

**Mike Fenwick**

2 June 2016

Sirs

Please note that this formal letter will follow an e-mail to you and to Sheila Scobie, in both instances by pdf file, and with 4 pdf items attached, which I trust will provide you with some insight into my past involvement in this instance, specifically around the Restrictive Practices Act, with the OFT, in articles written by me and responded to by Sir Gordon Borrie, and similarly with Professor Gower who was the author of the first blueprint on regulation of the financial services industry.

I can also provide further such items, and my continued involvement, as they relate to your current powers under the Competition Act 1998, but I have restricted myself to the above items for two specific reasons, firstly I hope they are sufficient to indicate that while you will never have heard of me, that I have some experience in these areas, more specifically however, I wish to draw your attention to how “exemptions” granted under the RTPA form a background to why much of your current work, for example on banking, had their genesis in such exemptions.

I have two reasons for making this initial contact, the first relates to your current work on banking, the second relates to Resale Price Maintenance in another area, where my highlighting of “exemptions” is very pertinent, in this instance to an exemption relating to Statutory Duties, where I wish to submit documentary evidence that a breach has occurred, involving RPM and an abuse of a dominant position.

The second item is not time pressured, however I am aware that you have requested responses to your Retail Banking Market Investigation by 5.00 pm on the 7th of June.

You will be aware that the House of Commons is currently in recess, and I am currently in contact with Members of Parliament, and regrettably I will not be able to meet your deadline date due to the fact that the recess only ends on the 6th, it therefore leaves me too little time. I am also in contact with Members of the Scottish Parliament, and in light of Sheila Scobie's recent speech, it may prove possible to find an alternative way of responding within the timescale you have indicated. In both instances I wish to arrange meetings, at which I will present the relevant documentary evidence, with the potential to be accompanied either by an MP or an MSP.

Clearly you must decide whether my contact with you is of sufficient importance to your work, and I will therefore restrict myself solely to the Retail Banking Market Investigation, and further intentionally restrict my comments in this initial correspondence.

Please firmly bear in mind, these are initial comments, at the meetings I hope you may agree to I will present the totality of the documentary evidence that I believe is relevant.

I start here, something that plays its part in your work, the subject of bank charges:

In December 2014, HM Treasury issued this:

*Government secures landmark deal with the big banks on basic bank accounts - ending fees for failed payments.*

*Link here:*

<https://www.gov.uk/government/news/new-basic-fee-free-bank-accounts-to-help-millions-manage-their-money>

- 1) The belief, and the statement, that Basic Bank Account holders will see fees ended for failed payments – is inaccurate. The documentary evidence I refer to above which I wish to present at a meeting is proof of the inaccuracy.
- 2) Your own work also makes reference to fee free basic bank accounts, and in a similar manner also repeats that inaccuracy.
- 3) In both cases, and beyond Basic Bank Accounts, into Personal Current Accounts with an overdraft facility, I believe I can supply, again in hard documentary evidence, substantial proof that your suggestion that charges be capped is in direct contradiction to earlier work carried out by the FSA, and continued by the FCA, and potentially undermines the FCA's authority in its work.

My evidence starts with the Supreme Court decision in November 2009. Rather than attach their full ruling, I have attached a pdf of the Press Release issued on the day of their ruling, and from which I offer these extracts:

#### *PRESS SUMMARY*

*Office of Fair Trading (Respondents) v Abbey National plc & others (Appellants)*  
*[2009] UKSC 6*

*On appeal from the Court of Appeal (Civil Division) [2009] EWCA Civ 116*

*JUSTICES: Lord Phillips (President), Lord Walker, Baroness Hale, Lord Mance, Lord Neuberger*

#### *INTRODUCTION:*

*This appeal involved a relatively narrow issue. The Supreme Court had to decide not whether the banks' charges for unauthorised overdrafts were fair but whether the OFT could launch an investigation into whether they were fair.*

*Lord Walker made clear that the scope of the appeal was limited – the court did not have the task of deciding whether or not the system of charging current account customers was fair, but whether the OFT could challenge the charges as being excessive in relation to the services supplied in exchange (Paragraph 3). As Lord*

*Phillips stated, even if such a challenge was not possible, it might still be open for the OFT to assess the fairness of the charges according to other criteria (Para 61).* You will be aware that to date, the question of whether bank charges are or are not fair remains open and unresolved, and therefore has a direct bearing on your suggestion of capping such charges.

My further evidence comes in various parts including:

– documentary evidence extracted from fines and penalties imposed by the FSA related to charges, such as unpaid direct debits.

