complainant's objectives.
4.7	5th November 2004	The complainant agreed to Firm A's recommendation to undertake an *in specie* transfer to a SIPP with Provider M. This to avoid a realisation of assets into cash.
4.8	17th November 2004	The complainant was provided with Firm A's terms of business and client agreement.
4.9	7th December 2004	Firm A contact the complainant and inform him that Provider M would not accept an *in specie* transfer.
4.10	8th December 2004	Firm A contacts the complainant confirming that Provider N would complete the required transfer on the conditions imposed by the complainant and that a fixed fund price had been agreed. Relying on this representation he instructs Firm A to arrange the transfer to Provider N.
4.11	Mid-December 2004	The complainant's existing occupational pension scheme providers *disinvested* his pension assets and transferred their value as a cash lump sum to Provider M.
4.12	19th December 2004	Firm A contact Provider M and request compensation for this incorrect transfer given the complainant's clear instructions to arrange an *in specie* transfer.
4.13	14th January 2005	Firm A write to the complainant confirming that it would reimburse him for any loss arising as a result of the transfer to Provider M.
4.14	25th January 2005	Mr X of Firm A assured the complainant, at a meeting, that his occupational pension fund had been liquidated and would be invested with Provider N.
4.15	29th January 2005	Firm A confirmed, by email, that his occupational pension fund had been liquidated.
4.16	1st February 2005	It became apparent from all these developments therefore that an *in specie* transfer was not possible. The complainant gave oral instructions to Mr X of Firm A to transfer the occupational pension fund to Provider N (at the guaranteed fund price) and to leave the section 226 policy in its current form. Mr X confirmed his compliance with the complainant's instructions.
4.17	17th May 2005	The complainant formally complained about the transfers to Provider M and Provider N to Firm A.

4.18	17th July 2005	Mr X of Firm A contacts the complainant and asks for clarification of the required action.
4.19	July 2005	The complainant confirms the actions that he wishes to take.
4.20	July/August 2005	Firm A now recommends a transfer to a Provider O SIPP.
4.21	4th August 2005	Firm A's authorisation through Network K is cancelled by the FSA.
4.22	19th August 2005	A meeting takes place between the complainant and Mr X and Mr Y from Firm A.
4.23	7th September 2005	Mr Y provides the complainant with confirmation about the proposed Provider O investment fund.
4.24	9th September 2005	Firm A becomes directly authorised by the FSA.
4.25	10th October 2005	The complainant requested a summary of the charges applicable to the Provider O SIPP.
4.26	11th October 2005	The complainant alleges that Mr Y provided partial information which provided an incorrect picture to him.
4.27	21st December 2005	The funds held under Provider N's SIPP were transferred to the Provider O SIPP.
4.28	22nd December 2005	The section 226 funds were transferred to the Provider O SIPP.
4.29	24th March 2006	The complainant took the maximum tax free cash available to him out of the SIPP he held with Provider O.
4.30	19th April 2006	The complainant complained to Firm A regarding the penalties he had incurred as a result of all the actions so far taken which did display, in my opinion, considerable and continuous incompetence on the part of Firm A.
4.31	15th December 2006	The complainant referred the matter to the Financial Ombudsman Service (FOS).
4.32	26th February 2007	Ombudsman R at the FOS responds and sets out that, as the amount claimed (£470,000) was over and above the highest award (£100,000) the FOS could make, it would be better dealt with by the courts. The relevant letter dated 26th February 2007 states:

		"Under the FSA Dispute Resolution Rule 3.3.1(10), the ombudsman may dismiss a complaint without consideration of its merits if he considers that it would be more suitable for the matter to be dealt with by a court. In this case, I am of the opinion that the court should deal with the dispute in its entirety, in order that every relevant issue can be addressed, once and for all".
4.33	Mid-2007	The complainant commences a lengthy pre-action protocol against Firm A, its supervising network (Network K) and Provider O.
4.34	30th May 2008	Firm B is incorporated.
4.35	8th July 2008	The complainant commences proceedings for the recovery of the sum of £460,105 and a further sum for alleged secret profits in the Chancery Division of the High Court. Firm A defended the claim.
4.36	1st April 2009	Firm B becomes directly authorised by the FSA.
4.37	December 2009	Firm A's supervising network (Network K) settles the part of the claim brought against it.
4.38	17th March 2010	Firm A submits an application to the FSA requesting the cancellation of its Part IV Permissions.
4.39	31st March 2010	Firm A ceases trading.
4.40	April 2010	The complainant becomes aware that Firm A has applied to the FSA to cancel its Part IV Permissions (which allow it to undertake regulated activity).
4.41	15th April 2010	The Solicitors email the FSA and notify it that Firm A is subject to ongoing litigation and as such it believes that it would be inappropriate for the FSA to allow the firm to cancel its Part IV Permissions. That email is received by the FSA.
4.42	18th May 2010	The FSA cancel's Firm A's Part IV Permissions.
4.43	21st May 2010	The Solicitors send a further email to the FSA requesting a response to its email of 15th April 2010.
4.44	24th May 2010	The FSA informs the Solicitors that its email of 15th April was not received by the Cancellations Team (being the appropriate section of the FSA) and that, as a result Firm A's Part IV Permissions were cancelled with effect from 18th May 2010. In a further email exchange the FSA confirms that the 'phoenix' of Firm A to Firm B was considered and that the FSA was satisfied that this was not the situation.

4.45	June 2010	There is further correspondence with the FSA in relation to this matter.
4.46	16th June 2010	The FSA requests that Mr X and Mr Y, the directors of Firm B, complete a standardised deed poll which transfers any liabilities arising from Firm A (their previously authorised entity) to Firm B.
4.47	1st July 2010	Mr X and Mr Y, directors of Firm A, sign a standardised deed poll confirming that Firm B will be liable for certain liabilities relating to Firm A's regulated activity.
4.48	15th September 2010	Firm A enters into voluntary administration.
4.49	8th November 2010	The Solicitors seek from the FSA a copy of the deed poll that the directors of Firm A had signed.
4.50	10th November 2010	The FSA provides a copy of the deed poll.
4.51	19th November 2010	The administrators confirm that Firm A has no assets and consents to judgment in favour of the complainant (this is the settlement previously referred to).
4.52	17th January 2011	Provider O settles the part of the claim the complainant has brought against it.
4.53	18th January 2011	Firm B is served with a Statutory Demand.
4.54	7th February 2011	Firm B applies to the High Court for an injunction to restrain the complainant from presenting a winding up petition based on that Statutory Demand. The basis for the proposed injunction was that the complainant was not an eligible complainant within the terms of the deed poll and that the settlement was disputed by Firm B.
4.55	28th February 2011	Firm B's application for an injunction is rejected by the High Court.
4.56	March 2011	Firm B applies to the Court of Appeal for leave to challenge the refusal of the injunction by the High Court.
4.57	4th March 2011	Toulson LJ grants Firm B leave to appeal against the refusal of the injunction by the High Court.
4.58	20th May 2011	A complaint is submitted to the FSA.

4.59	6th July 2011	The FSA sends a letter to all the lawyers involved and the Court itself following a request for assistance from the Solicitors.
4.60	July and August 2011	The FSA through its counsel made clear its willingness to liaise with the Solicitors and counsel in preparation for the Court of Appeal hearing involving Firm B and the complainant.
4.61	31st August 2011	The FSA defers the investigation of the complaint until such time as the Court of Appeal has ruled on the matter.
4.62	7th September 2011	The Court of Appeal, Longmore, Sullivan and Ward LJJ, considered the matter and allowed Firm B's appeal.
4.63	22nd September 2011	Following the Court of Appeal's decision the complainant requests that the FSA reopen its investigation into his complaint.
4.64	2nd December 2011	The FSA issues its decision letter.
4.65	14th January 2012	Firm A is dissolved.
4.66	14th February 2012	The complainant refers the matter to my office.
4.67	30th April 2012	The complainant receives an invoice for £67,559.46 from Firm B's solicitors in respect of the costs awarded to Firm B by the Court of Appeal following its success in obtaining the injunction that it sought.
4.68	3rd July 2012	An application for the dissolution of Firm B appears in the Gazette.

