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 and the appointment must be approved by H.M. Treasury. I currently hold that role.

1.3 I must immediately apologise for the long delay in coming to a final conclusion in this matter. The complaint was first received from the complainants via their lawyers in a letter dated the 28th September 2012 and it is unfortunate that it has taken until now to arrive at my final view. This is primarily due to a delay in receiving the entirety of all the relevant material from the FSA.

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

1.5 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.

1.6 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 Complaint Schemes can be found on the internet at the following website; http://fsahandbook.info/FSA/html/handbook/COAF.

1.7 In my Final Decision I have judged the evidence given to me on the balance of probabilities which is the level of proof required in civil cases

1.8 Having considered all the evidence available to me, I now provide my Final Decision setting out my findings and any recommendations. I intend to publish my Final Decision on my website.

2. The Complaints Scheme

2.1 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.

2.2 This complaint is different from those normally investigated by me in that no financial compensation is requested, no breaches of human rights are alleged only that the FSA through its actions and/or conduct has been guilty of unprofessional behaviour and/or a lack of integrity in the context of the events surrounding a meeting involving the FSA, the complainants and their lawyers. All the redress that the complainants seek is that "*the record [is] put straight that [the relevant] conduct was well beyond the limits of propriety and the down-playing of [the] conduct and professional standards by the Complaints Handler [at Stage One] is unacceptable*".

2.3 Such allegations do not make for an easy investigation given the absence of sufficient contemporaneous notes of the meeting with which I am concerned. Further my investigation does not have the benefit of formal hearings with evidence given on oath and subject to cross examination. It is a paper driven exercise therefore which makes arriving at the detail of what exactly took place difficult. In this case I took therefore the unusual course of asking for the complainants, their lawyer and the FSA staff involved at the relevant meeting to provide sworn affidavits as to what they respectively believed took place at the meeting concerned and particularly what led to the meeting being called in the hope that some common threads would emerge.

2.4 Unfortunately, that approach has had the effect of slowing down what should have been a reasonably prompt investigation primarily because of delay in the submissions of the affidavits which, in one case, took almost two months to reach me. In addition the complainants' response to my Preliminary Decision raised new issues which necessitated yet further detailed investigation.

2.5 In the response to my Preliminary Decision the complainants put forward the suggestion that they did not believe that "*the sworn evidence of the FSA is capable of any finding other than that of bad faith*". That allegation was not the subject of a Stage One investigation and given the content of 2.2 I have not escalated the complaint to that level as to do so would involve the FSA being allowed the opportunity to conduct a Stage One investigation of that specific allegation given its strong denial of that allegation. Further in the specific circumstances of this complaint I believe it is desirable to bring my Stage Two investigation to a conclusion before the FSA is dissolved as a Regulatory body on 1st April 2013. I also take cognisance of the fact that the FSA has conceded in its reply to my Preliminary Decision that it accepted that the apologies I identified in that Preliminary Decision would be given. It does not accept however that it has been guilty of bad faith. I do however comment further on the issue of bad faith in general terms later at 4.22 *et seq*.

2.6 It is now my firm view, that the detail of the purpose behind the meeting being called for plays a crucial role in determining what occurred in relation to the behaviour of the respective parties.

3. The Complaint

3.1 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 this case of unprofessional behaviour and/or a lack of integrity in the manner in which it has carried out, or has failed to carry out, its regulatory functions. The complainants in this case, on whose behalf the lawyers have contacted me, are unhappy both with the FSA's actions and the outcome of the FSA's own investigation into their complaint. I have been asked to review the FSA's actions in accordance with the rules of the Complaints Scheme and I now do so in accordance with 2.2 above.

3.2 The complaint can be best encapsulated in the following five aspects which differ in my view, individually, in seriousness, although Complaints 2, 3 and 4 were in my view the consequence of Complaint 1.

1. The actual reason or reasons and the subsequent notification to Firm K for the meeting that took place at the complainants' offices on 5th March 2012 (hereafter referred to as "the meeting").
2. The manner in which the FSA staff questioned the complainants about the non-submission of a Suspicious Transaction Report.
3. Individual comments that were made by the FSA's staff at the meeting.
4. The FSA staff's conduct towards the complainants' lawyer who attended the meeting (in respect of both the FSA staff's behaviour and the comments that were made).
5. The findings of the FSA's Stage One report in its reference to the behaviour of the complainants' lawyer.

3.3 I will deal with each complaint individually in that I will present, where relevant, and demanded by the context, the respective arguments contained in the affidavits where I consider they need to be presented in order to establish the appropriate findings and thus the rationale for my conclusion in respect of each of the complaints. Where I uphold a particular aspect of a complaint and have done so purely in reliance upon the FSA's evidence alone I have not referred in this Final Decision in the same detail to all that the complainants presented by way of evidence as it is superfluous to do so in that context.

3.4 In my Final Decision Person A, Person B, Person C and Person D are the staff from the FSA who attended the meeting and Person W, Person X, Person Y and Person Z are the lawyer and the individuals from the complainants who attended the meeting. I refer to the parties involved in that way to preserve both anonymity of those involved and in such a way as to conceal gender. One of the complainants suggested in responding to my Preliminary Decision that this approach on my part "*removed even the dignity of my gender*". I do not accept that argument and therefore reject it as being irrelevant to the substance of the complaints. There is no objective evidence that gender or size of the individuals involved in this matter played any part whatsoever in what occurred. Such a suggestion amounts to a subjective comment or an opinion without any objective evidence to justify it.

3.5 The staff of the FSA who attended being Persons A, B C and D represented two persons from the "Supervision" part of the Conduct Business Unit of the FSA (Supervision) and two persons from what is called the "Market Conduct" (Markets) part of the same unit.

The "Supervision" Division of the FSA is the area which is responsible for the day to day monitoring of the conduct of a regulated firm, for 'managing' the FSA's relationship with the firm and for ensuring a firm's compliance with the FSA's rules.

The "Markets" Division is the FSA's specialist resource for its market-facing responsibilities. It combines the FSA's responsibilities for the supervision of market infrastructures, markets policy, the identification of market abuse, the function of the UK Listing Authority and the client assets units.

3.6 The attendees from the complainants being Persons W, X, Y and Z comprised the lawyer advising the complainants' firm, together with two directors and the Compliance Officer from the complainants' firm.

3.7 When considering the affidavits, despite my request for these to include detailed recollections of who said what to whom and when, I am struck by the lack of detail contained within those provided by the FSA of what was actually said by members of the FSA; although they clearly contain details of what the complainants and their lawyer said. This is of concern and has, to an extent made my consideration of the matter more difficult than I would have wished. Although notes were taken during the meeting, copies of which have been passed to me, these provide a general summary of the general discussions and do not provide me with any assistance with establishing what was actually said, by whom it was said and when. They were not 'copious' notes as the complainants suggested in their reply to my Preliminary Decision or at least the notes that I have seen could not be described as such. It is also puzzling to me that the available information in this area is so limited given that the complainants made their complaint within seven days of the meeting which is the subject of this complaint.

It is indeed a matter of regret that there was no full or complete recording of the meeting nor a sufficiently detailed contemporaneous note on both sides of what took place by all the parties present. However, despite this absence a number of common threads have emerged sufficient for me to come to a Final Decision.

4. Complaint 1

The actual reason or reasons and the subsequent notification to Firm K for the meeting that took place at the complainants' offices on 5th March 2012

4.1 The complainants have alleged that the reasons for the meeting lacked clarity and were also misrepresented to them.

4.2 The complainants have alleged that the FSA misled the complainants as to the purpose of the meeting, in that they allege that the FSA informed them that the meeting was a general one to discuss the implementation of recommendations arising from a previous s166 report. However, the complainants allege that the FSA's primary intention was to allow it to question them in relation to its belief that the complainants had failed to submit a Suspicious Transaction Report (STR) in respect of a specific single occurrence (a trade which was made by Firm M, which was one of the complainants' clients).

4.3 The complainants have provided in support of their affidavits copies of the correspondence which was exchanged between Person A of the FSA and Person Z of the complainants' firm. This shows that, on 15th February 2012, Person A wrote to Person Z and stated:

"*I would like to arrange a meeting to discuss STR Requirements with you here at the FSA's offices*".

4.4 On 16th February 2012 Person Z responded and asked:

"*In order to ensure the appropriate attendees and that the meeting is as productive as possible I should be grateful if you could provide further information as to the areas the meeting will cover and <u>any specific incidences</u> (my underlining) with which you are concerned*".

4.5 On 17th February 2012 Person A responded:

"*The purpose of the meeting is to discuss the implementation of the recommendations of the s166 report regarding the ability to recognize (sic) suspicious transactions and report them to the FSA*".

4.6 On the face of the contents of the emails which Person A exchanged with Person Z, and despite Person Z asking whether there were any *specific* (my emphasis) incidences which the FSA wished to discuss, it would appear reasonable for the firm to have believed that the FSA simply wished to discuss in general terms the complainants' implementation of the recommendations made as a result of the previous s166 report with a particular regard to STRs. Nevertheless I need to address the issue in more detail.

4.7 I need to address this issue in more detail because the affidavits from the FSA display either a lack of clarity as to what the FSA understood the meeting to be about, or an intent to confuse either of which I would find to be unattractive on the part of the regulator.

4.8 I start with the sworn evidence of Person A which states, in that part concerning the background to the meeting that

"*[Markets] were considering taking action against [the complainants] because of a failure to [submit] an STR*".

and again:

"*Markets and Supervision continued to look closely at [the complainants] as the issues directly related to questions outstanding as to why no STR was made given the circumstances surrounding the trade...*".

but later:

"*[The complainants] requested further clarification regarding the topics to be covered. I confirmed with [the complainants] by email on 17th February, that the purpose of the meeting was to discuss the implementation of the recommendations from the s166 report regarding the ability to recognise suspicious transactions and to report them to the FSA*".

and again:

"*Given the concerns of Markets and Supervision about [the complainants'] failure to submit an STR, which was directly related to the firm executing trades on behalf of Firm M, the subject matter of the meeting was appropriate*".

4.9 Faced with that sworn evidence, (quite apart from the fact that there were produced after my Preliminary Decision the emails some of which I have identified in paragraphs 4.3, 4.4 and 4.5 and all of which I shall refer to later in far greater detail) I felt obliged to return to the FSA for further clarification since the deponent concerned appeared either uncertain or confused as to the meaning and issue of "*any specific incidences with which you are concerned*" as raised by the complainants in its email of 16th February 2012.