– and leads to Case No: CO/10619/2010, IN THE HIGH COURT OF JUSTICE QUEEN'SBENCH DIVISION ADMINISTRATIVE COURT - THE QUEEN on the application of BRITISH BANKERS ASSOCIATION - and - (1) THE FINANCIAL SERVICES AUTHORITY (2) THE FINANCIAL OMBUDSMAN SERVICE - and – NEMO PERSONAL FINANCE LTD.

– At the heart of that ruling was a Court Ruling (not appealed) on Section 150 of FSMA, from which the subsequent PPI reimbursement regime was established.

I ask only that I am allowed to present the further extensive evidence, because I believe your current proposals may be based on an wholly inaccurate assessment over the question of charges, and fails to take into account the legal position as established in the above legal proceedings.

If you refer to the items I have enclosed in my past dealings, I hope you will see that their purpose was to highlight similar anomalies, and to seek to offer comment which might lead to a solution. My contact with you is identical in its intent.

Yours

Mike Fenwick ...

18 June 2016

Thank you for your e-mail, it is appreciated. Whilst appreciating your further comments over the "team"'s response to issues raised, might I just place on record, and as an essential element in what might be termed an "audit trial", upon which I comment later, the fact that I have not received as a simple matter of courtesy any acknowledgement of my initial e-mail from the "team". An acknowledgement with or indeed without comment as might have been deemed appropriate. Thus my appreciation of your e-mail.

However, beyond that observation, lies a more important distinction, which relates to the roles, responsibilities, procedures and strictures of those involved. The initial e-mail to which I refer above was issued to the "market investigation reference group", the "team" to which you refer, my letter was however specifically issued to the Competition and Markets Authority, with a copy of that letter issued to you as the CMA representative for Scotland. It may prove important that this distinction is recognised.

It may seem immediately obvious that as my residence is in Scotland, I would include you. Equally obvious for my contact with you might also appear to be the existence of the Scottish Parliament, with its existing range of devolved powers, and the increasing nature of such powers, particularly perhaps those related to welfare, which have a very specific relationship with basic bank accounts, one of the items referred to in my letter.

However, what I suspect may be less obvious, and it relates to the distinctions I am drawing between my initial e-mail and my letter, relates to what I deem to be of the utmost seriousness, only briefly alluded to in my earlier contact.

I believe that the current Provisional Decision of the "market investigation reference group" may seriously undermine, and in some instances potentially negate the core objectives and responsibilities of the Competition and Markets Authority itself, and those of both the Financial Conduct Authority and the Payments Systems Regulator. That belief is grounded in the evidence I asked to present.

With that comment made, and its potential seriousness, may I be allowed to repeat these extracts from my earlier correspondence:

*"Please firmly bear in mind, these are initial comments, at the meetings I hope you may agree to I will present the totality of the documentary evidence that I believe is relevant.*

*I ask only that I am allowed to present the further extensive evidence, because I believe your current proposals may be based on an wholly inaccurate assessment over the question of charges, and fails to take into account the legal position as established in the above legal proceedings.*

*If you refer to the items I have enclosed in my past dealings, I hope you will see that their purpose was to highlight similar anomalies, and to seek to offer comment which might lead to a solution. My contact with you is identical in its intent."*

In the absence of any response from the "team", and reliant as I must be therefore on your comments, I do intend to issue further correspondence and the evidence that is relevant. I am likely to do so in a series of items, and I hope to achieve that within the time scale you have indicated, short though that is.

Such correspondence will be issued to the "market investigation reference group", with my full recognition of what you have advised over the manner in which they operate and the barriers that they choose to impose, and therefore my doubts as to whether I should anticipate any response whatsoever.

However I will also ensure that you will receive identical items, with my request that they are received by you as CMA representative for Scotland, with my belief, whether proven correct or otherwise, that if what I submit in evidence set against the seriousness of the comment I made earlier finds sufficient merit in your eyes, it may prove to be a matter which requires the attention of the CMA, and I choose to suggest potentially at Board level.

I should perhaps make this final comment. In my earlier correspondence, I made clear reference to the potential involvement of MSPs and MPs.

In the items to follow, I will also make reference, inter alia, to EU Competition Authorities and EU Directives, to the National Audit Office, and to the Treasury Select Committee.

Dependent on how matters develop, the "audit trail" to which I referred earlier may prove to have a specific relevance to those Bodies and other parties who have an interest in the Retail Banking Market.

Thank you again for your e-mail.

Mike Fenwick ...

20 June 2016

You have an e-mail copy of my comments recently addressed to Sheila Scobie, to whom a copy of this e-mail will also be issued, and I hope accepted by her as a Representative of the CMA, as distinct from the “team” (a phrase I am happy to adopt).