4.69 The relevant sequence of events as set out above is particularly important in following in detail the exact sequence of steps taken by all the parties involved. Truncating that sequence will produce a misleading impression when attributing causation to the eventual outcome now faced by the complainant.

4.70 Particularly relevant in the context of the FSA's actions are:

- The loss of the email of the 15th April 2010 (4.41 above).
- The creation of a standardised deed poll on 1st July 2010 (4.47 above).
- The participation of the FSA in the proceedings in the Court of Appeal (4.59 above).

4.71 Equally particularly relevant in the context of both Firm A and Firm B are:

- The date of Firm B's incorporation on 30th May 2008 (4.34 above).
- The complainant commencing proceedings in the High Court on 6th July 2008 (4.35 above).
- The date of Firm B's authorisation on 1st April 2009 (4.36 above).
- The date of Firm A's request to the FSA to cancel its authorisation on 17th March 2010 (4.38 above).
- The date of the cessation of trading of Firm A on 31st March 2010 (4.39 above).
- The commencement of the voluntary liquidation of Firm A on 15th September 2010 (4.48 above).
- The date of the settlement on 19th November 2010 (4.51 above).

4.72 In due course I will refer further to the interactions of these key dates and their relevance to the issue of causation.

4.73 I first set out the arguments that the Solicitors have made in pursuit of this complaint and secondly the arguments that the FSA has presented to me.

5. The arguments

5.1 The arguments the complainant has presented to me both directly and through his solicitor.

5.2 The complainant alleges that the FSA's failure to act upon the email sent on 15th April 2010 allowed Firm A to 'phoenix' into Firm B and in doing so allowed it to transfer all of the realisable assets Firm A had to Firm B. Although the FSA claim that its rules allow a firm to cancel its Part IV Permissions whilst claims are outstanding, had it not misplaced the email of 15th April 2010, it is argued that it would not have allowed Firm A to cancel its Part IV Permissions. The FSA should have prevented the "effective closure" of Firm A which would have assisted the complainant in obtaining the compensation he believed was due (on the assumption that Firm A possessed sufficient assets) by allowing him to continue with the ongoing litigation or to enforce the settlement.

5.3 Although the FSA's rules allow it to permit the cancellation of a firm's Part IV Permissions when there are outstanding complaints, in the given circumstances it is argued that "*it would have been extremely unlikely that the FSA would have allowed the de-authorisation to proceed and certainly not before [the complainant's] action had reached trial and in view of the history of the matter*".

The Solicitors add that the effect of the FSA's actions has been to "*render worthless all of the huge legal fees that had been spent (on the basis the action against the new company would have had to start over) and [the Solicitors] consider it inconceivable that the FSA would have permitted that to occur in all the circumstances*".

5.4 If the FSA had not allowed Firm A to cancel its Part IV Permissions the Solicitors argue that the matter would have "*gone to trial and [the claimant] would have won against [Firm A] and made a recovery. In the alternative [Firm A] may have gone into liquidation but there would have been assets against which [the claimant] could have effected a very simple recovery*". It is further said that, the "*FSA was clearly at fault for failing to note that there was an undischarged complaint to the FOS against [Firm A] and which had only been withdrawn on the advice of the FOS because it was too big*".

5.5 In the initial submission to me the Solicitors also say that Firm A's administrators have confirmed that when Firm A went into administration it had little or no assets but have pointed out that, prior to its closure, Firm A was receiving long standing trail commission payments and that these were transferred to Firm B with the FSA's agreement. Had the FSA not allowed Firm A to close (and transfer its assets to Firm B) the complainant would have been able to claim from the trail commission Firm A was receiving.

5.6 In a letter of 20th June 2012 the Solicitors question the FSA's view over the assets Firm A held (and which it is believed were transferred to Firm B). The FSA believed that Firm A held assets of only £15,000 but it is felt that this is incorrect and reference is made to the balance sheet attached to the accounts which Firm A's submitted to Companies House which indicates that, in February 2010, Firm A was profitable and had made a net profit of £140,000.

5.7 In this regard and in the alternative it is questioned why the FSA allowed Firm A to continue to trade if it did not hold sufficient capital to meet its capital adequacy requirements which it is argued would entail it holding sufficient capital to meet the complainant's claim.

5.8 It is argued that the FSA's attempts specifically to protect the complainant's position as a result of the maladministration in losing the email of 15th April 2010 failed. Once the FSA was aware of its 'error' it implemented a standardised deed poll and sent this to the directors of Firm B, Mr X and Mr Y, instructing them to sign it and return it to the FSA. Although Mr X and Mr Y signed it and returned it to the FSA, the deed poll' failed in its objective of transferring Firm A's liabilities to Firm B.

5.9 Given the FSA's failure to produce an effective deed poll it is alleged that the complainant has not only been unable to enforce the settlement, and recover the £243,511, but he has also incurred third party costs of £67,559.46, in addition to his own costs (which I am told amount to over £230,000) in bringing the abortive action in reliance upon the deed poll.

5.10 Although the FSA maintain that the deed poll remains effective, it is argued by the Solicitors that this is not the case. In a letter to my office the Solicitors state that it "*is wholly incorrect for the FSA to argue that the Deed Poll is not defective. It is defective. The FSA exists to provide protection to consumers and the intent and purpose of the deed poll should be that it is readily enforceable by consumers and drafted in such a way that it is unarguable that it is intended to cover them. The Court of Appeal has found that it is arguable that [the complainant's right of recovery of the settlement are] not covered under the deed and that issue needs to be tested in a full set of new legal proceedings. That is highly prejudicial to [the complainant]*".

5.11 Given that Longmore LJ held that whether the complainant fell under the definition of an 'eligible complainant' as set out in the deed poll was something which was capable of argument, the deed poll must be ineffective and therefore fail to give the complainant the protection that the Solicitors believe that he is entitled to. In arriving at this view the Solicitors have referred to the Court of Appeal judgment where Longmore LJ commented that, although there was some debate between the barristers representing respectively the complainant and the FSA over the appropriate definition of an 'eligible complainant', they "*both agreed that, whatever the right approach was, [Firm B's barrister] could not win because, even if it had the technical meaning in the handbook, if someone made a claim to the ombudsman service and either withdrew it or had it dismissed, he was nevertheless someone who was an eligible complainant who "in the present tense has a complaint" within the meaning of the deed poll. That itself seems to me a matter that is capable of argument*".

5.12 The Solicitors add, in a letter of 20th June 2012, that it is "*unarguable that the FSA's failure to draft a clear Deed led to the loss in the Court of Appeal. That is a matter of fact. Further, as we have already noted it is also a matter of fact that the Court of Appeal held that they were most influenced by the fact that the FSA themselves turned up but needed to submit huge amounts of evidence to try and justify their interpretation of their own document and, if it was clear, should simply not have been necessary*".

5.13 The Solicitors are also unhappy with the approach adopted by the FSA in which it says, in its letter to me of 14th February 2012, that the FSA looks to place responsibility for the failure of the Court of Appeal to uphold the validity of the deed poll on the Solicitors. In argument to me the Solicitors say that the "*FSA appears to blame [us] for the course of action undertaken in seeking to enforce the deed summarily. We are astonished by that suggestion and the allegation does the FSA no credit at all. [The complainant] has been pursuing the company for many years and at vast expense. For the FSA to argue that [we] should have commenced a new action for damages from the beginning and spend a further several hundred thousand pounds in legal fees with no guarantee of success (the Court of Appeal having found it arguable that he is not in fact covered) is wholly unacceptable*".

5.14 The Solicitors add that it "*chose to go down the summary procedure because it was most cost efficient and because the FSA themselves told us and argued that the deed poll did obviously cover [the complainant]. The Court of Appeal disagreed with them. There would be no substantive difference legally whether we brought proceedings under the winding up procedure or issued a claim for damages and sought summary remedy judgment. The net effect is that [the complainant] cannot enforce the deed without several more years of litigation and vast expense. As a retired consumer of a business regulated by the FSA and particularly given the unfortunate background facts, he simply should not have been put in that position by the FSA.*

Further, it is wholly unfair and unreasonable for the FSA to now raise this point. They themselves admitted in the Court of Appeal that the Deed was intended to cover our client and that it had entered it to avoid the need for him having to jump through costly legal hoops in order to enforce it. At no point did they raise the argument that they felt the summary procedure was somehow inappropriate and it is grossly unfair for them to now seek to do so".