4.10 In fairness to the deponent, I should here reproduce the entirety of the response (which of course is unsworn) some of which is irrelevant to this issue. It reads:

"*I hope the following will clarify the point raised by the commissioner.*

- *The email that was sent to the firm arranging the meeting was agreed with Person B. The meeting was not arranged to discuss the s166 report in general, it was clear that it related to only one aspect of that report, namely the firm's ability to recognise suspicious transactions and to report these to the FSA.*
- *This was an area that was previously highlighted in annex A - Scope of the Report of the Requirement Notice, Market Abuse Controls - point 7 which stated "the appropriateness of the firm's STR procedures, including monitoring, escalation internally for consideration and reporting to the FSA. The firm would have been aware of this.*

- *The recent request to the firm from Markets for information regarding the firm executing trades on behalf of Firm M raised concerns that these recommendations were not continuing to be implemented. This was my primary concern working in the Supervision team i.e. to ensure the firm's systems and controls over suspicious transactions were working to the appropriate standards.*
- *Based on this information Markets and Supervision had concerns about the firm's failure to submit STRs overall and the recent Firm M trade was the only available example to demonstrate our concerns.*
- *We wanted to discuss the firm's procedures regarding STRs and to establish whether the firm should have submitted an STR for Firm M*" (my underlining).

I did not obtain the clarity that I had hoped for from that response.

4.11 If I turn to the affidavits of the other FSA staff involved I get a slightly clearer picture even if as a result I still remain confused. One affidavit says for example:

"*Prior to the meeting with [the complainants], an internal FSA meeting ('the internal meeting') was held with Person B, Person C, along with Person A and me to discuss the agenda of the visit. ...*

Person B and Person C explained that Firm M had placed a substantial trade on 20th June 2011 through Firm K (the trade), three days before an announcement from the International Energy Agency (23rd June 2011) ('the announcement'). The announcement concerned a release of reserves, which drove down the price of oil substantially. I do not know how the trade originally came to Person B's and Person C's attention.

Firm K, in common with other firms, is required to submit suspicious transaction reports (STRs) to the FSA pursuant to SUP 15.10.2. Person B and Person C considered this trade suspicious based on the timing of it and therefore believed that Firm K should have submitted an STR. But Firm K did not submit an STR on this trade.

It was agreed at the internal meeting that Firm K should have submitted an STR (my underlining). It became apparent to me at the internal meeting that Firm K had previously been questioned regarding the non submission of an STR on the trade via email and post, and had confirmed that they did not view it as a suspicious trade. I was not involved in these communications.

It was agreed at the internal meeting that the non submission of an STR concerning this trade would be the subject of the meeting. As this was directly related to the topic of the section 166 report, it was also agreed that this discussion would take place in the wider context of the controls implementation as a result of the section 166 report. Therefore the relevant individuals from both Supervision and Market Conduct were present at the meeting".

4.12 In another affidavit on the same issue these paragraphs on the purpose of the meeting appears:

"*My understanding was that the meeting was to follow up on responses to the previous request for information regarding the trading by Firm M.*

I was not involved in the organisation of the meeting, other than making the suggestion that we should consider holding the meeting at the firm's offices so that they would be able to refer to documents held at their offices in response to any questions we might raise. For example, had the firm considered submitting an STR but decided against it, we could request documentary evidence of this decision-making.

Prior to the meeting I met with my colleagues Person A, Person D and Person B to discuss the nature of our concerns and the strategy for the meeting. It was agreed that we would ask Firm K to walk us through their STR process generally, then we would discuss the specific trading by Firm M, to learn why no STR had been submitted (my underlining). I was given copies of the information provided by Firm K, which from memory consisted of two letters and two charts. I felt that the responses provided by Firm K certainly required follow-up".

4.13 The fourth affidavit sets out extensively in some detail why that deponent (from the Markets section of the Conduct of Business Unit) wanted a meeting with the complainants. There is no need for me to quote from that affidavit since a clear conclusion to be drawn by an objective reader was that there were in fact "*specific incidences with which [the FSA was] concerned*".

4.14 In light of what I have set out, and taking into account the entirety of what the FSA has set out in its evidence to me, in my Preliminary Decision I set out that I was satisfied that:

i) there was a specific agenda for, and purpose behind, the meeting that took place on 5th March 2012;

ii) that that purpose was obfuscated by the FSA; and

iii) whether that obfuscation was caused by carelessness, poor management, or insufficient liaison between different areas of responsibility was difficult for me on which to make a formal finding. I was therefore not able to conclude that what happened in this area arose from any deliberate act of a member of the staff of the FSA.

4.15 However, following further representations from the complainants I asked the FSA to provide me with further details of exactly what discussions took place within the FSA prior to the arrangement of the meeting on 5th March 2012 at the complainant's offices.

4.16 I would first say that that I am disappointed that it does not appear that this further information was presented to the FSA's Complaints Team during its Stage One investigation. Either the Senior Investigator did not ask to see this further information which I requested or it was withheld from him. Whichever is the answer both represent unattractive scenarios. I have commented to the Board in the past on more than one occasion that for the Complaints Scheme to work there must be total transparency so that all can learn from the process involved.

I would also add this, had the Senior Investigator seen the email of 29th February 2012 (the content of which is set at 4.19 below) from Person A he might have reconsidered whether his comments about the complainant's lawyer were justified and indeed whether it was appropriate to make those comments in the first instance. I also cannot help wondering whether this further information passed to me after my Preliminary Decision was considered or reviewed by persons A, B, C and D when completing their affidavits submitted to me prior to my Preliminary Decision.

4.17 The information the FSA has now provided me with shows that it first became 'interested' in the trades Firm M had placed through Firm K in October 2011. It also shows that the FSA believed that Firm K had failed to submit a STR and felt that further action should be taken. This is confirmed in an email Person A sent to Person B on 10th October 2011.

"*Person B*

I spoke with [a member of the Market Conduct Team] on this. I agree with the proposed course of action, a comparison of the two charts will be good to see. I would consider enforcement action appropriate given the previous history with the firm and the S166 was only last year. I will speak with [a member of Wholesale Small Firms] today and confirm our thoughts and come back to you.

Thanks

Person A"

4.18 Although it is clear that further consideration was given to the matter, no further action was taken until the FSA received correspondence from the US Commodity Futures Trading Commission on 6th January 2012 regarding the trades. Following receipt of this letter the FSA entered into further correspondence with Firm K.

4.19 The FSA has also provided me with an email chain which shows the exchange of comments between members of the FSA staff involved and with Firm K in relation to both the arrangement of the meeting on 5th March 2012 and the meeting itself. I will now set out the full contents of those emails below as they shed even greater light on what lay behind the request for a meeting with the complainants.

Person A to Person Z by email on 15th February 2012 (timed at 10:49)

"Dear Person Z

I would like to arrange a meeting to discuss STR requirements with you here at the FSA's offices. I am looking at dates over the next two week to three weeks and would appreciate if you would let me know your availability and who will be attending with you. Unfortunately I am not available on 24th Feb, 2nd March or the 9th March.

I look forward to hearing from you.

Kind regards

Person A"

Person Z to Person A by email on 16th February 2012 (timed at 10:59)

"*Dear Person A*

Thank you for the email. I would like to propose meeting in your offices at 3pm on either the 5th or 6th March. In order to ensure the appropriate attendees and that the meeting is as productive as possible I should be grateful if you could provide further information as to the areas the meeting will cover and any specific incidences (my underlining) with which you are concerned.

Best regards

Person Z"

Person A to Person B by email on 16th February 2012 (timed at 11:04)

"*Person B*

How much can we give them (that is Firm K) *on this?*

Either day is good for me.

Thanks

Person A"

Person B to Person A by email on 16th February 2012 (timed at 14:55)

"*Hi Person A*

The 6th is the best day for Person C and me – [Person C] has a clash in [their] *diary on the 5th.*

I think you could (my underlining) say that this meeting is to discuss the implementation of the recommendations from the s.166 report in regard to their ability to recognise suspicious transactions and report them to the FSA.

That should be sufficient to get them here (my underlining) and then (my underlining) we can discuss with them this particular issue (my underlining) (they are already aware of it because we wrote to them for information about it) in a general sense.

Is that okay with you?

Person B"

Person A to Person Z by email on 17th February 2012 (timed at 13:01)

"*Dear Person Z*

Thank you for getting back to me. The 6th March would work for us. I will book a meeting room for 3pm here at the FSA's offices.

The purpose of the meeting is to discuss the implementation of the recommendations from the s.166 report regarding the ability to recognize suspicious transactions and report them to the FSA.

We look forward to meeting with you on the 6th, please let me know who will be attending with you so that I can arrange for passes with our reception.

Kind regards

Person A"

It is worthy of note at this point that despite Person Z's direct request for details of "*any specific incidence*" none was given despite the clarity of the request.

Person B to Person A by email on 20th February 2012 (timed at 16:39)

"*Hey Person A*

Sorry, I haven't been around but wanted to bring up something that Person C suggested. Since we're going to bring up a specific incidence we could attend the meeting at their place so we can mention the incident to them and then if we were there, it would allow them access to their files regarding the incident. It sounds like a logical approach to me but may be you and Person C could talk and decide which would be better – here or their offices. Person C will be taking over our STR supervision when the changes take effect that I mentioned to you the other day, we are going to take over STR supervision from Supervision.

Person B"

Person Z to Person A by email on 24th February 2012 (timed at 11:30)

"*Dear Person Z*

Further to your email [of 23rd March which I have not set out] *I am afraid that I need to re-arrange our meeting as one of my colleagues has been called away from the office that day. Given the location of one of my colleagues on the 5th March would it be possible to have the meeting on Monday 5th March at 3pm at your offices? If this is not possible then we will have to defer to a later date, otherwise please let me know as soon as possible as co-ordinating diaries is quite a challenge lately.*

Apologies for any inconvenience.

Kind regards

Person A"

It is worthy of note that the change of venue perhaps had more to do with the "*specific incidence*" to be raised as referred to by Person B's preceding affidavit rather than for the alternative reason that was proffered.