Is that distinction important? In this e-mail I will make reference to the National Audit Report into “The UK competition regime” dated 5<sup>th</sup> February 2016. I have every confidence that the NAO report will have received the very close attention of the CMA Board, and will have played its part in the formation of its operational plans for the year 2016/2017.

Therefore, where this e-mail makes reference to some essential evidence which identifies and reinforces some of the issues raised by the NAO, then at a minimum, I believe the CMA Board should have its attention drawn to them. Whether, in due course, it is revealed that has occurred, or has failed to occur, will form part of the “audit trail” to which I have made prior reference.

With regret, I make this observation. It was only on receipt of Ms Scobie's e-mail that I became aware that any further submissions to the “team” had to be concluded by the 22<sup>nd</sup> of June. I so wish that had been made clear to me much earlier by the “team” in response to my original e-mail to them, indeed any response, even of simple receipt of my original e-mail would have been appreciated.

That fact has two unsatisfactory consequences, the first is that I may not meet that timescale, leading to the “team” excluding my comments and evidence from their work and consideration, the second being that in attempting to meet that deadline, it will inevitably reduce greatly my ability to ensure that what I say is sufficiently coherent and comprehensive. I make no apology should that be the result, and further I accept no responsibility for the “team” having left me in that position.

It is with that background that I advised Ms Scobie that I would release my further comments and evidence in a series. This is the first such item.

It is my assumption that the “team” will have knowledge of the NAO report in its entirety, however because of the limited timescale with which I am now faced I have attached a pdf file with some limited extracts from the report (less unfortunately than I would have wished). Inter alia, they focus on:

EU competence in the area of competition law – with that aspect not being addressed and being expressly excluded within the NAO report, an omission which plays its part in my evidence.

Coordination and cohesion within the range of UK regulatory bodies – an essential element in my evidence.

Wider awareness of competition law – I know of the CMA's efforts, eg., with its outreach to regional lawyers, my efforts primarily, not exclusively, relate to communication with ordinary members of the public (as this e-mail will evidence).

Consumer behaviour – This e-mail will, I hope, illustrate the importance of examining and understanding such behaviour, not in arrears to work carried out by the CMA, or its “teams”, but in advance of, and in recognition of its intended actions, in this instance, centred on the retail banking sector.

The views and opinions of others, in this instance the Treasury Select Committee.

I ask that the relevance of this inevitably shortened list is not judged to be the only relevant factors, lack of time dictates their adoption.

I repeat below in italics my central theme for my contact with both the “team” and Ms Scobie as the representative of the CMA:

*I believe that the current Provisional Decision of the “market investigation reference group” may seriously undermine, and in some instances potentially negate the core objectives and responsibilities of the Competition and Markets Authority itself, and those of both the Financial Conduct Authority and the Payments Systems Regulator. That belief is grounded in the evidence I asked to present.*

I repeat that I will offer comment and evidence in support of that belief in a series, this being the first.

Yesterday, I attended a public meeting in Glasgow, during that meeting I asked for 5 volunteers from the audience to take part in a recorded session during which I offered extracts from some of the evidence that is relevant to this matter.

With a major caveat(\*), which I will explain, this is a link to that recorded session:

<http://independencelive.net/event/790>

(\*) I have not had time to extract the session to which I wish to draw your attention from a video of the entire meeting. To watch only the portion which is relevant, and avoid a 2+ hour recorded meeting - please choose to start watching the video at 2.42.30.

As that portion will more than adequately demonstrate, the 5 members of the public who took part were a random sample, apart from my earlier request that it included gender representation, and that whilst they knew the generic substance of the issue, they had no prior knowledge of its details.

I ask this – do my comments during that session, the evidence extracts to which I make reference in the session, and the reactions and comments made by the 5 individuals, offer an initial indication that there are some very serious issues to be addressed?

I ask this – have the “team” an acute awareness that these issues exist?

I ask this – will the eventual conclusions of the “team” address and resolve such issues?

I ask this – where some of these issues relate to the FCA or the PSG, have the “team” formed a coordinated and cohesive approach with their fellow regulators?

Since the production of that video, which was live-streamed to a wider outside audience than attended the meeting, I have been asked to provide copies of the papers and extracts I presented. Again my comments on the time available is so relevant, I would have wished to have more time to offer the “team” their direct copies of such items. However, they are all available in the public domain, and I identified them as I made the presentation, and for now that will have to suffice.

However, in response to the public enquiries I have received to date, I intend to upload the items to the cloud (probably Google Drive) and leave them open for viewing. Whether I can accomplish that, and also issue the remainder of the items in the series that is to follow is highly debatable, I will however advise when it is completed so that the records and evidence are complete.