5.15 The Solicitors also add they "*remain of the opinion that the FSA were extremely uncooperative in our attempt to proceed against Firm B under the deed. In this regard [we] raise one additional issue (and following the Court of Appeal hearing the FSA intervened in those proceedings to support our case and we do not doubt that they did so with good intent). However, it is extremely unfortunate that in practice their involvement in the proceedings in fact highly prejudiced our attempts to make a recovery, as confirmed by the Court of Appeal at paragraph 20 of their judgment*". For the sake of completeness in this context I set out paragraph 20 of the Court of Appeal judgment:

> "20. *There are obvious difficulties in the way of each of these submissions, many of which have been canvassed by the court in questioning Barrister F [acting for Firm B] and also by Barrister G for [the complainant] and Barrister H for the FSA. But for my part I cannot say that they are fanciful. I was particularly struck by the fact that Barrister G and Barrister H were unable to agree whether or not the phrase "eligible complainant" in the deed poll referred to "eligible complainant" as defined in the FSA handbook and the FSA rules.*
>
> *Barrister G submitted that eligible complainant just meant eligible in the terms of the deed, in other words someone who had a complaint giving rise to liabilities in contract, tort or otherwise pursuant to bullet point 4, whereas Barrister H submitted that words "eligible complainant" were terms of art that could only be construed by reference to the handbook and the FSA rules. They both agreed that, whatever the right approach was, Barrister F could not win because, even if it had the technical meaning in the handbook, if someone made a claim to the ombudsman service and either withdrew it or had it dismissed, he was nevertheless someone who was an eligible complainant who "in the present tense has a complaint" within the meaning of the deed poll. That itself seems to me a matter that is capable of argument*".

5.16 On the issue of bad faith in the context of this complaint the FSA is not liable for acts of negligence (as I have indicated in paragraph 3.2 above), which could include the loss of the email of 15th April 2012. The Solicitors are aware that this exemption from liability in damages does not extend to instances where there is an allegation of bad faith or where there is an alleged breach of the Human Rights Act 1998. When making the complaint to my office, neither the complainant nor his Solicitors have made any substantiated allegation or argument to the effect that the FSA has acted in bad faith.

5.17 However, the Solicitors have alleged that the "*FSA's acts or omissions have infringed [the complainant's] peaceful enjoyment of his possessions, firstly his claim relating to his pension fund against Firm A and secondly his right to enforce the judgment debt against Firm B under the Deed*". The Solicitors add that "*the definition of 'possessions' is extremely broad ... and includes both legal claims and Judgment debts*". In closing the Solicitors argue that by losing the email of 15th April 2010 and allowing Firm A to cancel its Part IV Permissions shortly before the matter went to trial, the FSA "*deprived [the complainant] of the opportunity of [enjoying his property and enforcing his rights] on two separate occasions*".

5.18 The Solicitors also allege that the FSA's supervision of both Firm A and Firm B has been inadequate and feel that the FSA's response regarding continued action has been unsatisfactory. Specifically the Solicitors have referred to *"the extremely serious concerns expressed by the Court of Appeal against the individuals running Firm B. They appear to have put in several witness statements that have misled the Court during the proceedings in addition to having misled the FSA on the de-authorisation"*. Specifically, I understand that the Solicitors are referring to the comments made by Longmore LJ at paragraphs 23 and 24 which again for the sake of completeness I set out below.

> *"23. Barrister G's final point was that since this is a claim for an injunction it should fail in any event, however arguable the points are, because Firm B do not come to the court with clean hands, having said in their first statement by Mr X that they had notified the claim which [the complainant] had brought to the FSA, but, having made clear in the second and third witness statements, that that was an error and that they had not notified the claim. As a result of that failure to notify, Firm A were allowed to have their authorisation withdrawn without the FSA being aware that there was an outstanding claim against [Firm A]. The clean hands doctrine is of course a very important doctrine.*
>
> *Mr X says that it was a matter of inadvertence because he thought that when he was asked to notify claims that only meant claims which had come to a definite resolution, which he calls a definite liability, presumably by way of judgment award or settlement, none of which had happened at the time he signed the document.*
>
> *24. One might have very great reservations about the truth of Mr X saying that this was an omission due to inadvertence, but, whatever suspicions one might have, I cannot think it would be right that we should disregard his assertion in his witness statement that it was by inadvertence without his being cross-examined because if indeed he intended to deceive the court it would be a very serious matter."*

From these comments it is clear that the Solicitors feel that the FSA should take immediate action against Mr X and Mr Y as well as Firm B to protect both their client and other consumers who may be adversely affected by their combined actions.

5.19 Finally the Solicitors also highlight that, based upon the information presented to the Solicitors by Firm A's administrators Firm A and Firm B *"are affectively (sic) uninsured because of the previous declinature. The company is still trading and it is not sufficient for the FSA to simply say they are unable to advise us of any further action that they may have taken. They have clearly not taken any action and should do so as a matter of urgency to stop other consumers being put at risk"*.

5.20 The arguments that the FSA has presented to me.

5.21 The FSA has accepted that it misplaced the email sent to it on 15th April 2010. In the FSA's decision letter of 2nd December 2011 the FSA states that the *"FSA accepts that it failed to deal with the email of 15 April 2010 in a timely manner"*.

5.22 The FSA has disagreed with the Solicitors' views that had it acted upon the email of 15th April 2010, it would not have cancelled Firm A's Part IV Permissions. In its decision letter the FSA has set out that:

"When a firm applies to cancel its permission, the FSA is concerned to see that current or former customers of the firm are able to bring a complaint or claim against a successor firm concerning the acts or omissions of the predecessor firm. Although the process of considering Firm A's application to cancel proceeded without knowledge of [the complainant's] claim against Firm A, the FSA took steps to satisfy itself that Firm B would assume the liabilities of Firm A.

1. *It received from Mr X a document described as a novation agreement between Firm A and Firm B under which "existing business and liabilities" held with Firm A were to be transferred to Firm B.*

2. *It received an email from Mr X on 17th March 2010 confirming that all of Firm A's liabilities would be transferred to Firm B.*

3. *It received an assurance from the directors of Firm A that Firm A's clients would all be advised that the business was being transferred to Firm B (as a 'rebranding exercise', as described in the letter of 14th February 2010 to the firm's clients). The FSA had only Firm A's assurance that all clients received the letter. [The complainant] had in fact not received this letter (as was later learned by the FSA).*

The purpose of inviting the directors of Firm B to enter the deed poll was to confirm the firm's private assurances to the FSA that it would assume Firm A's liabilities, and to make public such an undertaking. As was advised to the High Court in the FSA's letter of 26th February 2011, the FSA invited the directors of Firm B to enter into the deed poll in order to respond to the FSA's failure to have dealt in a timely manner with your email of 15th April 2010.

Had the FSA processed the email of 15th April 2010 in a timely manner, Firm A would have been contacted to ascertain:

1. *why it had not notified the FSA of [the complainant's] claim in its cancellation application as required; and*

2. *what provision was being made for any liabilities that might accrue on the determination of the claim.*

Regardless of what Firm A said was being done by way of provision to meet any liability arising from [the complainant's] claim, it is highly likely that the directors of Firm B would have been invited to sign the deed poll before a decision to cancel was taken.