Person A to Person B, Person C and Person D by email on 29th February 2012 (timed at 16:40)

"*Person B/ Person C*

Wanted to touch base with you regarding plan of action for Monday's meeting and setting some form of agenda. How do you want to play this one, do you (sic) me to open meeting or do you want to take the lead on this from(sic) start given STR subject matter.

The firm is aware that we wish to come in and speak with them in relation to the Market Abuse Controls set out in the S166 requirement of September 2010 regarding STR procedures. I did not elaborate on anything else (my underlining), although we also wish to raise the matter of non reporting of STRs i.e. Firm M, of which they know we have been in contact with them and requested information from them in this regard.

I know I previously discussed with Person B the possibility of requesting the firm to carry out a focus report, and if still appropriate how we get them to do it given that it is not a S166 request. Can we ask them to do it internally, I think so. In addition we also wanted to advise the firm that given regulatory history in the last couple of years, including this current matter, they are now firmly at the top of our radar. I would not be surprised if there is resistance from Person W but we need the firm's responses more than Person W's (my underlining).

I would like to further establish the following:

- *The appropriateness of the firm's current STR procedures, including monitoring, escalation internally for consideration and reporting to the FSA.*
- *Who is responsible in the review and escalation of a potential STR?*
- *Who in senior management are STRs reportable to?*
- *Update on responsibility in the FSA going forward regarding STRs and Market Conduct.*
- *Firm M – Firm's explanation / the lack of STR and associated information we have on this matter, I will leave to you to raise with the firm.*
- *FSA expectations going forward*

Please add any further bullet points or include comments in existing points and I'll put together a high level agenda.

Any other questions you have please let me know.

Does the above sound ok so far?

Person A"

This last email from Person A I will refer to later on a separate matter.

4.20 The FSA in its response to my investigation stated that it had not

"*prior to the meeting formed any view that Firm K had committed a serious regulatory convention. Rather, the FSA was concerned to check whether a contravention had taken place and needed an appropriate explanation from the firm*".

It continues

"*it is quite normal, in view of the FSA's statutory objectives, for the FSA to challenge senior management of a regulated firm. This is a consistent approach that the FSA has used, particularly following the financial crisis but also since its inception*".

While I accept that statement it does appear to me to be in part contradicted by the impression I received from these emails. But the essential issue must be that when challenges are to be mounted as happened in this case the party being challenged must understand that that is the purpose of the meeting where the challenge is to take place.

In the same response the FSA states

"*that there is no dispute by any of the parties that the questions raised during the meeting about Firm M's trading were legitimate questions of a regulator to ask a regulated firm*".

But it is not suggested that the questions were not legitimate but rather that the complainants had not been told that they were to be one of the purposes of the meeting.

4.21 Given my finding of fact that the entire purpose of the meeting was not made clear to the complainants, *despite its request for that information* (my emphasis), I can make some further relevant comments.

4.22 In a number of the FSA's affidavits reference has been made to Principal 11 which states:

"*A firm must deal with its regulators in an open and cooperative way, and must disclose to the FSA appropriately anything relating to the firm of which the FSA would reasonably expect notice*".

In my view although Principal 11 applied to regulated firms it must equally apply to the FSA as the regulator. Indeed if the FSA can be shown to have deliberately misled a regulated firm then its action could be considered to be approaching the area of displaying 'bad faith'.

4.23 A finding of bad faith on my part represents a serious finding and demands both clear evidence and cogent reasoning. Bad faith is an issue which attracts a heavy burden of proof. It is fundamental to the legitimacy of regulatory decision making and actions by the regulator, that official decisions and actions are taken in good faith and are not tainted with impropriety, improper or disguised motives.

4.24 Bad faith can be defined in a number of ways. In my view in the context of the FSA there must be an implied covenant of good faith and fair dealing in considering overall the acts of a statutory regulator. Bad faith has been defined as an act or acts designed to deceive or mislead in order to gain some advantage. While there is no legal definition – I am attracted by a definition in the Canadian Courts. The Canadian definition (in *Collins v Transport and Allied Workers Union (1991) 6 CPC*) stated that in effect:

"*Good faith and its opposite, bad faith, imports a subjective state of mind, the former motivated by honesty of purpose and the latter by ill will.*"

4.25 I believe that definition must include a person who intentionally tries to deceive or misleads another in order to gain some advantage. Accepting that that approach is the reasonable one for me to adopt, is it the case that, in the context of this complaint, there is sufficient evidence of bad faith as I have defined it above on the part of the FSA? I believe that what I have read in the FSA's evidence in this investigation comes perilously close to that for the reasons I will adumbrate shortly. That however is as far as I need to go in that such a finding is not necessary in the context of this particular complaint and for the avoidance of doubt and having regard to what I set out in paragraph 2.5 earlier I make no finding of bad faith on the part of the FSA.

4.26 The issue of bad faith is only relevant if the complainants were seeking an award of damages under the provisions of Schedule 1 of the Act. But they are not and indeed they only seek an apology from the FSA in the terms outlined in 2.2 earlier. Nevertheless I have referred to the issue of bad faith because of the serious nature of this complaint and to assist me in deciding whether the FSA has been guilty of "unprofessional behaviour" and/or a "lack of integrity" within the provisions of COAF 1.4.1. It is COAF 1.4.1 that is the issue I need to address in the context of this complaint. I believe that the FSA is guilty of both of those limbs. My reasons must now follow in some considerable detail.

4.27 The core of those reasons is primarily addressed by the way in which the meeting on 5th March 2012 was arranged, as well as the chosen venue.

1. All the affidavits submitted by the FSA support my view that the complainants were misled as to an important part of the purpose in arranging the meeting. For example:

(i) Person D – the note taker, deposes as follows:

2.5 Person B and Person C explained that Firm M had placed a substantial trade on 20 June 2011 through Firm K ('the trade'), three days before an announcement from the International Energy Agency (23 June 2011) ('the announcement'). The announcement concerned a release of reserves, which drove down the price of oil substantially. I do not know how the trade originally came to Person B's and Person C's attention.

2.6 Firm K, in common with other firms, is required to submit suspicions transaction reports (STRs) to the FSA pursuant to SUP 15.10.2. Person B and Person C *considered this trade suspicious* based on the timing of it and therefore believed Firm K *should have submitted an STR.* But Firm K did not submit an STR on this trade.

2.7 It was *agreed* at the internal meeting that Firm K *should have submitted* an STR. It became apparent to me at the internal meeting that Firm K had previously been questioned regarding the non submission of an STR on the trade vial email and post, and had confirmed that they did not view it as a suspicious trade. I was not involved in these communications.

2.8 It was *agreed* at the internal meeting *that the non submission of an STR concerning this trade would be the subject of the meeting.* As this was directly related to the topic of the section 166 report, it was also agreed that this discussion would take place in the wider context of the controls implemented as a result of the section 166 report. Therefore the relevant individuals from both Supervision and Market Conduct were present at the meeting.

The words in italics above are my emphasis.

(ii) Person B, a Senior Associate, deposes as follows:

21. After reviewing what was asked of Firm K and the response to those information requests, it was still unclear why Firm K had not submitted an STR. The information that was provided to the FSA *indicated suspicious trading by Firm M.* Although we had written to Firm K twice, no mention was made in its responses of an options position that had been obtained by Firm M during what the FSA specified as the relevant period.

The words in italics again are my emphasis.

(iii) Person A, a Senior Associate, deposes as follows:

8. I have recently been involved with a request made to Markets from the US Regulator the Commodity Futures Trading Commission ("CFTC") relating to Firm M & the Firm. Although Markets decided no further action should be taken in relation to Firm M, *they were considering taking action against Firm K* because it failed to report trades by Firm M (no Suspicious Transaction Report ("STR") was received from Firm K).

10. Firm K provided the FSA with further information and related graphs concerning this particular trade and the reasons why an STR report had not been provided. But *further consideration was still given by Markets/Enforcement to whether ENF action would be appropriate in this case.*

12. I was involved in the meeting at the request of colleagues in Markets both because I was the supervisory contact for Firm K and because of my knowledge of the firm's history. *I was aware of Markets' concerns regarding the non-submission of STRs* and that requests for information had been made to Firm K about this. I had attended several internal meetings to discuss the matter. Based on the information provided and concerns regarding STRs *it was agreed that a meeting with Firm K was appropriate* and I therefore co-ordinated the necessary meeting.

17. *Given the concerns of Markets and Supervision about Firm K's failure to submit an STR*, which was directly related to the firm executing trades on behalf of Firm M, *the subject matter for the meeting was appropriate.*

The words in italics are again my emphasis.

(iv) Person C, then a Senior Associate, deposes as follows:

3. Prior to the 5 March 2012 meeting with Firm K ("the Meeting") the Market Conduct team had been reviewing trading in ICE Brent Crude Futures by Firm M, a client of Firm K. *Part of the review was to consider whether Firm K should have submitted an STR.*

5. Given my STR role, the firm's history and the question-mark over STR controls, Person B, who was responsible for reviewing the trading raised the case with me. My involvement with the case review was peripheral until *it was decided that the FSA should have a meeting with the firm to discuss the matter.*

8. Prior to the meeting I met with my colleagues Person A, Person D and Person B to discuss the nature of our concerns *and the strategy for the meeting.* It was agreed that we would ask Firm K to walk us through their STR processes generally, *then we would discuss the specific trading by Firm M, to learn why no STR had been submitted.* I was given copies of the information provided by Firm K, which from memory consisted of two letters and two charts. I felt that the responses provided by Firm K certainly required follow up.

The words in italics are again my emphasis.

2. The chain of emails around the same time, that I set out verbatim at 4.19, that were not disclosed to me at the initial stage of my investigation, and therefore played no part in my Preliminary Decision, confirm without any doubt remaining in my mind that there was an agreed agenda for the meeting on 5th March 2012 the full nature of which was concealed from the complainants. I regret in particular that all these emails were not made available to me from the start of my investigation. I have no means of establishing whether they were made available at Stage One of the investigation that I understand was carried out by a Senior Investigator. I suspect not and I have already commented on that issue in 4.16 earlier. Such was the clarity of purpose displayed by these emails and the impression made upon me by them that I felt compelled to set out their contents in full at 4.19. It is my finding that on the factual contents of those emails alone no doubt is left in my mind that (a) the FSA had a dual purpose in seeking the meeting in question but (b) decided not to tell the complainants the entirety of that purpose.