Towards the end of the session I intentionally state the two reasons for my involvement, first identify the problems, and secondly play a constructive part in offering potential solutions. I ask that this e-mail and those that follow be read and understood in that manner.

To illustrate that I make reference to a speech given by CMA Chief Executive, Alex Chisholm, at the Annual International Consumer Protection Enforcement Network (ICPEN) Conference, on the 6<sup>th</sup> of April this year.

These are his opening remarks:

*The Digital Age has ripped up the rule book on consumer behaviour – and the way consumers make decisions continues to change.*

*We are now seeing a wave of new innovations – and are presented with both opportunities and risks we have not encountered before.*

*The advent of smartphones means that we can access the internet whenever and wherever we want.*

About 10 plus years ago, I was involved with individuals in Kenya, prior to and in the development of Safari Com and M-Pesa, indeed I also held meetings including with some MSPs introducing the concept.

The Chief Executive of the CMA recognises that the world is changing, I recognise, and have recognised for some time, the very same.

That example from Kenya is but one illustration of serving the consumer's interests, of innovation, of providing dramatic and highly effective competition in the world of retail banking. It is recognised as such by the World Bank.



It is a solution, one of many. This one example illustrates how to completely transform what we call “the retail banking market”.

I ask this – is it one of the many innovative, pro-competition solutions which the “team” recognise?

Mike Fenwick ...

21 June 2016

To avoid any confusion, this is not my last e-mail, I have decided to make additional comments, and at least one further e-mail will follow, by Wednesday at the latest.

I have tried to make clear that I see my task as evidencing a problem, and also attempting to suggest solutions, this e-mail reflects that position.

I should also clarify that in virtually all correspondence of this type where I use extracts from documents, they will always be documents that are in the public domain, and it is my standard practice to provide links to where such documents can be found. You will see procedure being adopted in my earlier reference to the use of "Google Drive). However I am conscious, again due to the shortage of time available that I am not immediately able to follow this procedure as I might wish, and where therefore as in this e-mail I use extracts, but do not provide web links, I ask that where a search by you does not reveal in any instance the source of any extract, please refer back to me and I will provide the details as soon as I am able to do so.

For example, in this e-mail I will make reference to and draw extracts from the meeting held by the Treasury Select Committee on the 4<sup>th</sup> of November 2015, where the witnesses were Alasdair Smith, Chair, Competition and Markets Authority (CMA) Retail Banking Market Investigation, Adam Land, Senior Director, Remedies, Business and Financial Analysis, CMA, Daniel Gordon, Senior Director, Markets, CMA, and Christiane Kent, Project Director, CMA.

Now it may not appear immediately obvious why I have listed the witnesses, they would have both access to the TSC web video, and the transcript which is available, and the witnesses were there in person.

My reason is to do with terminology, and in particular acronyms. After each witness listed you can see "CMA", I then referred to the TSC, using its acronym. I suspect that there is nobody who reads this e-mail who would not know what those acronyms stand for, and in day to day discussion would use the acronym. I also believe that would be true of similar items, the FCA, the PRA, HMT and many many more.

However, step outside of the financial and regulatory "bubble" and ask any member of the public (unless perhaps with an interest in finance) what those acronyms relate to, and the answer would be very very different.

Why am I raising this subject? It has to do with financial capability, how information is conveyed in the complex world of finance – much discussed in the meeting to which I refer.

This is an extract from the meeting, the words are from Mark Garnier MP:

*You are proposing to present actually what is a lot more technical information to consumers who, according to the Money Advice Service in this report, do not know what they are talking about. I do not mean that in a disparaging sort of way. I think we have let them down in terms of financial education in school but, nonetheless,*

*you are expecting people who are ostensibly financially illiterate to be able to work out fairly complex sums and assessments.*

It also arises in this extract:

*Christiane Kent: The Payment Accounts Directive is already coming in to harmonise the terminology and information that banks have to provide to make sure that key terms mean the same thing.*

In the video session I conducted in Glasgow I made reference to a TSB “Cash account”, I could have referenced a Nat West “Foundation account” or a Nationwide “Flexbasic account”. All are accounts with basic features – but would members of the public instantly and understandably know that? Or might they have no idea, the clue is not in the name, and whether it does what it says on the tin is in no way obvious?

It is hard to think of an immediately attractive acronym for “an account with basic features”, but it very easy to consider using BBA as the acronym for a “Basic Bank Account”.