However, it is unlikely that Firm A's application to cancel would not have been approved simply because [the complainant's] claim was outstanding, unless there was evidence that steps were being taken to prevent funds being available in Firm B to meet any liability that might arise from the determination of the claim. That is because:

1. *an application to cancel does not involve the seeking of permission to transfer assets from one firm to another, and the FSA has no power to prevent such a transfer unless it has a basis for the exercise of its authority to vary a firm's permission so as to restrict such a transfer. In a case of a claim such as [the complainant's] where there had been no determination of liability, let alone quantum, the FSA would have had no basis, if it was otherwise satisfied that there were adequate arrangements in place for the successor firm to accept liability for the predecessor firm's debts, for imposing such a requirement on Firm B's permission;*

2. *the signing of the deed poll provided the legal assurance the FSA was seeking that the successor firm would accept liability for the predecessor firm's debts; and*

3. *refusing the application to cancel could have no bearing on whether Firm A went into liquidation, as in fact it subsequently did.*

Concerning whether cancellation of permission can occur if there is an outstanding complaint, [this is addressed in the FSA's Supervision Handbook specifically] *SUP 6.4.10 G, SUP 6.4.20 G and SUP 6.4.22 G are relevant. Under SUP 6.4.10 the FSA 'may request' confirmation that there are no unresolved complaints. This does not mean that there is a requirement that all complaints must be resolved before cancellation of permission can occur.*

Furthermore, under SUP 6.4.10(1) and (2) the FSA 'may request' confirmation, as appropriate, of the steps (if any) which have been taken under the firm's complaints procedures and the amount of compensation claimed. The FSA 'may also request' an explanation of the arrangements made for the future consideration of such complaints.

SUP 6.4.20 states that if it is not possible for a firm to demonstrate a relevant matter, for example, that it has discharged, satisfied or resolved complaints against it, the firm will be expected to have satisfied the FSA that it has made adequate provisions for discharging any liabilities to clients which do not involve the firm carrying on regulated activities.

In addition under SUP 6.4.22 it states that the FSA will take into account all relevant factors including if there are any outstanding complaints. It does not say that this will prevent a cancellation taking place although any potential complaint will be considered.

In substance, the [Supervision] *Handbook provisions enable the FSA to be satisfied that appropriate arrangements exist whereby a cancelling firm's liabilities will be accepted by the successor firm. It is not the case that firms may not have their permissions cancelled even though there may be outstanding claims or complaints*".

5.23 The FSA has, as I have indicated above, confirmed that it "*has no power to prevent such a transfer unless it has a basis for the exercise of its authority to vary a firm's permission so as to restrict such a transfer. In a case of a claim such as [the complainant's] where there had been no determination of liability, let alone quantum, the FSA would have had no basis, if it was otherwise satisfied that there were adequate arrangements in place for the successor firm to accept liability for the predecessor firm's debts, for imposing such a requirement on Firm B*".

5.24 The FSA has also confirmed in correspondence with my office that on "*17th March 2010, the FSA received copies of [Firm A's] management accounts. These indicate that as at 28th February 2010 and therefore shortly before cancellation, Firm A had net assets of around £15,000. Firm A's accounts for the year ended 2008, filed at Companies House, indicate net assets/shareholders' funds of about £73,000*".

5.25 The FSA has noted the Solicitor's comments regarding the deed poll but disagrees. In its letter of 2nd December 2011, the FSA sets out:

"The FSA does not accept that "it failed to draft a correct deed". The primary purpose of the deed poll, where there is transfer of business from a predecessor firm to a successor firm, is to enable current or former customers of the predecessor firm to bring an action or a complaint against the successor firm in respect of acts or omissions of the predecessor firm. Such an action may be by way of a complaint to the FOS or by court proceedings. Further, the FSA argued in the Court of Appeal that on proper construction, the language of the deed poll was wide enough to enable an eligible complainant to enforce against the successor firm a consent judgment entered against the predecessor firm.

The FSA does not accept that Firm B's legal challenge concerning the deed poll or the decision of the Court of Appeal means that the deed poll is defective. The Court of Appeal refused to uphold the statutory demand as valid where the statutory demand was served on the basis of a consent judgment obtained upon reaching a settlement with Firm A's liquidators. The court's concern was that the summary insolvency procedure was the wrong forum to determine whether Firm B was liable on the basis of the deed poll. This does not amount to a determination that the deed poll was defective.

It is the FSA's view that any prejudice suffered by [the complainant] was caused by way in which he chose to proceed against Firm B. It was for [the complainant], advised by his lawyers, to choose the means of proceeding against Firm B. The FSA had provided a means, through the deed poll, by which Firm B could be pursued in respect of the acts or omissions of Firm A. For example, it would have been open to [the complainant], once he became aware of the deed poll, to bring an action for damages against Firm B instead of continuing the action against Firm A and settling with Firm A's liquidators. Alternatively, following Firm B's refusal to meet the statutory demand, [the complainant] could have sought judgment from a court against Firm B relying on the deed poll. In both cases, the court would have had to decide the substantive question of whether the deed poll operates so as to impose liability on Firm B in respect of the judgment obtained against Firm A. [The complainant] instead chose to proceed by way of a summary procedure. The Court of Appeal determined that the summary procedure was not an appropriate occasion to decide the question whether Firm B was liable by virtue of the deed poll for a judgment entered by consent against Firm A. The FSA is not responsible for the litigation decisions that [the complainant] took".

5.26 In commenting on the formation of the deed poll the FSA has set out, by way of background the reason why it was introduced. In its correspondence with my office the FSA has set out that:

"The deed poll is part of the FSA's Change of Legal Status application pack, and was first introduced in 2006/2007 as a replacement for a regulatory undertaking that had been in use for many years before that. It may also be employed where the business of one authorised entity is transferred to another which has already been authorised (as in this case). The deed's primary purpose was to ensure that FOS awards would be met by successor firms, but the FSA's view was (and remains) that the deed poll is also effective in relation to complaints that, whilst eligible to be considered by the FOS, have in fact been considered by the courts. The High Court agreed".

5.27 The FSA added that, having reviewed the matter following the Court of Appeal judgment:

"The FSA considers that the deed poll is capable of being used to recover the agreed sum due to [the complainant]. The Court of Appeal refused to uphold the statutory demand as valid where the demand was served on Firm B on the basis of a consent judgment obtained upon reaching a settlement with Firm A's liquidators. The court's concern was that the summary insolvency procedure was the wrong forum to determine whether Firm B was liable on the basis of the deed poll. This does not amount to a determination that the deed poll was defective. The FSA therefore does not propose to amend deed poll executed by Firm B".

5.28 From these comments the FSA's position is that it believes the Court of Appeal's decision to grant Firm B's injunction application was related to the process of using the statutory demand procedure (within the context of the settlement against Firm A and not Firm B) rather than the way in which the deed poll was drafted. In response to a question I raised with it, the FSA argued in correspondence with my office that it believes the:

"Court of Appeal based its judgment on the fact that the summary procedure, under which it was considering an injunction, was not the correct forum for determining whether Firm B was liable, by virtue of the deed poll, for a judgment entered by consent against Firm A.

[The Solicitors] suggest that the Court of Appeal has indicated simply that "the Deed Poll is so unclear that it cannot be enforced in any summary fashion". But the Court of Appeal has also indicated that "there are obvious difficulties in the way of each of the submissions" put forward by Firm B – including their arguments about the inoperability of the deed poll".

5.29 The FSA has further commented to me that:

"[The complainant] commenced proceedings against Firm A in July 2008. At the time that Firm A's permission was finally cancelled in May 2010, therefore, proceedings against Firm A were already ongoing.

As noted in our letter to [the Solicitors] of 2nd December 2011 ... [the complainant] and his lawyers could have followed other more cautious approaches. For example, [the Solicitors] could have started new proceedings against Firm B based on the Firm A judgment and then applied for summary judgment, based on the deed poll. An alternative approach would have involved [the Solicitors] applying to the court to substitute Firm B for Firm A in the proceedings. If the application was granted, the case would have proceeded to trial (the February trial date had been known for some time), and, if successful, [the complainant] would have had a judgment on the merits against Firm B".

5.30 The FSA has also added it its correspondence with me that:

"The FSA has apologised for its failure to respond to [the complainant's] email in April 2010. But we do not accept that we should become involved in further proceedings to enforce judgment against Firm B. The FSA remains of the view that [the complainant] still has the ability to enforce the consent judgment against Firm B – and that it is for him to do so.

It is surprising that [the Solicitors] suggest that "the assignment of causes of action in this manner to the FSA and the FSCS are very common." Whilst the FSCS frequently accepts assignments of rights from those to whom it has paid compensation (in order to maximise recovery of funds) it is neither appropriate, nor common practice, for such rights to be assigned to the FSA. The FSA does not provide a fund of last resort".