3. I have not, in giving these reasons, referred to the evidence and affidavits of the complainants because, insofar as they are relevant, they do not derogate in any relevant way from either my findings or my reasons. Indeed I take the view that their evidence and affidavits cumulatively reinforce my findings.

4.28 I note that a number of the FSA's affidavits have indicated that, as the complainants had been in correspondence with Markets about Firm M it should have been clear to the firm that Firm M's trading would arise in the meeting. Likewise, the fact that the complainants were prepared clearly indicates that it was an expected topic.

4.29 In my opinion this is of little or no consequence as a firm should always be prepared in its dealings with the regulator, especially when it has been the subject of a s166 report and there has been considerable correspondence with the regulator in relation to one of its clients. In addition even if the firm was prepared in the manner put forward by the FSA that does not excuse the approach adopted by the FSA on this occasion. I can also add that if the FSA believed the complainants were aware of the entire purpose of the meeting then why then did the FSA, to remove all doubt, not set out that purpose in its entirety in the first place. Why hide it from the complainants?

4.30 In summary therefore the position is this. Between July and October 2011 the FSA corresponded with Firm K and its Compliance Officer concerning a single trade that the FSA suspected should have been the subject of an STR. On 5th March 2012 the FSA arranged a meeting with Firm K at its premises to discuss the previously referred to s166 report, supposedly in generic terms from the Firm K's perspective, but from the FSA's viewpoint, as both affidavits and emails disclose, the meeting was to discuss the singe trade that was the subject of the correspondence the previous year referred to above. When at the meeting that single trade was raised the evidence produced to the FSA was such that the FSA's concerns evaporated. It is worthy of note at this point that had the FSA been more forthcoming about the purpose of the meeting in the first place (and therefore Firm K had as a result alleviated the FSA's concerns) no meeting might ever have had to take place.

4.31 The decision to conceal the full reason for the meeting had a number of consequential effects and was the cause of events leading to this Stage Two investigation. It must be remembered that the FSA staff had suspected that Person W, as Firm K's lawyer, was likely to offer some resistance to what was to be the FSA's planned approach when with considerable prescience Person A in the email of 29th February 2012 made the comment

"I would not be surprised if there is resistance from Person W but we need the firm's responses more than Person W's"

I will return to that prescient comment and address its implications later.

4.32 My Final Decision in respect of Complaint 1 therefore, based on the findings set out above, is that the FSA was not sufficiently open with the complainants to the degree expected of a regulator and, when arranging the meeting, concealed, in part, the reason for the meeting.

5. Complaint 2

The manner in which the FSA staff questioned the complainants about the non-submission of an STR

5.1 I have set out above, that despite the views urged upon me by the FSA staff, my Final Decision is that the FSA indicated to the firm that the reason for the visit to Firm K was to discuss its progress in implementing the recommendations which came out of the previous s166 report but did not give the complainants the entire reason for the meeting despite a clear request to do so from Person Z.

5.2 In the light of that conclusion, I can understand the complainants' and their lawyer's concern, as anticipated by Person A when the questioning switched to the FSA's view that Firm K had failed to submit an STR in respect of a trade made by Firm M. I, therefore, in the light of 4.32 above now turn to the detail of Complaint 2.

5.3 Whilst Firm K's actions in this matter may have been of concern to the FSA it is simply not germane to my investigation of the complaint. My investigation concerns at the request of the complainants the conduct and personal behaviour of those who were present at the meeting on behalf of the FSA and not the events which may or may not have contributed to the manner in which the FSA acted during that meeting. Whether or not the complainants' actions during the meeting, as set out in considerable length within the FSA's affidavits and once again in its recent response to me, impacted upon the manner in which the FSA conducted themselves in the meeting is of limited value given my finding in 4.32 above.

5.4 Those acting for the regulator are used to operating in difficult situations and to seek to blame a regulated firm's action for the manner in which those representing the FSA have conducted themselves is not generally acceptable. On this occasion it is clearly not appropriate to hold the complainants responsible where the full purpose of the meeting has not been made known to them. Those representing the regulator must, at all times, conduct themselves professionally regardless of the situation in which they find themselves. If those from the FSA feel that a firm has acted inappropriately then there are procedures which the regulator must follow.

5.5 In the complainants' affidavits it is stated that the FSA questioned them continuously over their STR reporting procedures. It was accepted by Person A that the submission of an STR is, what can best be described, as a judgement call and that there is nothing to indicate whether it is right or wrong to submit an STR. This is a view that I understand is supported by SUP15.10 which describes the test under which an STR should be submitted as "*reasonable grounds to suspect*". This is relevant to what occurred later in the meeting.

5.6 The complainants' affidavits indicate that following the general discussion of Firm K's STR reporting procedures, the discussions moved to the Firm M's trades and Firm K's decision not to submit an STR. The affidavits indicate that, given the email Person Z had received from Person A, the complainants and their lawyer became uncomfortable when the questioning appeared to dwell upon, and to continue, around this issue; perhaps not unnaturally, given what they had been told was the purpose of the meeting and asked for clarification on why this was the case.

5.7 Given that Person W was a lawyer representing clients, a request for clarification in this regard does not appear to be unacceptable and I believe was appropriate given the lawyer's role and in the context of the limited, if not misleading, information the FSA had provided to the firm before the meeting. The FSA's affidavits have gone to great lengths to indicate that the complainants were prepared for the subsequent questioning but, as I have indicated above I do not consider that a particularly relevant factor. The complainants were entitled to receive a genuine answer to the question as to what was the purpose of the meeting and, in my opinion, were entitled to be told in advance the nature of the meeting. That issue continually therefore impacts upon the context of this particular complaint. An ambush by a regulator of the regulated is not generally an approved way to proceed at a meeting such as the one that I am considering here. I have a suspicion that the complainants felt that was the reality and that feeling produced what followed, to everyone's disadvantage.

5.8 The affidavits indicate that the complainants attempted to answer the questions which were put to them by Person B which centred around the reason why an STR had not been submitted. The affidavits also indicate that although the complainants answered Person B's questions, Person B did not accept the explanation and continued to press the complainants for an answer which Person B believed the facts, as Person B perceived them, demanded.

5.9 The complainants and the lawyers allege that Person B's behaviour was discourteous, unbelieving of what Person B was told and dismissive of what Person B was told by Person B's personal actions. That is denied by Person B. It is not helped that none of the affidavits submitted by the FSA really assist me in coming to a reasoned and objective view in this area. What is reasonable in the area of personal actions by one person can give the opposite impression to another. I am unable to come to any firm conclusion about the questioning being discourteous save to say that it is always unfortunate if a regulated body or its lawyer can come out of a meeting with the FSA with a lasting impression of the kind that appears to have happened in this case. Plainly what Person A anticipated, as a reaction on the part of Person W, in the email of 29th February 2012 might occur, was proving to be the case.

5.10 I have indicated that, unfortunately, the affidavits I have received from the FSA contain little 'detail' about exactly how, and what was said, and when at the meeting. However, the affidavits on the part of the FSA all say that given the concerns the FSA had it was quite reasonable for the FSA to ask the questions that it did.

5.11 Person B's affidavit also states that Person B did not and "*could not have required anything to be done at a meeting that was being attended voluntarily. [Their] own summary of the position is that [they] asked relevant questions of those who attended the meeting voluntarily*".

5.12 Whilst I accept that the FSA is entitled to ask questions to allow it to conduct its regulatory function, questions must be put in a reasonable manner. Given the comments made in the complainants' affidavits it is apparent that the complainants were left with the view that the questioning was pursued in a far from reasonable manner.

5.13 However, there are some pointers I can identify in the context of this complaint. In this case, all of the affidavits without exception indicate that the complainants were asked a question and that this question was answered more than once. The affidavits on the part of the complainants and the lawyer also indicate that the FSA did not accept the complainants' answers, with the FSA's affidavits all stating that these answers were challenged robustly.

Person D's affidavit states (and in doing so sums up the position) that:

"*Further questioning of the firm repeated previous ground already covered. It was clear both sides believed they were right in their assertions*".

5.14 The FSA is entitled to challenge a firm but, the FSA's affidavits contain little detail of what is meant by a 'robust challenge' and more importantly how the complainants' answers were robustly challenged. I am unable to comment, from the FSA's perspective, on the manner in which it challenged the complainants' answer, beyond recognising that it repeated the same question on at least three occasions.

5.15 It is alleged that Person B, when challenged by Person W over the repeated questioning indicated that they could ask whatever questions they felt appropriate during the interview. Given Person W's background, this was clearly unsettling given the voluntary nature of the meeting. I am aware that Person B has been involved in a number of Enforcement investigations and in so doing has conducted a number of Enforcement interviews. Clearly, an Enforcement interview is a compelled interview and conducted in considerably different circumstances (and with a number of safeguards in place).

5.16 Person W, as a lawyer, was fully aware of the use to which statements made at a voluntary meeting could be put. It was that awareness which caused Person W to respond to the questioning in the way that Person W did and to continue with resistance to the approach adopted by Person B.

5.17 When conducting a meeting and questioning a firm it is reasonable to expect the regulator to use the appropriate language and to 'tailor' the manner of questioning to suit the appropriate situation. There is a suspicion from the FSA's affidavits that this was not the case here, particularly in respect of the comments made during the questioning of the firm. This is something I will return to under Complaint 3.

5.18 The complainants' affidavits however indicate that, because Person B continued to press for an answer the complainants' lawyer questioned the powers which the FSA was using to compel the complainants to answer the question (and provide a different answer to that which had been given) particularly as SUP15.10 describes the test under which an STR should be submitted as "*reasonable grounds to suspect*".

5.19 I was not present at the meeting and because there is neither a recording of the meeting nor any agreed or otherwise contemporaneous notes of the meeting, I have to arrive at my Final Decision based upon the information contained in all the affidavits. Subject to what I comment later I found this to be a difficult exercise. From these, what I can say is that it is clear that the manner in which the FSA disputed the complainants' explanation, and challenged it, was robust. It appears nevertheless that it was deemed to pass, in the eyes of the regulated body and its lawyer, what was viewed as necessary, despite the voluntarily attended nature of the meeting.

5.20 Whilst the FSA has every right to challenge a regulated firm's actions, it must be careful that it balances its needs with the rights of the regulated. Clearly, the FSA must take steps to ensure that it (and its staff), when carrying out its regulated functions, act at all times within the considerable statutory provisions and powers it holds. Overstepping its powers is something which the FSA should not do.