Consider this item, itself an extract from a CMA report:

- 7. The Parliamentary Commission on Banking Standards (PCBS) in 2013 also made a number of further recommendations including a review of account number portability and a voluntary code to provide free basic bank accounts (BBAs) and free use of automated teller machine (ATMs). Both the ICB and the PCBS recommended that consideration should be given to the CMA carrying out a market investigation by 2015 in light of the competition concerns they had identified.*

Acronyms in profusion, but of note is the simple choice of “BBA”.

May I offer this test, as a method of demonstrating what may appear as a mute point on first consideration, if one goes to the CMA web site Gov.uk, a search box is provided, insert the word “misleading” into that search box, and view the results.

I ask – do those results show that in all too many cases in which the OFT, and now the CMA (and many other departments) are involved, the “misleading” of the consumer is central.

I ask – whilst the PAD (yes, the acronym used extensively by the CMA), and the more recent UK legislation to implement PAD allow for “branding” is that not at its most simple level, already conducive to confusion amongst the general public, when the “brand” over-rides what it camouflages. Is it evidently, but needlessly, misleading?

I ask - Is it also in breach of both PAD and UK legislation when it is produced in any bank documentation as the primary not secondary nomenclature? It may not have been obvious, but I gave a clear example of that potential “misleading” aspect in my reference to the RBS item I used in the video session, where the RBS used the words “basic account” - was it indeed a BBA or not?

I ask – when the use of comparison web sites is being debated will it be 100% clear what accounts names or descriptions are to be used, including those which are “accounts with basic features” and are to be the subject of any comparison, as opposed to other accounts which may be similar but divergent?

I ask – when it can be seen that “misleading” consumers is all too often the subject of investigation, are we about to fall at the first hurdle?

I ask – should the adoption, and seen to be enforceable as a primary objective under both EU and UK law, of the words Basic Bank Account, and the acronym BBA, be the first step in preventing any consumer from being “misled”? That very acronym is used extensively by the CMA in its documentation – might not the CMA consider exemplifying the phrase, not only do as I say – do as I do. The very phrase chosen and spoken by Adam Land in the video of the TSC meeting.

I ask – when considering these comments and questions it may prove helpful if the CMA take into account why, in a separate field, we can find The Business Protection from Misleading Marketing Regulations 2008?

I ask – when the CMA have the opportunity to prevent consumers being misled in any way should they seize that opportunity, as the most simple basic step, or let it slip from their grasp, with I suggest the near inevitability that at some stage in the future it may prove to be the subject of an investigation?

In a subsequent e-mail which I am currently preparing I will make reference to a letter issued by the Group Chief Executive of Lloyds Banking Group to Andrew Tyrie, Chairman of the TSC, the letter dated 25<sup>th</sup> October 2011, for the purposes of this e-mail this is the relevant extract:

*“ The Group has around 4,300,000 basic bank account customers across the three brands.”*

That extract, whilst dated, gives an illustration of the numbers of consumers to whom these matters may be not only important but crucial in their understanding.

I finalise this item with this extract, again drawn from the TSC meeting last November:

*Alasdair Smith: I would not use the term “window dressing”. There are objective reasons why provision of basic bank accounts is uneconomic. People who have basic bank accounts necessarily tend to have low balances. They typically do not have overdraft facilities. They are probably not the kinds of customers who do lots of foreign exchange transactions, but they nevertheless have free access to ATMs and so on. It is good that we have a system for providing such people with bank accounts, and it is not window dressing to have them provided for them.*

I ask - As is evident from the first extract, across the UK there are considerable numbers of “such” people, let us assume they can be measured in the millions, should they be patronised or ignored, or should the CMA and other regulatory bodies ensure that they are given the greatest protection possible?

I ask – as I did in the video session in Glasgow, if there are indeed objective reasons why the provision of basic bank accounts are uneconomic, if that is evidenced as a problem, might it also suggest that may be the one area upon which a solution should be found, indeed I will go further might it be found that if one starts by an acute investigation into basic bank accounts, that solutions to increasing competition in the retail banking market overall can be demonstrated?

Perhaps that investigation includes consideration of the Welfare Budget at around £200bn. How much of that budget is distributed through basic bank accounts, and how much knowledge abounds within the general public of the Carr v Carr 1811 case, and which passes to, and retains within, the ownership of such funds to the banks involved?

I ask - are we saying that we can find no innovative, pro-competitive alternative to the distribution of sums in the £bns, and proves to be profitable. Perhaps we have been looking in the wrong places, and perhaps if we look elsewhere we might assist in removing Andrew Tyrie's frustrations over the years spent on the lack of competition in the retail banking market, with no solution yet established.