5.31 The FSA has noted the Solicitors comments regarding the loss of £243,511 its client has incurred as a result of the alleged unenforceability of the deed poll and the third party costs of £67,559.46 he has incurred. In response to this the FSA has set out arguments to the effect that:

"In their letter, [the Solicitors] raise a number of potential remedies which they say the Commissioner may consider it appropriate to propose. [The Solicitors] suggest that the Commissioner recommend that FSA pay [the complainant] the judgment sum of £243,511 on the basis that it allowed Firm A to phoenix itself and this prevented [the complainant] from recovering this amount from Firm A. [The Solicitors] also suggest that the FSA should pay the costs [the complainant] has to pay Firm B following the unsuccessful statutory demand proceedings.

As a starting point, the FSA considers that it would only be in a case where the FSA's actions or inactions have clearly caused loss to a complainant that an ex-gratia payment should be considered. Even if a clear causal link can be established, given that regulated firms would fund any payment, the size of any potential payment is a relevant factor for the Commissioner to take into account before recommending a payment. In [the complainant's] case, there is no clear causal link between the FSA's actions or inaction and [the complainant's] "loss".

First, [the complainant] still has, in the FSA's view, the ability to enforce the consent judgment against Firm B relying on the deed poll. The Court of Appeal has not said otherwise (we note in passing that the letter from [the Solicitors]. mischaracterises the FSA's involvement in the proceedings). To recommend that the FSA pays the judgment, when there has been no decision on the efficacy of the deed poll, would be wrong in principle.

Second, the FSA notes that at the time when Firm A applied to cancel its permission, the firm had net assets of around £15,000, which is significantly less than the amount claimed by [the complainant]. The position at the end of 2008 was not dissimilar. Yet the implication of [the Solicitors'] suggestion is that the FSA should act as guarantor of all firms' liabilities to consumers.

As the FSA is one part of the regulatory system which also includes the industry-funded FSCS, which has set limits on payments, this is a startling proposition.

Third, as regards the costs awarded against [the complainant] following the Court of Appeal judgment, as stated in our previous response, the FSA should not be expected to underwrite the litigation tactics adopted by [the Solicitors]".

5.32 The FSA has also set out that:

"*The FSA attempted to assist [the complainant] in three respects. First, it required Firm B to execute the deed poll. Second, ... the FSA provided information to [the Solicitors] relevant to [the complainant's] case. Third, the FSA became involved in both the High Court and the Court of Appeal hearings*".

"*The FSA does not accept that its actions in this case have caused [the complainant's] loss. The FSA took steps – in drafting the deed poll – to ensure that [the complainant's] claims would be met by Firm B. It is for [your client] to seek to enforce the rights which he has – and which the FSA sought to ensure that he had ...*

There would appear to be an obvious avenue open to [the complainant], if he wants to avoid payment of the costs awarded against him by the Court of Appeal. Namely to indicate to Firm B that he has a counter claim based on the deed poll. If this approach was adopted the court would then have to decide the validity of that deed poll".

5.33 The FSA has noted that the Solicitors have also been critical of the assistance it provided to the Solicitors when the Solicitors were looking to pursue Firm B for the settlement the Solicitors obtained in relation to Firm A's actions. The FSA has considered the Solicitors' comments on this matter and has made the following comments:

"*The FSA was initially cautious about involving itself in [the complainant's] proceedings because of its longstanding policy of remaining neutral in legal proceedings between firms and* customers" and as it is "*the FSA's view is that, as regulator, involvement in individual disputes risks blurring the line between its role and that of the FOS (or the courts). Also, the FSA should not appear to be "taking sides" in disputes. Third, the FSA is not resourced to assist in disputes*".

Notwithstanding this, the FSA has also argued that:

"FSA did involve itself in [the complainant's] predicament because, as explained above, this seemed to be a case where the FSA's regulatory solution (i.e. the deed poll) was being questioned. The FSA had also recognised that it had failed to respond to [the Solicitors] e-mail of April 2010 at the time, hence Firm B being required to execute the deed poll. The FSA's involvement included— providing [the complainant] with a statement for the purpose of the High Court hearing, in which the FSA confirmed that the deed poll was sent to Firm B in response to the FSA becoming aware of [the complainant's] claim against Firm A, and as a means of confirming, as far as the FSA was able to do, that Firm B would honour Firm A's liabilities, including whatever eventuated from the determination of [the complainant's] proceedings against Firm A".

The FSA also tells me that it "*intervened at the Court of Appeal hearing at the request of [the Solicitors]*" and wrote to the parties involved in this case on 6th July 2011 confirming its position.

5.34 I also understand that

"*The FSA and its counsel made clear their willingness to liaise with [the Solicitors] in preparation for [the Court of Appeal] hearing but [the Solicitors] did not take advantage of that*".

5.35 Similarly the FSA also adds that it attempted to provide the Solicitors with all the reasonable assistance it could and provided this in a timely manner:

"*Other information was provided to [the complainant] within the agreed timescales. On 26th February 2011 the FSA provided [the complainant] with a letter which could be produced in court. Further requests for information were received on 24th March 2011 and 30th March 2011 with responses being provided on 25th March 2011 and 5th April 2011 respectively*".

5.36 The Solicitors also highlighted to the FSA that Firm A and, the Solicitors, believe Firm B are trading without the required Professional Indemnity Insurance (PII). The FSA's position in this regard is that it has undertaken what it believes are sufficient checks to establish whether this is in fact the case. The Solicitors also alleged that Firm A (and probably Firm B) had failed their capital adequacy requirements (as a result of the declined Professional Indemnity claim). It confirmed details of Firm A's assets in both 2008 and 2010 and commented upon Firm A's PII arrangements. In the papers the FSA has provided to me it has stated that:

"*On 17th March 2010, the FSA received copies of Firm A's management accounts. These indicate that as at 28th February 2010 and therefore shortly before cancellation, Firm A had net assets of around £15,000. Firm A's accounts for the year ended 2008, filed at Companies House, indicate net assets/shareholders' funds of about £73,000.*

A firm's resources available to pay any compensation required may also be increased by access to the firm's professional indemnity insurance (PII). The FSA has checked the position with regard to both firms' PII coverage. PII for both firms is provided by PII Provider P. PII Provider P have confirmed that Firm A had PII cover in place...

PII Provider P has also confirmed that cover was subsequently arranged with Firm B. Firm B's current PII policy ... lists both Firm A and Firm B as insured entities".

5.37 I appreciate that the complainant is anxious to bring this matter to an early conclusion and is somewhat concerned that Firm B's entry on the Companies House register shows Firm B's status as "*Active – Proposal to Strike off*". Although this was not an issue that the FSA considered as part of the complaint the Solicitors have referred to it. I have asked the FSA to comment upon this information. In its response to me the FSA has confirmed that it believes Firm B has not submitted an application to "strike off" but the "proposal" is one submitted by Companies House itself as a result of Firm B's account submission being overdue. Firm B's Supervision Team within the FSA is aware of this.

6. My final conclusion and findings as to the factual position.

6.1 I have now had the opportunity to review the FSA's investigation file and all the submissions to this office. I have also had the opportunity to consider the detailed arguments put to me including the most recent following my Preliminary Decision dated 19th July 2012 in relation to what is clearly an unhappy series of events. I hope that I have reproduced the essential aspects of those arguments each of which I have carefully considered and which I will now address where I consider they are directly relevant to the issues at hand.

6.2 It is clear from the correspondence with both the FSA and this office that the complainant received advice from Firm A which does not, on any basis, appear to have been at the standard one would expect to receive from a firm operating within the UK's financial services industry. Succinctly put the advice was incompetent. I find that to have been established by the finding of the Court of Appeal to that effect in paragraph 2 of its judgment. That negligent advice is particularly unfortunate but the fact of it cannot be laid at the door of the FSA as the UK's financial services regulator.

6.3 The file presented to me clearly indicates that the complainant, correctly and continuously, raised his concerns about the competence of the advice he received with Firm A. Although I have not seen all the correspondence he exchanged with Firm A in relation to his complaint (as it not relevant to my investigation into the complaint raised against the FSA), it is clear that the complainant was clearly and justifiably unhappy with the decisions reached by Firm A as well as its advice that he received as he referred his complaint to the FOS.