5.21 The affidavits clearly suggest the meeting was arranged, and the manner of questioning conducted was in the manner of a fact finding meeting to establish whether formal Enforcement action should be taken. It is clear that some considerable time before the meeting was arranged that both Supervision and Markets considered that Enforcement action was a strong possibility. In an email Person A sent to Person B on 10th October 2011 Person A states:

"*Person B*

I spoke with [a member of the Market Conduct Team] on this. I agree with the proposed course of action, a comparison of the two charts will be good to see. I would consider enforcement action appropriate given the previous history with the firm and the S166 was only last year. ...

Thanks

Person A"

Additionally, the continuation of this view is evidenced by Person A's affidavit where, at paragraph 8, it says that:

"*Although Markets decided no further action should be taken in relation to Firm M, they were considering taking action against Firm K because it failed to report trades by Firm M (no Suspicious Transaction Report ("STR") was received from Firm K)*".

5.22 This is supported by the comments which were made by Person B's in that person's affidavit where it is stated:

"*...The FSA has every right to ask such pertinent questions when it is appropriate and must do so to satisfy itself that the regulated firm is conducting its business appropriately. If it is not, then the regulated firm could be taken through the disciplinary process as normal procedure. Before a disciplinary process can be undertaken, background information such as that sought by us at the Meeting (sic) must be obtained*".

This is subsequently supported by further comments, in paragraph 91, where it is stated (at paragraph 60):

"*...Person W's contact with the Enforcement Division resulted in my being asked to discontinue any contact with Firm K that pertained to the investigation that was mentioned by Person W in the Meeting*".

On the balance of probabilities I therefore take the view that this explains why the meeting followed the course that it did but that explanation is not a justification.

5.23 I have not in the case of this complaint quoted extensively from the affidavits from either the FSA or the complainants since both contradict the other and on the issue of Complaint 2 concerning the manner adopted by the FSA staff can offer me little or no objective assistance. What is clear is that the FSA's approach was based upon what it considered to be the primary purpose of the meeting which had not been understood to be the primary purpose by the complainants. Effectively that then gave rise to what transpired at the meeting.

5.24 Given the disclosures the FSA has now made regarding the dual purpose of the meeting and the failure to disclose the entirety of this to the complainants in advance when asked it is clear to me why the FSA's approach in the meeting was bound to be seen, by the complainants, as being excessive or heavy handed in the manner in which it was conducted. That failure, as my findings based upon the affidavit evidence indicates, led directly to the manner of the FSA's questioning of the complainants being perceived to be overtly hostile as well as repetitive, for no apparent or understandable reason.

In these circumstances it must follow that as I have upheld Complaint 1, I should, and do, as a Final Decision, uphold the essentials that are behind Complaint 2. I would not necessarily have done so had the entire reason for the meeting been made clear in the first place to the complainants. I accept that had that been the case questioning by the FSA may well be robust but would have been on the basis that both sides fully understood the entire purpose of the meeting.

6 Complaint 3

Individual comments that were made by the FSA's staff at the meeting

6.1 The complainants have also raised concern over a number of comments which were made by Person B during the meeting which they alleged were inappropriate and possibly defamatory. These comments included reference to sending people "to jail" (Allegation 1) and that Firm M only deal with Firm K "as it knows" that it will not submit a STR (Allegation 2).

6.2 Clearly these are two significant comments and were likely to concern those meeting with the FSA. I would also add that without supporting evidence Allegation 2 clearly could be seen to be possibly defamatory and to question the integrity of the complainants.

6.3 Dealing first with Allegation 1. The affidavits from the FSA say this and I quote from the respective affidavits of Person A, B, C and D:

"*There was then a fairly heated debate regarding the transaction between Person B, Person Z with interjections from Person Y. Some comments made were general and others specific to the transaction; however, some comments made by Person B may have been misinterpreted 'we have put people in jail for less'. I do not believe Person B was threatening the firm with this comment – rather [Person B] was seeking to emphasise the seriousness of not submitting an STR*".

"*I never told Person Z that he could be jailed for any conduct. I said we had put people in jail for insider dealing who had themselves been considered to be "A list" clients. No mention of Person Z going to jail was ever made by me or anyone else from the FSA*".

"*Person B made a comment about the FSA jailing people in relation to market abuse offences. Person Z [of the complainants] was clearly upset by this comment*".

"*At some point during this dialogue, Person B stated 'people have gone to jail for less' or 'people have gone to jail for this'. This was taken as a serious provocation by Firm K, who recoiled at the suggestion that they may be going to prison. Firm K all objected to this statement and in particular to the use of the word "jail"*"".

6.4 Given that all the affidavits confirm that the word "jail" was used as confirmed by all the affidavits of the complainants and their lawyer I find that the Allegation 1 of Complaint 3 is established. I also find that the fourth affidavit set out in 6.3 above comes, in all probability, closest to the impact that that reference had at the time.

6.5 Dealing next with Allegation 2 the affidavits from the FSA say this and I quote from the respective affidavits of Persons A, B, C and D:

"*Person B asked if the trade would have been suspicious without the options position. Person Z replied that due to the profile of the client, Person Z thought not. Person Z thought the choice of instrument was not characteristic of insider knowledge. Person B replied ... that Firm M could be taking advantage of Firm K's relationship with it and its approach to STRs. This was a hypothetical statement and I believe that Person B's intention was to enquire about a hypothetical situation – i.e. how would the firm respond if Firm M, a longstanding client of the firm , did act on insider information and believed the firm would not submit and STR (sic)*".

"*After Person Z said they were relaxed about Firm M having done something untoward because they were an "A list" client, I suggested that this may have been the reason why Firm M placed trades with them*".

"*Person Z commented on how well Firm K knows its clients and referred to different categories of clients. It appeared that this categorisation meant that some clients were seen as less likely to undertake suspicious trading. I think Person B responded that we have fined regulated firms, and this should not prevent Firm K considering their behaviour as potentially suspicious. Person B also mentioned that some clients might use certain brokers to conduct illegal activity based upon knowledge of the broker's controls and likelihood that they would, or would not, submit a suspicious transaction report*".

"*Person B stated that Firm M could theoretically be using Firm K as their broker because Firm M knew, or took the view, that Firm K would not submit a STRs regarding their trades. The point of this argument was missed by Firm K and it was taken an insinuation that Firm K and Firm M were acting in illegal concert somehow*".

6.6 Given that all the affidavits of the FSA confirm to varying degrees the accuracy of Allegation 2 I find that Allegation 2 of Complaint 3 is established. Obviously the affidavits of the complainants and their lawyer, having made Allegation 2, support my finding in that context.

6.7 A number of comments can be made following these findings:

i) failing to submit a STR is not, on its own, a criminal offence;

ii) a comment about "jail" could be seen to be an attempt, as suggested by the complainants' lawyer, to intimidate the complainants;

iii) the complainants' lawyer was at a meeting of this nature understandably concerned that these kind of comments had been made at all; and

iv) the use of these comments was extremely unhelpful in the context of progressing the meeting and ensuring that there was an open dialogue between Firm K and the FSA.

6.8 The FSA, despite Firm K having implemented the recommendations of the previous s166 report, still had concerns over its reporting. Whilst the FSA correctly should be able to challenge a firm over its procedures it has to be careful over the manner in which it challenges these. In this case, given the lack of knowledge of the complainants as to the entire purposes of the meeting the choice of words was inappropriate and unfortunate and could be construed to question the integrity of Firm K and the complainants. Even more is that the case where the complainants and their lawyer had misunderstood what lay behind the meeting.

6.9 Given the concern which was raised by the complainants and its lawyers over this unfortunate choice of words, it is unclear from the FSA's affidavits why, given that the FSA was believed to be making a only hypothetical statement, what steps it took to reassure the complainants and their lawyers that it was purely raising a hypothetical situation (and not making a direct allegation against Firm M and Firm K).

6.10 It is not disputed that the manner in which the meeting was being conducted had deteriorated and that as a result the exchanges between Person B and Person W had become tense. However, given the comments contained within Allegations 1 and 2, I can understand why Person W felt it appropriate to challenge the FSA intentions.

6.11 My Final Decision in respect of Complaint 3 is that the particular comments that are complained about, were made by the FSA during the meeting, and were inappropriate.

7. Complaint 4

The FSA staff's conduct towards the complainants' lawyer who attended the meeting (in respect of both the FSA staff's behaviour and the comments that were made)

7.1 As the allegations are made by the complainants' lawyer I turn to the FSA's staff and their responses in their sworn affidavits. Person A's affidavit states:

"*Person W interjected to remind Person B that the FSA was using Person Z and Person Y as expert witnesses on a separate matter and thus must be held in good standing by the FSA. Person B corrected this statement in that Person Z and Person Y had been requested as compelled witnesses and that [Person W] should allow him to continue with [the] line of questioning as Person B was present to meet with the firm and not [Person W]. Person W strongly objected to the discussion and how it was progressing. In a raised voice, speaking at the same time as Person B, Person W told Person B that Person B had overstepped the line and was acting outside of [their] regulatory powers. [Person W] was obstructive, preventing continued discussion between Person B and Person Z.*

There was a heated exchange of words between Person W and Person B, at which point Person B requested that Person W leave the room as [Person W] was preventing the FSA from continuing discussions with the firm's senior management. Person B advised that [Person B] would not speak with Person W further and was here to meet with the firm. Person W was clearly outraged. Person B asked Person Z and Person Y if they wanted Person W to stay, Person Y replied that they did".

Person B's affidavit states concerning the same allegation:

"*At that point Person X said to Person Z that [they] (Person Z) should have told [them] (Person X) about the situation and that Person Z should do so in the future. Person Z agreed with [Person X] that [they] should have done that and they seemed to be satisfied that although they had not followed their own procedures in this case they would do so in the future. Person W started speaking more frequently and as we questioned Firm K about the lack of an STR, [Person W] began to answer for them. [Person W] started to question us more and more as we asked Firm K staff questions, [Person W] continued to answer the questions....*

This tack became disruptive and even Firm K's staff were noticing how much Person W was answering for them – they began to look at [Person W] when [Person W] did this. However, none of them intervened, nor tried in any way to prevent [Person W] from doing this even though our questions were being put to them and not Person W.