I ask - Have we still major lessons to absorb following the latest in banking crashes, and against that wider background are the provisional remedies of the CMA being established in a coordinated manner with the FCA, and the PSG, not least when we are discussing those who may be the most vulnerable in society?

I end with where I started, I have tried to make clear that I see my task as evidencing a problem, and also attempting to suggest solutions, this e-mail reflects that position.

Mike Fenwick ...

22 June 2016 (2)

In my earlier e-mails I have commented on a distinction I believe has great importance, namely the distinction between any items I send to the “team” and those I send to Sheila Scobie as a representative of the CMA. I have made that comment to ensure that if my comments, and the evidence in their support, are seen as illustrative of serious errors on the part of the “team”, then in protection of its own (CMA) interests they can, if deemed so, be made known to the Board of the CMA.

To reinforce that position and to offer corroboration of it, may I use this extract from the TSC meeting I referred to in my last e-mail in November last year:

*Q101 George Kerevan: If somehow those issues were not addressed, as the body overseeing general competition, you would come back to that.*

*Alasdair Smith: I do not speak for the CMA. The market investigation is an 18-month investigation conducted by an independent panel, and we are not accountable to the CMA management or part of the ongoing work of the CMA.*

My repetitive comment, namely, I have tried to make clear that I see my task as evidencing a problem, whilst I will also attempt to suggest solutions. Again I am applying that very intention to the distinction to which I refer.

I now move onto another of my earlier comments, which I also believe has great significance, this one:

*I believe that the current Provisional Decision of the “market investigation reference group” may seriously undermine, and in some instances potentially negate the core objectives and responsibilities of the Competition and Markets Authority itself, and those of both the Financial Conduct Authority and the Payments Systems Regulator. That belief is grounded in the evidence I asked to present.*

I believe my earlier e-mails show examples of where that belief, and the evidence for it, is established. However for this e-mail I wish to add to the FCA, the PSG, one further body, the Prudential Regulatory Authority (PRA).

Might I ask that you refer back to my original contact. You will find that my basic request was for a meeting at which I could present evidence. No response has ever been received to that request, and matters have continued in writing, and in today's e-mails I have been assured that my notes will be passed to the “team”.

I also made reference to the potential attendance of an MP or MSP at any agreed meeting. I have also placed on record, including during the video session in Glasgow, that I was not restricting the distribution of my notes solely to the “team” or Sheila Scobie.

There is ongoing interest in what I am writing and placing in evidence, not least amongst the public, and more recently amongst journalists.

My fairly extensive experience in matters such as these (and I fully appreciate the “team” may never have heard of me) has taught me that certain aspects should be discussed in private and in confidence. Not to hide them, but to consider their potential implications once they become known publicly.

If you refer back to one of the attachments in my first e-mail, one involving Professor James Gower, you will see evidence of that past experience in practice. During Professor Gower's work, I had such private meetings with him, and the (yet to be formed) SIB, and Government Ministers, and only once those private meetings were concluded, did I write the articles that pertained and place the matters in the public domain.

The PRA, as you will be well aware, are responsible for the solvency of banks, amongst others. One of the items of evidence and commentary later in this e-mail will reveal the possibility of a situation similar to that of PPI, with the consequence of costs falling on banks, and where it is highly unlikely that the PRA are aware of the possibility.

It would have been highly desirable if the request for a meeting had been granted so that this possibility could have been aired, even if eventually found to be questionable.

My request was not granted, and with the timescales involved (and commented on in great detail in earlier e-mails) I cannot now achieve the position I know would have been preferable. Again an item for the “audit trail” to which I have made more than one reference.

However, and I do not know it will assist in any way, I have decided to issue these notes in two parts, of which this the first, it is the best I can achieve.

Let me use the e-mail I received from Sheila Scobie to proceed. In it she says:

*“ To clarify the position on charges, the Provisional Decision on Remedies does not propose the introduction of caps. There is a proposal to require banks to set a monthly maximum charge for unarranged overdrafts on personal current accounts. It would be for the bank to set and publicise the charge. More detail can be found in pages 209-221 of the PDR. This, and proposals to improve the transparency of information about fees and charges, are aimed at ensuring consumers are more easily able to choose the provider and type of account that offers best value for them.”*

In the video session in Glasgow, I used as one of the evidence items the REVISED BASIC BANK ACCOUNT AGREEMENT involving HMT and a number of participating banks, these are extracts from that agreement:

*The BBA has not engaged in any discussions around commitments to desired pricing individually or collectively with its members, in accordance with anti-trust legislation.*

*HMT has liaised directly with individual providers on this point.*

As Ms Scobie makes clear, the Provisional Decision on Remedies contains the proposal of a monthly maximum charge for unarranged overdrafts on personal current accounts, and for that maximum monthly charge to be assessed and set by banks individually.