6.4 Although it is unfortunate that the FOS felt that it could not assist the complainant, its primary reason for this appears to be that the amount claimed by the complainant (in excess of £400,000) exceeded the maximum award the FOS can enforce against a firm (which at the time was £100,000). Given this, the FOS felt that the appropriate avenue for the complainant to pursue his claim was through the Courts.

6.5 Following the FOS' decision to dismiss the complaint for the reason set out in 6.4 above, I believe that, in mid-2007 the Solicitors (acting upon the instructions of the complainant) entered into a pre-action protocol with, amongst others, Firm A.

6.6 Although Firm A engaged with the Solicitors during the pre-action protocol, I understand that an appropriate settlement figure could not be agreed upon and, as a result of this, on 8th July 2008 the complainant, through the Solicitors, instigated proceedings in the Chancery Division of the High Court.

6.7 From those actions and indeed from those of Firm A, Network K and Provider O, it is clear that the losses the complainant incurred stem from the actions of Firm A, as the complainant's financial advisers, when arranging the transfer of his pension arrangements into a SIPP. They displayed a complete lack of understanding of the issues involved and whether it was even possible to carry out the complex instructions that had been given by the complainant. The outcome was error built upon error causing the complainant considerable financial loss only some of which has been recovered.

6.8 The papers the FSA has presented to me also indicates that Firm B was created to allow the directors to pursue a different business model using a different 'distribution' method to that adopted by Firm A. I would also add that, although Firm B did not receive approval to undertake regulated activity until 30th April 2009, the application for Firm B to become authorised by the FSA was actually submitted 18th June 2008. This was before proceedings were commenced in the High Court and some 21 months before the directors of Firm A submitted an application to the FSA to allow the cancellation of Firm A's Part IV Permissions (which it did on 18th March 2010).

6.9 The FSA received an application from Firm A to cancel its Part IV Permissions (or authorisation to conduct regulated activity) on 18th March 2010. This application set out that the directors of Firm A were intending to cease trading on 31st March 2010.

6.10 The FSA accepts that the complainant became aware of this in April 2010. It has also accepted that, the Solicitors emailed it on 15th April 2010 to notify it that there was ongoing litigation against Firm A with a hearing set for January 2011. The FSA also accepts that having received this email, it did not forward it to the correct area with the effect that neither the Cancellation nor Supervision Teams were aware of the litigation until after Firm A's Part IV Permissions had been cancelled. That, in my view, is a serious act of maladministration on the part of the FSA and a matter of regret. The FSA has apologised for this error.

6.11 The FSA has set out in its response that the "*cancellation of permission can occur if there is an outstanding complaint, SUP 6.4.10 G, SUP 6.4.20 G and SUP 6.4.22 G are relevant. Under SUP 6.4.10 the FSA 'may request' confirmation that there are no unresolved complaints. This does not mean that there is a requirement that all complaints must be resolved before cancellation of permission can occur*". Likewise, the FSA has highlighted that "*under SUP 6.4.22 it states that the FSA will take into account all relevant factors including if there are any outstanding complaints. It does not say that this will prevent a cancellation taking place although any potential complaint will be considered*".

Whilst there may be ongoing complaints, the FSA is *not prevented* (my emphasis) from authorising the cancellation of a firm's Part IV Permissions. Even if the FSA had not authorised the cancellation of Firm A's Part IV Permissions, Firm A had indicated on the cancellation application that it was intending to cease trading with effect from 31st March 2010.

6.12 It is clearly unfortunate that the FSA lost the email, and whilst the FSA accepts that had it not done so it would have considered the ongoing litigation before authorising the cancellation of Firm A's Part IV Permissions, the FSA has set out that there is no guarantee that this would have altered its decision to do so. I would also add here that, whilst it was clear that the complainant was in the process of suing Firm A there was also no guarantee that, when the matter came to trial, he would have been successful and would have recovered the sum he is now seeking either in whole or in part.

6.13 Had the complainant been successful at trial, any damages he would have been able to obtain would have been based upon the assets held by Firm A. In this regard it must be remembered that Firm A had clearly set out that it was no longer intending to trade after 31st March 2010 and, given that the matter was not scheduled for trial until January 2011, Firm A's financial position may well have altered considerably over this period.

6.14 I would add here for the sake of completeness that, although the FSA *could* (my emphasis) delay the cancellation of Firm A's Part IV Permissions it *could not* (my emphasis) compel Firm A to continue to trade and actively seek to undertake new business, as this is a decision which can only be undertaken by Firm A's directors. If the FSA had not cancelled Firm A's Part IV Permissions, there is nothing to indicate that Firm A's financial position would not have deteriorated as the directors had clearly indicated that the firm was to cease all business activities with effect from 31st March 2010.

6.15 When the Solicitors contacted the FSA on 15th April 2010, to notify it about the complainant's ongoing litigation, the firm had *already* (my emphasis) ceased trading.

6.16 The assets Firm A held between December 2008 and February 2010 reduced considerably. The Solicitors have highlighted in the papers presented that, in December 2008, Firm A had net assets of £73,270. Whereas at the time Firm A applied to cancel its Part IV Permissions, it had assets of just £14,916.22. I appreciate that there is considerable concern at this reduction but, Firm A's management accounts (contained within Tab 6 of the papers presented to me) clearly indicate that on 28th February 2010 Firm A had a capital balance of just £14,916.22 (which was approximately equal to the regulatory capital Firm A was required to maintain).

6.17 The management accounts indicates that, Firm A had a Profit and Loss Account balance of £136,284.30, however they also indicate that Firm A had a reserve shortfall of £122,370.08 resulting in it having assets of just £14,916. I deduce from the information presented to me (by the FSA), that this relates, to a large extent, to commission claw-back (or debts owed to product providers). The position also appears to have deteriorated further when the firm went into administration in September 2010 as the accounts provided in tab 2 of the papers presented to me indicates that Firm A had a shortfall of £429,039.

6.18 Firm A transferred £100,000 to Firm B, but this money is accounted for in Firm A's management accounts as a Firm A asset. As such, it does not appear that the asset has been 'hidden' from Firm A's potential creditors.

6.19 The transfer of assets between Firms A and B took place before an application for cancellation of Firm A's Part IV Permissions had been made. The FSA, having misplaced the solicitor's email of 15th April 2010 was unaware, prior to the cancellation of Firm A's Part IV Permissions, that the Solicitors had instigated proceedings against Firm A.

6.20 The transfer of assets had been disclosed and Firm A's cancellation application confirmed that Firm B was to accept Firm A's existing and future liabilities. Further at that point no liability nor quantum had been the subject of a Court determination.

6.21 When Firm A subsequently went into administration it would be for its administrators rather than the FSA to review the financial position of Firm A and if appropriate investigate the transfer of assets between Firms A and B together with the circumstances which gave rise to those transfers. There is no evidence that the administrators found that any of the transfers were unusual or appeared to be an attempt to 'protect' Firm A's assets from claims by potential creditors, I can assume therefore (based upon the limited information available to me) that the administrators were satisfied that any transfer of assets was conducted in 'good faith' and was not in anyway suspicious (i.e. an attempt to protect the assets from the claims of potential creditors).

6.22 Firm A's administrators did not feel that the transfer of assets Firm A made to Firm B was unusual or appeared to be an attempt to 'protect' assets from claims by potential creditors. Firm A was now in administration, and had no significant assets and was no longer trading, the administrators appear to have accepted that they were unable to pursue the ongoing litigation but accepted that the complainant may have a legitimate claim against Firm A in respect of the advice that had been given.

6.23 The administrators granted the complainant the settlement against Firm A. Although it is clear that this was granted by the administrators, I have no means of knowing what investigations the administrators undertook and therefore whether the directors of Firm A had been involved in the discussions, at the time the settlement was agreed to by the administrators.

6.24 The settlement was agreed to after Firm A had ceased trading and after the FSA had cancelled Firm A's part IV Permissions and after Firm B had given an undertaking to the FSA to take on all liabilities arising from Firm A's actions.