It appeared that Person W was going to respond to every question that was asked of [Person W's] clients and the situation was not getting better. Up until this point the discussion had been pretty congenial. Person Z then mentioned that another reason why they had not submitted an STR was that Firm M was an "A-list" client and that this had given Person Z comfort that they wouldn't do anything wrong. I replied that the identity of the client did not have any bearing on whether someone had done something wrong and that we had put people like that in jail for insider dealing.

At this point Person W started to raise [Person W's] voice to me at a very high level. [Person W] said that I had no right to question [Person W's] clients about why they had not submitted an STR. [Person W] said that we should not question their integrity or their judgement and that they had been called as expert witnesses in an entirely separate investigation by the FSA's Enforcement Division. [Please note, I did not mention this at the Meeting, but I knew full well about the investigation to which Person W referred. I was appointed investigator on that investigation and it had been instigated from a case that I had referred from Markets Division to our Enforcement Division. The FSA had compelled Firm K's directors to attend an interview to be questioned about its knowledge of the oil markets. Person W's comments made it sound as though the FSA was relying on Firm K as expert witnesses, when in fact they had been compelled to attend for questioning in just the same way as other market participants (sic – bracket not closed.)

As Person W continued to raise [Person W's] voice, the meeting stopped. I had responded to [Person W] by raising my voice to [Person W] and I asked [Person W] to leave the room immediately. I said that we had come there to discuss the issue with Firm K and that [Person W] was disrupting this discussion. I also said at the same time that Firm K had the right to legal counsel and that they could confer with [Person W] at any time, but that [Person W] needed to leave the meeting. I regret that in the heat of the moment I raised my voice to Person W.

I looked at Person Y, who was sitting across the table from me and slightly to the right, and said that we needed to finish the meeting and asked if [they] wanted [Person W] to leave or stay. [Person Y] very softly said that [they] wanted [Person W] to stay. Person Z had done most of the talking for Firm K up until this time. Person X has responded to some things that we had said but Person Y had (sic) very little until this point.

I don't recall any of the three from Firm K raising their voice during the Meeting, only Person W had done that and I had responded to [Person W] by raising my voice to [Person W] and asking [Person W] to leave immediately.

After a short period, Person Z then calmly said that we should focus on the matters at hand and that was the point at which both Person W and I stopped raising our voices to one another. [Person W] did not leave the meeting, but also said very little for the rest of it. We made it clear to Firm K that it was their relationship with the FSA that was important and not that of their legal advisor".

The other two affidavits from the FSA staff recount a similar position

"*As a result of Person W's continued aggravating and disruptive comments to the meeting, Person B stated that [Person B] did not want to talk with [Person W] but only with [Person W's] clients, i.e. Firm K. Continued interruption of Person B's dialogue with Firm K prompted [Person B] to suggest the idea that Person W leave the meeting. Person B asked Firm K if they wanted Person W to stay. Firm K stated that they did. This was then accepted by Person B but [Person B] asked Person W to not interrupt [Person B's] questioning of Firm K*".

"*I acknowledge that Person B's behaviour was not perfect. Person B was clearly agitated in [the] exchanges with Person W, frustrated with Firm K for failing to offer a full explanation, then shocked by the production of additional, material information. Meetings such as this are extremely rare – emotions were running high on both sides and Person B was not the only attendee to step "outside what would be considered desirable and professional behaviour".*

It is absolutely correct that Person W should seek to protect [Person W's] client's interests. In this case, my view was that Person W and Person B clashed, neither would back down and the matter escalated until voices were raised, and lines of acceptable professional conduct may have been crossed by both parties. The description or (sic) Person B's behaviour as "like a school bully", "intimidating", etc but Person W's as "professional", "firm" and "appropriate" is simply unfair. I repeat my belief that this was a simple case of two individuals fighting their corner in the belief they were doing the right thing.

Person B did not "order" Person W to leave the room. My recollection is that [Person B] stated [Person B] was there to ask Firm K questions, not to speak to their legal adviser. [Person B] did talk to Person Z about Person W leaving the room but also said they were entitled to legal advice at any point. Person Z wanted Person W to remain in the meeting and my recollection is that this is the point at which matters started to calm down. Person Z became conciliatory and with the input of Person A, we got back on track".

7.2 In the context of this complaint (and what I have set out is also relevant to Complaints 2 and 3 but is best dealt with here relative to complaint 4) given that this complaint is in general as well as purely specific terms, I turn for help to the complainant's affidavits. Person Xs affidavit said this by way of general comment.

"Person X deposed as follows:

"*Person B went on to say to Person Z: "Maybe they [Firm M] only deal with you because they know you will not make an STR". Person W warned Person B that his behaviour had crossed the line and that Person B was acting outside of their powers. Person W was firm in their manner, conducting themself in a way which was in my view entirely consistent with their role. Person B again demanded an explanation of why no STR had been submitted. Person W interposed that, under SUP 15.10, the test was "reasonable grounds to suspect", observing that Person Y and Person Z had already provided Person B with an explanation of why there had been no reasonable grounds to suspect the Firm M Trade. I recall that at one point in the Meeting Person B said "knowing what you know now, wouldn't you be more cautious in accepting orders from them [Firm M] and not reporting them".*

Person B repeated their demand for an explanation of why no STR had been submitted. Person W then asked Person B to state which statutory powers they were invoking in making this demand. I felt that, in doing so, Person W was laying down a marker for Firm K so that we understood our legal position in respect of Person B's line of questioning. Person B re-iterated their demand for an explanation. By this point, Person B's voice was raised and the other FSA attendees' eyes were downcast, in my view in embarrassment. Person W again asked Person B which statutory powers Person B was invoking in order to require a response from Firm K. Person B replied: "I will not speak with you" and repeated their demand for an explanation, to which Person W responded by again asking Person B to state which statutory power Person B was invoking. Person W spoke firmly and remained entirely professional in their manner.

Person B then appeared to lose control, suggesting in very strong terms that Person W leave the Meeting as Person W was interfering with what Person B described as "the interview". Person B appeared to be frustrated with Person W's comments and seemed to feel that they were being hindered in pursuing their irregular and improper line of questioning by Person W's presence, saying: "if your clients wish to speak with you they can do so outside". This was quite clearly an absurd and impractical suggestion. Given the accusations and threats which had been made by Person B, it was obvious to me that we needed our legal counsel to remain present in the Meeting in order to ensure that our interests were protected. I was shocked that Person B had made such allegations within the context of the Meeting since it appeared from Person B's persistent accusations that the FSA suspected Firm M of insider dealing, in which case it was reasonable to assume that a formal investigation into the trading activities of Firm M was being conducted. Person Z would be a primary witness in any such investigation whose evidence must be sought within the proper procedure prescribed by law and with the application of all relevant safeguards. It should certainly never have been sought under circumstances in which Person Z was to be given no opportunity to prepare for questioning, be subjected to bullying and baseless threats of imprisonment and finally denied legal advice.

Person W reminded Person B that Person B was an invited guest in the offices of Firm K and not in any position to order Person W to leave. Person B then asked Person Y to ask Person W to leave, which Person Y declined to do, saying that Person Y would prefer Person W to stay".

Person Y provided sworn evidence as follows:

"*By this point in the Meeting, Person B appeared to have become very agitated and aggressively repeated his accusation that an STR should have been submitted, again demanding of Person Z and I an explanation for why no STR had been submitted. Person W reminded Person B that the test under SUP 15.10 was "reasonable grounds to suspect" and that Person Z and Person Y had already explained why they had no reasonable grounds to suspect the Firm M Trades. Person W then warned Person B that Person B's behaviour had crossed the line, saying that Firm K had already provided an explanation several times and that Person B may not make such allegations within the forum of the Meeting. Person B repeated that he "expected an explanation" from Person Z.*

Person W then asked Person B what statutory powers Person B was invoking in order to require an answer from Firm K. Person B, now very heated indeed, said to Person W "I will not speak with you" and repeated Person B's demand for an explanation, to which Person W responded by firmly asking Person B once again to state what statutory powers Person B was invoking in demanding a response. Person B at this point appeared to lose control of his temper and, shouting, aggressively instructed Person W to leave the room, saying that Person W was interfering with the "interview". Person W pointed out that Person B was an invited guest in the offices of Firm K and in no position to order any person to leave. Person B then challenged me to instruct Person W to leave the Meeting. I replied that I would prefer Person W to stay. Person B's behaviour had turned the Meeting into a very unpleasant affair".

Person Z provided sworn evidence as follows:

"*Person B described my review of the Firm M Options Trades as an "investigation", the clear inference being that I had misled the FSA. I corrected Person B, explaining that it was not an investigation and that I had simply looked at the options trading activity of this client as I do routinely in respect of Firm K's futures clients. Person B then accused me of having failed to submit an STR in respect of the Firm M Trade, saying; "We have put people in jail for less". I considered this to be an attempt to intimidate and threaten me. Person B then said in relation to Firm M, "Maybe they only deal with you because they know you will not make an STR". This I found to be a disgraceful allegation, deeply offensive not only to Firm K but also to Firm M. I found it astonishing that Person B was prepared to make accusations of complicity in insider dealing against Firm K in the forum of a voluntary meeting which had purportedly been scheduled to discuss the implementation of the 166 (sic) Report. Person Y pointed out that a participant wanting to avoid the risk of being reported to the FSA would place trades directly on ICE rather than using Firm K or any other broker.*

By this point, it was obvious that the true purpose of the Meeting was to interrogate Firm K in relation to the Firm M Trade and to accuse me of failure to submit an STR. I felt that I had been misled, having asked Person A in my email of 16 February 2012 whether the FSA were planning to discuss any specific incidences in the Meeting and having received a reply which clearly indicated that they were not.