It is only too obvious why it would be set by individual banks, and not collectively, and the anti-trust legislation referred to in the Basic Bank Account agreement provides the reason.

I ask - however, does that proposal (it plays a fairly central part in the proposed Remedies) solve a problem, or create an even greater one?

I ask – was it discussed and shared, as a proposal, with other regulatory bodies, specifically perhaps with the FSA?

I ask – could the proposal be seriously out of line with the legal position under PAD , and/or with  
The Payment Accounts Regulations 2015?

I will start with the Payment Accounts Directive, and this extract drawn again from the TSC session in November 2015: (the highlighting is mine):

*Alasdair Smith: The remedies that we are looking at to provide much better information for consumers are compatible with the Payment Accounts Directive. One of the issues we will need to consider is to make sure that the Payment Accounts Directive works well for consumers, **but our current view, and I am looking to Christiane again, is that the kinds of remedies that we are looking for will not run up against any problems with the Payment Accounts Directive.** In itself, it does not do the full job, but it allows us to do the job that we think needs to be done.*

These are extracts from the PAD, and are highly relevant to this issue:

*(15) It is vital for consumers to be able to understand fees so that they can compare offers from different payment service providers and make informed decisions as to which payment account is most suitable for their needs. Comparison between fees cannot be made where payment service providers use different terminology for the same services and provide information in different formats. Standardised terminology, coupled with targeted fee information presented in a consistent format covering the most representative services linked to payment accounts, can help consumers to both understand and compare fees.*

I include the above item as a general guide but additionally to reinforce comments in my earlier e-mails about terminology, and here, on the subject of fees, not just brochure branding, the PAD further expresses views in support of those I have made.

I ask – can it be right, as I showed in the video session in Glasgow, that it is possible to find material from a bank which explains there is no overdraft facility in a basic bank account, then to proceed to use the word “overdraft” in relation to potential



fees, a few paragraphs later?

*(46) In order to ensure that payment accounts with basic features are available to the widest possible range of consumers, they should be offered free of charge or for a reasonable fee. To encourage unbanked vulnerable consumers to participate in the retail banking market, Member States should be able to provide that payment accounts with basic features are to be offered to those consumers on particularly advantageous terms, such as free of charge. Member States should be free to define the mechanism to identify those consumers that can benefit from payment accounts with basic features on more advantageous terms, provided that the mechanism ensures that vulnerable consumers can access a payment account with basic features. In any event, such an approach should be without prejudice to the right of all consumers, including non-vulnerable ones, to access payment accounts with basic features at least at a reasonable fee. Furthermore, any additional charges to the consumer for non-compliance with the terms laid down in the contract should be reasonable. Member States should establish what constitutes a reasonable charge according to national circumstances.*

This later extract is fundamentally important in a number of respects, firstly it recognises that on a Europe wide perspective, some banks may not operate a “free if in credit” system, and that it can be expected that some banks may charge for opening and maintaining a bank account.

Secondly, it introduces the word “reasonable” in relation to fees.

Thirdly, it addresses the question of any additional charges to the consumer for non-compliance with the terms laid down in the contract, and that they should be “reasonable”.

Lastly, it allows Member States to establish what constitutes a “reasonable” charge in such events related to national circumstances.

I ask - if it is the Member State who are to determine what is or is not a "reasonable" charge, and the method by which they should do so - has that occurred and are the "team" acting in accord with what the Member State has concluded?

I ask - by what method, and under what authority, have the "team" concluded that its proposals for a monthly maximum charge are in accord with PAD?

I ask - if the monthly maximum charge is to be set by individual banks - can each such individually calculated charge be deemed "reasonable" - given (and it is an assumption on my part) that the hope will be that they in fact differ, so that comparisons can be made?

I ask - put as simply as I am able, can what may be vastly differing charges, created by each individual bank according to their individual circumstances, and not according to the PAD criteria for the Member State to fulfil that function, all be deemed "reasonable"?

What can be derived, deduced or made more clear from the The Payment Accounts Regulations 2015, the UK legislation?