6.25 The deed poll entered into in this complaint was one that was in standardised form and which so far as the FSA was concerned was effective. The Court of Appeal did not decide otherwise but rather that Firm B had an arguable case based upon the fact that it was not a party to the settlement coupled with the use of a summary procedure to wind up Firm B following a statutory demand. The effectiveness of the deed poll *per se* was not determined although argument was adduced by Firm B's Counsel to the Court of Appeal.

6.26 I am bound by the terms of the decision of the Court of Appeal given the provisions of paragraphs 1.5.15 and 1.5.16 of COAF which state:

> 1.5.15 In the investigation of a complaint by either the *FSA* or the *Complaints Commissioner*, any finding of fact of:
>
> (1) court of competent jurisdiction (whether in the *United Kingdom* or elsewhere); or
>
> (2) the *Tribunal*; or
>
> (3) any other tribunal established by legislative authority (whether in the *United Kingdom* or elsewhere); or

(4) any independent tribunal charged with responsibility for hearing a final appeal from the regulatory decisions of *PIA*, *IMRO* or *SFA*;

which has not been set aside on appeal or otherwise, shall be conclusive evidence of the facts so found, and any decision of that court or tribunal shall be conclusive

1.5.16 Any findings of fact or decisions of courts or tribunals not covered by COAF 1.5.15 G will carry such weight as the *FSA* or the *Complaints Commissioner* considers appropriate in the circumstances

6.27 The Solicitors feel that the Court of Appeal reached the decision that it did based upon the manner in which the deed poll had been drafted by the FSA and the FSA's need to provide considerable documentation to support the drafting of the deed poll and have stated it is "*unarguable that the FSA's failure to draft a clear Deed led to the loss in the Court of Appeal. That is a matter of fact. Further, as we have already noted it is also a matter of fact that the Court of Appeal held that [it was] most influenced by the fact that the FSA themselves turned up but needed to submit huge amounts of evidence to try and justify their interpretation of their own document and, if it was clear, should simply not have been necessary*".

6.28 Whereas the FSA hold the view that the "*Court of Appeal based its judgment on the fact that the summary procedure, under which it was considering an injunction, was not the correct forum for determining whether Firm B was liable, by virtue of the deed poll, for a judgment entered by consent against Firm A*".

6.29 The Court of Appeal has ruled that some of the arguments made by all of the parties involved in the proceedings are capable of argument, it has *not* (my emphasis) ruled that the deed poll is defective and cannot be enforced in appropriate circumstances.

6.30 I believe on a factual basis therefore (and this is not a *non sequitur*) that I am obliged to conclude from reading the Court of Appeal judgment and weighing up the arguments presented to me:

- That the deed poll is not ineffective.
- But that in the particular circumstances of this case that its use to deal with the enforcement of the settlement was not sufficiently beyond argument and certainly not so as to allow a Summary Procedure to be allowed to succeed as the means of enforcing the settlement against Firm B. In other words the additional problem of the liability of Firm A being the liability of Firm B may be open to challenge if this method was used when it involved the use of a deed poll.

6.31 I am therefore unable to gainsay the conclusions and findings at the Court of Appeal in this instance and believe myself bound by them to the extent I have set out in 6.29 and 6.30 above. In effect I accept the accuracy of the statement that

"*The Court of Appeal refused to uphold the statutory demand as valid where the statutory demand was served on the basis of a consent judgment obtained upon reaching a settlement with Firm A's liquidators. The court's concern was that the summary insolvency procedure was the wrong forum to determine whether Firm B was liable on the basis of the deed poll. This does not amount to a determination that the deed poll was defective*".

6.32 The remaining issues are matters of argument upon which I now need to reach a Final Conclusion.

7. My Final Conclusion

7.1 In brief I am satisfied that, although the FSA could have handled this entire matter in a far more efficient and focused manner, the actual losses that the complainant has incurred are not as a *direct* (my emphasis) result of the FSA's actions. The losses the complainant has incurred are firstly as a direct result of the poor advice/service he received from Firm A and secondly in pursuing Firm B using the deed poll but also using the summary procedure to enforce a judgment involving not Firm B but Firm A. As I have set out above, whilst the FSA accepts that it misplaced and therefore failed to act upon the email of 15th April 2010, there is no evidence that the FSA's failure to do this was the direct cause of the complainant being unable to recover funds from Firm A as a result of the ongoing legal proceedings. This acceptance brings into play COAF 1.4.1 and I believe (a) of that provision. I do not believe, and there is no evidence, that (b), (c), (d) or (e) are relevant or applicable however.

7.2 At the time the Solicitors sent its email to the FSA Firm A had *already ceased trading* (my emphasis) and only had a small amount of remaining capital (around £15,000).

7.3 I do need at this point to address the loss of the email within the FSA in terms of its causative effect as well as the inconvenience and concern its overlooking inevitably gave rise to on the part of the complainant.

7.4 My Final Conclusion is that its loss, while causing considerable irritation and inconvenience, did not directly cause the complainant's present position in the context of his seeking recovery of the settlement. However, its loss was a serious administrative error by the FSA where there should be considerable care taken. In those circumstances I recommend to the FSA that it makes an *ex-gratia* award of £1,500 to the complainant to reflect the distress and inconvenience that has resulted to the complainant. My rationale for that amount is that the element of maladministration involved at this particular and important juncture was serious. I therefore considered it merited an award at the top end of what it is considered reasonable in the context of *ex-gratia* awards leading to and causing distress and inconvenience. It could also be said to have led to some additional legal costs sustained by the complainant in chasing up what had happened to the email of 15th April 2010. I understand that the FSA in responding to my Preliminary Conclusion has accepted this recommendation as well as my second one concerning putting place safeguards whereby when authorised enterprises are deregulated by request no relevant information in possession of the FSA is overlooked.

7.5 There remains the issue of bad faith and the first protocol of the Human Rights Act 1998 given that the FSA is exempt from liability in negligence and thus for damages save in the case of these two aspects.

7.6 The Solicitors have made no direct allegation of bad faith nor have I found evidence of bad faith on the part of the FSA. I therefore formally record that (3)(a) of 3.2 above has no application.

7.7 I next turn to the issue of 3(b) of 3.2 above and section 6(1) of the Human Rights Act 1995. That provides as I have set out in 3.5 above but for the sake of clarity at this point I should confirm that it provides that it "*it is unlawful for a public authority to act in a way which is incompatible with a convention right*". The only convention right I need to consider is Article 1 of the First Protocol set out in 3.7 above. For the purposes of this Final Decision I consider that the settlement is a "possession" within the provision of Article 1.

7.8 Has the FSA "acted" in a way which is "incompatible" with that "possession"? My Final Conclusion is that it has not. My reasons are set out below.

7.9 The sequence of the acts referred to in 4.70 and 4.71 above clearly establishes the precise chain of events as they occurred and do not involve at the relevant times any "acts" by the FSA that were "incompatible" with the complainant's Human Rights or that directly led to the present outcome.

7.10 The only possible "acts" carried out by the FSA that could be considered relevant are the loss of the email but at best that could only be an indirect cause and plainly could not, and does not, amount to acting in a way that is "incompatible" with a 'convention right'. At worst it was an act of maladministration which was resolved by the actions of the FSA in creating the deed poll.

7.11 But was it so resolved? Was the "act" of creating the deed poll "incompatible" with the complainant's Human Rights? Plainly that is not the case. The deed poll was put in place to assist the complainant and was not an act therefore incompatible with his Human Rights. It is my view that the creation of the deed poll was the appropriate resolution to assist the complainant which it plainly does because the Court of Appeal has not said it was an ineffective deed poll. All that I take from the judgment is that *using* (my emphasis) the deed poll the way it was used in the actions before the Court of Appeal was ineffective but using it that way *was not within the direct control of the FSA* (my emphasis). There is therefore no direct causal connection with the outcome in the Court of Appeal and the FSA's actions.

7.12 Even if I was wrong in that view the worst interpretation that could be put upon the content of the deed poll used by the FSA is that as a standardised document used by the FSA on a regular basis its drafting in the circumstances of this complaint made it the wrong document to use, was misplaced and represented an error of judgement on the part of the FSA. To come to that conclusion would require clear evidence that the deed poll is ineffective but I do not have sufficient evidence of that before me. I note that the generic current deed poll is under consideration for amendment by the FSA but again that does not invalidate my conclusions in this area of causation. Its use in this case therefore cannot represent an "act" by the FSA sufficiently incompatible to bring into play section 6(1) of the Human Rights Act 1998.