Person B (went on to impugn) *the commercial reputation of Firm M further by saying: "knowing what you know now, wouldn't you be much more cautious in accepting orders from them and not reporting them". Person B then repeated their demand for an explanation of why no STR had been submitted. Person W responded by reminding Person B that the test under SUP 15.10 was "reasonable grounds for suspicion" and pointing out that Person Y and I had already explained why we had no reasonable grounds to suspect this trade several times.*

Person B again demanded that Firm K provide an explanation and Person W asked Person B to state what statutory powers Person B was invoking to require an answer from Person Y and I. Person B, ignoring Person W, asked again for an explanation and Person W again asked Person B to say what statutory powers Person B was invoking. Person W spoke firmly and remained professional in her manner. Person B, becoming increasingly loud and belligerent, said to Person W "I will not speak with you", repeating their demand for an explanation once more. Person W again asked Person B to say what powers Person B was invoking. At that point Person B appeared to lose control, saying that Person W was interrupting the "interview" and ordering her to "get out" of the Meeting. Person B's manner was most aggressive and unpleasant and I was astounded that, having accused me of failure to submit an STR and threatened me with jail, Person B now appeared to be intent upon depriving me of legal advice. Person W observed that Person B was in the offices of Firm K as an invited guest and could not command any person to leave the room. Person B then asked Person Y to request that Person W withdraw from the Meeting, to which Person Y replied "I would prefer Person W to stay". Person B's suggestion that Person W, also an invited guest in our offices, be ejected from the Meeting was insulting and inappropriate".

Person W gave sworn evidence as follows:

"*Person B's behaviour became increasingly discourteous and rude during Person Z's explanation of the options positions of Firm M, as Person B smirked and made dismissive hand gestures indicating that Person B thought Person Z's explanation to be nonsense. Person B stated that the options trading of Firm M was "irrelevant" and repeatedly demanded an explanation as to why no STR had been made. Person Z again explained that the options positions adopted by Firm M around the Relevant Period were entirely inconsistent with the trades that a participant in possession of insider knowledge would have placed. Person B refused to accept this point, or did not understand it, and became increasingly aggressive and offensive in his demeanour, accusing Person Z of failure to submit an STR and, in an egregious misstatement of the law, said "we have put people in jail for less". Person Z and Person Y reacted with shock and horror at this statement, as it was clearly intended that they should. It appeared to me that Person B intended to intimidate my clients by making this (inaccurate) statement. Failure to submit an STR is not a criminal offence and no custodial sentence can be imposed in relation to it.*

Person B went on to say, in relation to Firm M, "maybe they only deal with you because they know you will not make an STR". Person Y responding by pointing out that a participant wanting to conceal the fact that they were trading on the basis of insider information would execute the deals themselves directly on the screen and not expose themselves to the risk of discovery by arranging the trades via a third party.

I specifically recall Person B stating in relation to Firm M: "knowing what you know now, wouldn't you be much more cautious in accepting orders from them and not reporting them". I found it quite astonishing that Person B was prepared to make such allegations which were unsupported by any formal findings of guilt. We did not, and do not, know whether Firm M were under investigation in regard to the Firm M Trading. ... Person B left me in no doubt that Person B regarded the trading of Firm M to be highly suspicious and indicative of their having been in receipt of inside information. As a former prosecutor, I am very well aware of the duties of persons charged with the investigation of any criminal offence to pursue all reasonable lines of enquiry including those which point away from the commission of the offence. If it appears that there is material that might reasonably be considered capable of undermining the prosecution case or assisting the case for the accused, steps must be taken to retain it. Were there to be an investigation (which was clearly in contemplation) or a subsequent prosecution, Person Z's and Person Y's evidence would be highly relevant in any such investigation and possibly determinative. It was completely improper for Person B to question them in this irregular manner without the application of the proper safeguards and wholly unacceptable to attempt to intimidate potential witnesses into altering their account of events.

Person B refused to accept any of the points made by Firm K, was wholly intolerant of any challenge and repeatedly demanded an explanation of why no STR had been made. I reminded Person B that the test under SUP 15.10 is "reasonable grounds to suspect" and pointed out that Person Y and Person Z had already provided an explanation several times of why there had been no reasonable grounds for suspicion in relation to the Firm M Trading. I observed that there was no good reason why the opinion of Person B should be preferred by the FSA over that of Person Z and Person Y who are acknowledged experts in this market. I warned Person B that Person B's behaviour had "crossed the line" and that Person B was "far exceeding Person B's powers".

Person B said that Person B expected an explanation from Firm K. However, it had already had explained to Person B at length the reasons why there were no grounds to suspect the Firm M Trading. It appeared to me that Person B intended to intimidate Person Z and Person Y into admitting a regulatory contravention by conceding that a STR should have been submitted. It appeared to me that the explanation of the reasons why the trades were not suspicious given by Person Y and Person Z was truthful and accurate and both were authoritative witnesses. I was extremely concerned by the refusal to accept their explanation and the pressure being brought to bear on them to change their evidence.

I asked Person B to say what statutory powers Person B was invoking in demanding a response from Firm K. Person B did not respond to this, instead saying again that Person B required an explanation from Firm K. I asked Person B what statutory powers Person B was invoking. Person B became very loud and aggressive, re-iterating Person B demand for an explanation, to which I responded by once again asking Person B to state what statutory powers Person B was invoking. In doing so, in addition to challenging Person B's improper interrogation of my client, I was also making Firm K aware that they were under no obligation to respond further to Person B's questioning in the absence of Person B invoking powers of compulsion. Person B at that point simply lost control and shouted at me, ordering me to "Get out" of the Meeting. I observed that Person B was an invited guest in the offices of Firm K and had no powers to prevent a person from receiving legal advice when accused of a serious regulatory contravention and misleading the FSA. Person B told me that I was interrupting the "interview" and made the extraordinary suggestion that if my client wished to speak with me they could do so "outside". Person B had no powers to require Person Y, Person Z or Person X to order persons to leave their office. Person B went on to say to me "I will not speak with you" and asked Person Y to require me to leave. Person Y replied "We would prefer Person W to stay".

7.3 I have set out quite extensively the affidavits in the context of Complaint 4, but particularly the complainants' affidavits because the complainants' lawyer considers that Person W is personally involved in this complaint and the evidence of the complainants as well as the complainants' lawyer is relevant to my conclusion.

7.4 The FSA's affidavits on the same aspect have also been set out here and also within the context of Complaint 3. I have upheld Complaint 3 and on the balance of probabilities I have been driven to the conclusion that in the case of Complaint 4, the complainants' affidavits more accurately reflect the nature and manner of what actually occurred. My reasons for this view are as follows below.

7.5 Whilst those present from the FSA have indicated that Person W continually interrupted the FSA and it made it difficult for the FSA to ask the questions that it wanted to, the response I received from the complainants to my Preliminary Decision indicates at paragraph 39 that:

"*...Person W had not spoken at all for the entirety of the first half hour of the meeting, and Person B had (the complainants' emphasis) questioned the Complainants for over half an hour*".

Whilst the FSA has disputed the length of time Person B had questioned the complainants before their lawyer spoke (as it has suggested that Person A initially asked questions before passing over to Person B), it is not disputed that Person W did not interject until such time as it was felt that the questioning of the complainants had moved past that which was expected given the explanation that had been given by the FSA for the purpose of the meeting. That factor appears to be clear from all the affidavits.

7.6 The complainants' lawyer's interjections may have eventually made it more difficult for the FSA to question the firm in the manner it wished. Nevertheless it was not appropriate for Person B to instruct Person W to leave the room. I appreciate that there is some disagreement about how Person W was instructed to leave the room but despite the actual words being disputed the fact that there was a request to leave the room has also been established to my satisfaction.

7.7 It is extremely unfortunate that the FSA felt that it needed to do this particularly as "resistance" from Person W was something the FSA believed might occur and Person A had indicated was likely in the email of 29th February 2012. Given this expectation it is unclear why the senior people present from the FSA (namely Person A, Person B and Person C) did not realise the importance of managing the situation better.

7.8 In relation to this issue the complainants have alleged that the FSA's intention was to question the firm without the firm having legal representation. I appreciate that Person B has stated that Person B did not try to prevent the complainants having legal representation and has stated in the relevant affidavit:

"I had responded to [Person W] by raising my voice to [Person W] and asked [Person W] to leave the room immediately. I said that we had come there to discuss the issue with Firm K and that [Person W] was disrupting this discussion. I also said at the same time that Firm K had the right to legal counsel and that they could confer with [Person W] at any time, but [Person W] needed to leave the meeting".

I note that Person B now regrets that they raised their voice to Person W. I welcome this comment and reflection. I also accept that Person B did not have any intention to prevent the complainants having legal representation.

7.9 However, whilst I can appreciate that Person W may have been preventing the FSA engaging fully with the FSA in the manner that it wanted to, I am concerned that the FSA felt it appropriate to ask a firm's legal representative to leave a meeting. I appreciate that Person B has indicated that the complainants could confer with their legal representative at any time, but given that their legal representative would not be in the room, it is unclear to me how genuine representation could be afforded.

7.10 As I was not present at the meeting it is not possible to comment with complete accuracy what was or was not said. Doing the best I can, however in studying all the affidavits on both sides, and for the reasoning that I have set out above as well as given the common threads, I conclude and find that the evidence of the complainants and the complainants' lawyer is preferred by me having been much assisted by the chain of emails set out earlier in 4.19.

7.11 It is clear from all eight of the affidavits I have received that the interaction between the parties deteriorated during the meeting. This in my view must be primarily attributable to one party in the room not fully understanding what was behind the meeting. That cannot be gainsaid in light of my earlier findings.

7.12 It is clear to me however from the affidavits provided by the complainants and their lawyer that the behaviour of Person B from the FSA fell below that which one would expect from a senior staff member employed by the regulator.

7.13 Person B, in Person B's affidavit, accepts that Person B's conduct fell below the standard which was expected as an individual representing the regulator and clearly and very honestly now regrets this. I welcome this admission and the regret which, given the pressures upon regulators, can sometimes be understandable. I also suspect that there is a grain of truth in the observation by one deponent (not Person B) that *"this was a simple case of two individuals fighting their corner in the belief that they were doing the right thing".*

7.14 I have commented in previous decisions (which have been published on my website) that those acting on behalf of the regulator must conduct themselves appropriately and not allow their emotions to influence their behaviour no matter how challenging the situation in which they find themselves. In this case it is unfortunate that Person B was unhappy with the challenges that were being made and allowed this to affect the relevant behaviour now complained about.

7.15 My Final Decision in respect of Complaint 4 is that, on the balance of probabilities the evidence that I have examined leads me to the conclusion that the conduct of the FSA's senior staff, on this occasion, towards the complainants' lawyer was unprofessional and fell below the standard expected from the regulator.

8. Complaint 5

The findings of the FSA's Stage One report in its reference to the behaviour of the complainants' lawyer

8.1 The FSA, in its Stage 1 decision letter of 28th June 2012 commented upon the conduct of the complainant's lawyer, Person W in such a way that it could even be considered to be an allegation of professional misconduct. It appears to have been based upon the comments made by one or more of the FSA's staff who attended the meeting.