7.13 For the sake of completeness I need to address finally the provisions of COAF 1.5.5 that provides (*inter alia*) that remedying a well founded complaint may include "*...taking steps to rectify an error...*". The solicitors in their reply to my Preliminary Decision of 19th July 2012 asked "*whether any further recommendations can be made to assist our client in enforcing the Deed. We do not understand why you feel it inappropriate for the FSA to make a direction to the new company [to] meet the Judgment debt under the Deed and given that they accept that it was specifically put in place to do so*".

7.14 The question then arises therefore are there relevant "*errors*" to rectify. There can only be two that could come within that definition. The first is the loss of the email of 15th April 2010 and the second surrounds the deed poll and its construction. In the context of its provisions the FSA has already apologised for the misplacing the email and in addition I have made an award in that context which the FSA has accepted. My decision in relation to the deed poll within the parameter of the Court of Appeal judgment which I am bound by means that there is no action the FSA can be asked to take to remedy "*an error*". The Court of Appeal's judgment leads me conclude there is no "*error*" to remedy even taking into account the possibility of general redrafting referred to in 7.12 above. As to any additional compensatory award based on section 6(1) of the Human Rights Act 1998 paragraphs 7.8 to 7.11 deal with that issue.

7.15 It is therefore my conclusion that COAF 1.5.5 is not engaged in the context of any further rectification of "*an error*" beyond that what the FSA has put in place.

7.16 I appreciate that the complainant will be disappointed with the overall effect of these various conclusions, but having considered the matter in some detail, I hold the view that the complainant has not been able to provide sufficient evidence that the FSA's actions either *directly* caused the complainant's loss or prevented him from obtaining recovery direct from Firm A (as a result of the misplaced email) or from Firm B (as a result of the deed poll). As such, it is my decision that I am unable to uphold the complaint

7.17 I have set out, at some length, my reasons for not upholding the complainant's complaint against the FSA. I hope that those reasons do not appear to be in breach of the overarching demand of rationality when taken in the round. It is my view that, although the FSA accepts that it misplaced the complainant's email of 15th April 2010, this had little effect on the overall position as Firm A had in effect closed (having ceased trading on 31st March 2010).

8. The FSA's supervision of Firm B

8.1 At this point I need, briefly to refer to comments made in argument by the Solicitors concerning the FSA's supervision of Firm B and the conduct of Mr X in light of the comments and concerns the Court of Appeal raised in its judgment regarding the contents of the witness Mr X submitted to it. Although I accept that the FSA's Supervision of Firm B may not been as efficient or as effective as one might expect or indeed have hoped, I am satisfied that it has considered adequately the concerns which have been raised and has taken decisions which appear reasonable in all the circumstances.

8.2 Although I am satisfied that the decisions the FSA has taken appear reasonable in all of the circumstances, I am unable to comment further upon what action the FSA may or may not have taken. This is not because I wish to be unhelpful, but simply because of the reporting restrictions contained within Section 348 of the Act, the FSA could not provide any further explanation about what action it may or may not have taken. Section 348 of the Act states:

348 Restrictions on disclosure of confidential information by Authority etc.

(1) Confidential information must not be disclosed by a primary recipient, or by any person obtaining the information directly or indirectly from a primary recipient, without the consent of—

(a) the person from whom the primary recipient obtained the information; and

(b) if different, the person to whom it relates.

(2) In this Part "confidential information" means information which—

(a) relates to the business or other affairs of any person;

(b) was received by the primary recipient for the purposes of, or in the discharge of, any functions of the Authority, the competent authority for the purposes of Part VI or the Secretary of State under any provision made by or under this Act; and

(c) is not prevented from being confidential information by subsection (4).

(3) It is immaterial for the purposes of subsection (2) whether or not the information was received—

(a) by virtue of a requirement to provide it imposed by or under this Act;

(b) for other purposes as well as purposes mentioned in that subsection.

(4) Information is not confidential information if—

(a) it has been made available to the public by virtue of being disclosed in any circumstances in which, or for any purposes for which, disclosure is not precluded by this section; or

(b) it is in the form of a summary or collection of information so framed that it is not possible to ascertain from it information relating to any particular person.

(5) Each of the following is a primary recipient for the purposes of this Part—

(a) the Authority;

(b) any person exercising functions conferred by Part VI on the competent authority;

(c) the Secretary of State;

(d) a person appointed to collect or update information under section 139E or to make a report under section 166;

(e) any person who is or has been employed by a person mentioned in paragraphs (a) to (c);

(f) any auditor or expert instructed by a person mentioned in those paragraphs.

(6) In subsection (5) (f) "expert" includes—

(a) a competent person appointed by the competent authority under section 97;

(b) a competent person appointed by the Authority or the Secretary of State to conduct an investigation under Part XI;

(c) any body or person appointed under paragraph 6 of Schedule 1 to perform a function on behalf of the Authority.

In summary, Parliament by virtue of Section 348 of the Act imposes upon the FSA, as the regulator, a ruling of confidentiality in the context of disclosing its response or position when acting in the discharge of its function as the relevant regulator. This means that, other than in limited circumstances, the FSA is unable to disclose any information about what action it did or did not take against a firm or individual (and the reasons for that decision).

8.3 In this instance, while I do not believe that the exceptions apply and I cannot comment further, I do myself have the power to delve more deeply into such matters, in my role as Complaints Commissioner, to enable me to be satisfied as to the propriety of what the FSA has done. I am however limited, in most cases, as to the further disclosure of the details that I am then informed about. I am therefore unable, directly, to answer the questions that have been posed.

8.4 As part of my investigation into the complaint I have asked the FSA to comment on what enquiries its Supervision Team made into the actions and conduct of Firm B and its directors. Although I am unable to comment in any great detail on the information the FSA provided, what I can say is that, in my view, I consider that at the time, and currently the FSA continues to take all appropriate steps relevant to the firm given the information provided and the allegations the Solicitors and the complainant have made in the correspondence.

8.5 The position therefore is that I have obtained freely from the FSA the appropriate information to satisfy myself that the FSA exercised and made its judgements on a reasonable basis. I can appreciate that all this is not the kind of answer desired but it represents the position as I see it having regard to what I have established following my investigation.

8.6 Although the FSA accepts that Firm B has not submitted annual accounts to Companies House, Firm B *has* (my emphasis) provided the FSA itself with its six monthly reporting submissions which include details of its assets and liabilities. I would add here for the sake of completeness that, at my request, the FSA has provided me with copies of these returns, although I cannot make any further comment on what these returns show.

8.7 Likewise, the FSA is aware that Firm B's status, as shown on the Companies House register, is currently shown as "*Active – Proposal to Strike off*". The FSA has explained in its arguments to me that it is aware of this proposal and understands from the Gazette entry that this proposal is one made by Companies House itself (rather than Firm B) as a result of Firm B's failure to submit accounts to Companies House. I would add here that the FSA have considered the matter and reached a decision which I consider to be appropriate in all of the circumstances. Unfortunately, section 348 of the Act (as I have set out at 8.2 above) prevents me from making any further comment on what actions (if any) the FSA is taking as a result of this.

8.8 Although I cannot comment upon the FSA's intentions regarding whether it intends to take any action against Firm B, what I can say is that the FSA register shows that Firm B has now cancelled its Part IV Permissions. This means that, although Firm B remains regulated by the FSA, it now cannot undertake any regulated activity.

9. Recommendations

9.1 Given the serious administrative error by the FSA in loosing an important email, I recommend that the FSA should make an ex-gratia payment of £1,500 to the complainant. The FSA has agreed to this.

9.2 I also recommend that the FSA puts in place further safeguards to ensure that, in cases where authorised enterprises are deregulated by request, the appropriate area (the Cancellations Team) received all appropriate documentation so that no relevant information in possession of the FSA is overlooked. The FSA has provided me with its proposals in this area with which I am content.

Sir Anthony Holland
Complaints Commissioner

18th September 2012