8.2 I have stated earlier that I do not know what evidence was available to the FSA at the Stage One process of this complaint but it is clear to me that having regard to the evidence I have now seen and read it was inappropriate to comment without more justification about the behaviour of the complainants' lawyer. Indeed if as I suspect that the email of 29th February had not been seen it was a comment made without being aware of the whole picture. The Stage One decision was wrong to make the comments that it did about the complainant's lawyer. My Final Decision therefore upholds Complaint 5.

9. Observations

9.1 The Conclusion contained in the FSA's Stage One investigation states:

"*In light of the above we have not upheld your complaints. However, it is acknowledged that at one stage the tone of an FSA staff member did step outside what would be considered a desirable or professional demeanour. In light of this we would like to offer our sincere apologies*".

That conclusion contains a *non-sequitur* in that the FSA's Stage One investigation did not uphold the complaint but then proffers an apology for "*the tone of an FSA staff member did step outside what would be considered a desirable or professional demeanour*". In view of what I have set out above I feel no further comment is required.

9.2 I have been critical of Person B's conduct in this complaint but, I feel that all of those present at the meeting could have handled the situation better and tried to 'defuse' what was clearly becoming an uncomfortable, and ultimately confrontational, situation. This is true not only of Person A and Person C, as senior members of FSA staff but in my Preliminary Decision I came to the view that it was true of Person W as the complainants' lawyer.

9.3 It is clear that Person W was intent on acting in the best interest of the clients when challenging the manner in which the FSA was conducting the meeting. As I have indicated above, it is clear that the FSA had arranged the meeting not so much to discuss the implementation of the s166 report's recommendations but as to conduct an investigation into why Firm K had not submitted a STR. It was, as I have remarked earlier in this Final Decision, the actions of the FSA Markets Division, I suspect, to dissemble as to the entire purpose of the meeting which caused the meeting steadily, and inevitably, to deteriorate in a manner that gives no credit to those involved. I can now understand Person W's approach at the meeting for that reason.

9.4 All of the affidavits indicate that the manner in which the meeting was being conducted deteriorated badly and that there was a strong reaction between Person B and Person W as the meeting progressed. That was unfortunate. Person W, as the complainants' lawyer is required to put the client's interest first and foremost at all times. Person B was not a lawyer and therefore was carrying out a different and in some respects more challenging role at the meeting.

9.5 I have been and remain critical of the conduct of the more senior FSA staff involved at the unfortunate meeting. In my Preliminary Decision I also stated that I did not believe that Person W was entirely without responsibility for what occurred as I felt from the affidavits I had seen that Person W's conduct may not have been entirely in the best interests of the client to allow the confrontational situation to develop. However, given the further information which has now been presented to me, particularly by the FSA, it is apparent that Person W clearly felt that the complainants were in effect being 'ambushed' by the FSA. This is a view which I feel is reasonably supported by the contents of the numerous emails exchanged between Person A and Person B on 16th February 2012, and 29th February 2012 (the contents of which I have set out in full at 4.19 above). Given this, whilst I may have a few lingering reservations, I can understand and sympathise with Person W's approach during the meeting.

9.6 The affidavit of Person W states:

"Person B requirement that Person Z answer [the] questions without the exercise of statutory powers was counter to the FSA's standard practices, was unfair and lacked transparency since Person Z was not made aware on the basis upon which Person B required an answer, whether an investigation was being conducted into Firm M and what [their] rights were in relation to the statements which he was being required to make. It was my duty to intervene in order to protect Person Z from being coerced into making statements which might be used in evidence against [them without having] been informed of the restrictions on the use of statements obtained by use of statutory powers in any subsequent proceedings".

But also states earlier:

"To have remained silent and to have allowed such a circumvention of the proper safeguards to which my client was entitled without intervening to protect their interest would have amounted to a breach of my professional code of conduct: as a barrister, I am governed by the Bar Code of Conduct which obliges me to "promote and protect fearlessly and by all proper means the lay client's best interest"..... I have sat on the Professional Conduct Committee of the Bar Council for over two years and I am well aware of the standards of conduct required by a barrister. At all times I acted properly and in a manner consistent with my professional duties as set out in the code of conduct..... I do not know why the FSA, a body created by statute and with statutory powers, should regard a request to explain which powers it was exercising as "obstructive" or unco-operative. A simple explanation of the powers being exercised would have been sufficient".

9.7 Part of the extract above refers to "*the lay client's best interest*". All practitioners, whether solicitors or barristers are aware of the overriding obligation (apart from the duty to the Court) to act in the best interest of the client at all times. That obligation is enshrined in the codes of conduct for both solicitors and barristers.

9.8 Although Person W has kindly drawn my attention to the Bar Standards Board Code of Conduct, it is the solicitors' one that should apply given that Person W was present in the capacity as a partner of the firm of solicitors representing the client which is regulated by the Solicitors Regulation Authority according to its notepaper. It is probably a distinction without a difference however as equally the obligation towards the client remains the same – that is, it is a core duty of any lawyer to act in the best interests of their client(s). It is my view that given all the circumstances Person W did so in the light of what transpired as the meeting progressed.

9.9 I think that it is a pity that Person W was not able to prevent what occurred from happening. It is always important for any lawyer to appreciate that in safeguarding a client's best interests raised voices are unlikely to achieve that purpose. I do not say this in a critical spirit of Person W but merely make it as an observation relevant to the events that I have been charged to investigate and again it must be borne in mind that Person W was the only lawyer present and was anxious to protect the clients' position.

9.10 Person W's response to my Preliminary Decision stated:

"*Whilst I agree that raised voices cutting across each other rarely benefits anyone, rarely is not never and this was a situation that it was imperative that I [acted]*".

I would add that the responses I received from the complainants support Person W's conduct. In their response the complainants state that:

"*Knowing what they now do of the FSA's attendees intentions, the Complainants wish to record their gratitude to Person W for what [they] did to protect their interests*".

They continue:

"*With the benefit of hindsight, the Complainants do not now consider that there was any realistic alternative to confrontation. They now know the purpose of the Meeting was intended by the FSA attendees to be the extraction of incriminating statements and documents from the Complainants to support a referral to enforcement...This was not a situation in which a conciliatory approach would likely to have achieved the objective of protecting the Complainants' interests*".

9.11 I retain a belief in the importance of handling difficult meetings with careful consideration and judgement. Although I have reservations about any lawyer allowing any meeting to become confrontational, in this situation, given the representations I have received from both the complainants and their lawyer I am satisfied that Person W's conduct was reasonable, justifiable and cannot be criticised.

9.12 In arriving at this conclusion I am faced with the fact that to come to a view other than this would require me to enquire as to the precise nature of Person W's instructions. Unfortunately, this is not something I am able to do given that they are protected by legal privilege which the complainants have not waived.

9.13 Given these comments I am satisfied in this case that what transpired can be laid at the door of the FSA as a whole due to the less than transparent disclosures it made when arranging the meeting.

10. Outcome and Recommendations

10.1 As I have set out above, I feel that the FSA's conduct in relation to the events surrounding the meeting of 5th March 2012 was unprofessional and lacked integrity and as such I have upheld all five arms of the complaint.

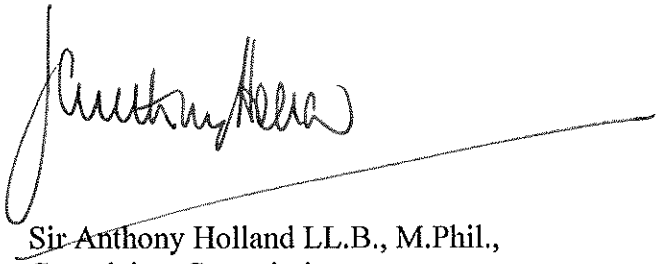
10.2 As a result of this Final Decision, I recommend that:

10.3 The FSA should offer an apology to Firm K for not providing a full and appropriate answer to Person Z for the reason for arranging the meeting.

10.4 The FSA should offer an apology for the manner in which its staff conducted themselves during the meeting at Firm K's offices on 5th March 2012.

10.5 The FSA should also offer an apology for the comments it made about Person W's conduct in its Stage One decision letter of 28th June 2012.

10.6 The Board of the FSA and its relevant successor bodies ensure that regular regard is paid by all towards paragraphs 17; 2.14; 3.11; 4.11 and 4.20 of the Fourteenth Report by the Committee on Standards in Public Life (reproduced in Annex 1 hereto for ease of reference).



Sir Anthony Holland LL.B., M.Phil.,
Complaints Commissioner

12th March 2013

Annex 1

Although a copy of the Fourteenth Report by the Committee on Standards in Public Life - Standards matter – A review of best practice in promoting good behaviour in public life (Cm8519) can be obtained from the internet (http://37.128.129.237/wp-content/uploads/2013/01/Standards_Matter.pdf), the relevant paragraphs of this report which I have referred to in my recommendations are set out below.

17. All organisations should monitor and regularly review how well they measure up to best practice in ethical behaviour. They should ensure that standards issues feature regularly on board agendas and they should make certain that standards risks feature appropriately on their risk registers, with mitigating strategies in place and actively monitored. Simply ticking boxes is unlikely to be enough, unless organisations and their leaders also genuinely take responsibility for their own standards and maintain an appropriate degree of vigilance to ensure they are upheld.

2.14 There is a risk that public sector organisations find themselves in the same positions as some banks of possessing superficially robust codes of practice which are not reflected in actual behaviour.

3.11 There is a growing area of ambiguity occupied by people contracted to deliver public services who may not be public office holders. We strongly believe that the ethical standards captured by the seven principles should also apply to such individuals and their organisations.

4.11 Principle and rules are necessary but not sufficient to ensure that an organisation maintains high ethical standards. People's awareness of rules does not necessarily make them more motivated to follow them. A key lesson of the past 18 years is that consistently high standards of behaviour have to be part of the everyday culture of an organisation with any breaches robustly challenged. People need not only to know what acceptable behaviour should look like but also to understand the principles behind it and internalise them.

4.20 The effects of induction can wear off quickly. So it is important that learning about ethical issues is reinforced from time to time by appropriate training. Such training is particularly important where an organisation experiences rapid movement of staff.