Inter alia - these extracts assist:

*“the Act” means the Financial Services and Markets Act 2000(a)*

*“the Authority” means the Financial Conduct Authority;*

*“Financial Ombudsman Service” means the ombudsman scheme referred to in section 225 of the Act;*

*“Payment Systems Regulator” means the body established pursuant to section 39 of the Financial Services (Banking Reform) Act 2013(b);*

*Publication of the linked services list*

*3.—(1) Following adoption by the European Commission of regulatory technical standards setting out the EU standardised terminology, the Authority must without delay, and at the latest within three months of entry into force of the EU standardised terminology, publish a list of the most representative services linked to a payment account and subject to a fee (“the linked services list”).*

*(2) The linked services list must—*

*(a) feature at least 10 and no more than 20 of the most representative services linked to a payment account offered by at least one payment service provider and subject to a fee;*

*(b) contain terms and definitions for each of the services featured; and*

*(c) where applicable, use the EU standardised terminology.*

I believe those extracts confirm that the FCA, the PSR, and indeed the FOS, each have a central role to play in relation to the powers granted to them under the Act. Thus all my earlier references to coordination and cohesion between all the bodies concerned, as reported on by the NAO.

I ask - have all such bodies been made aware of the "team's" proposals on a monthly maximum charge, and have offered their approval of that proposal?

These extracts seek to show those areas where the subject of fees are included in the legislation, and where the term "reasonable" is included in a helpful manner. These and others can all be found in the legislation:

### *Fees*

*20.—(1) Subject to paragraph (2), a credit institution must not charge any fee for the services set out in regulation 19(1) when those services are provided as part of a payment account with basic features.*

*(2) Where a credit institution provides any service set out in regulation 19(1) to a consumer in a currency other than sterling, the credit institution may charge a fee for that service provided that the fee charged is reasonable.*

*(3) In determining whether a fee charged pursuant to paragraph (2) is reasonable, regard shall be given to the following criteria—*

*(a) national income levels;*

*(b) average fees charged by UK credit institutions in respect of the service.*

*(4) Where a consumer holding a payment account with basic features—*

*(a) authorises a payment transaction from the account; and*

*(b) the payment transaction is not executed as a result of there being insufficient funds available, the credit institution must not charge the consumer any fee.*

*(5) Where there has been overrunning on a payment account with basic features, a credit institution must not charge the consumer any fee or any interest.*

Those extracts identify quite clearly the position on "accounts with basic features" - no fee to be charged.

I ask - why at the video session in Glasgow was I able to evidence of banks apparently charging fees for precisely such accounts?

I ask - is that a matter for the CMA, or the FCA, and eventually for the FOS?

The extracts also show the way in which what is "reasonable" is to be assessed, and I draw specific attention to *(b) average fees charged by UK credit institutions in respect of the service.*

I ask - if a fee is deemed "reasonable" by dint of reference to an average, are any fees in excess of such average, or perhaps far distant from it, to be deemed "unreasonable"?

I ask - does the "team's" current proposal for a an individually set monthly maximum charge dovetail well with that legislative requirement, or place itself in a questionable position?

Perhaps, despite PAD and the UK Act, we need to assess this position from an entirely different perspective, how would the FCA as the Authority see such matters?

Do they regulate on the basis of "reasonableness"? Or do they seek to uphold and impose different criteria?

These are extracts from the FCA - published in May 2015:

### ***Fair treatment of customers***

*All firms must be able to show consistently that fair treatment of customers is at the heart of their business model.*

*Above all, customers expect financial services and products that meet their needs from firms they trust.*

### ***Consumer outcomes***

*There are six consumer outcomes that firms should strive to achieve to ensure fair treatment of customers. These remain core to what we expect of firms.*

*Outcome 1: Consumers can be confident they are dealing with firms where the fair treatment of customers is central to the corporate culture.*

*Outcome 2: Products and services marketed and sold in the retail market are designed to meet the needs of identified consumer groups and are targeted accordingly.*

*Outcome 3: Consumers are provided with clear information and are kept appropriately informed before, during and after the point of sale.*

*Outcome 4: Where consumers receive advice, the advice is suitable and takes account of their circumstances.*

*Outcome 5: Consumers are provided with products that perform as firms have led them to expect, and the associated service is of an acceptable standard and as they have been led to expect.*

*Outcome 6: Consumers do not face unreasonable post-sale barriers imposed by firms to change product, switch provider, submit a claim or make a complaint.*

### ***Regulatory responsibilities***

***Firms are responsible for making sure customers are treated fairly. Our principles (PRIN) include explicit and implicit guidance on the fair treatment of customers.***

***Principle 6 says: 'A firm must pay due regard to the interests of its customers and treat them fairly', but other principles also apply to this area of business behaviour.***

*These principles apply even for firms that do not have direct contact with retail customers. Risks and poor conduct can be carried from wholesale to retail markets.*

The highlights are mine, but fully justified in my opinion to show that the FCA do not expect "reasonableness", they expect and have established clear Principles that are based on "fairness".

I ask - are the concepts of what is deemed "reasonable", as defined above fully compatible with the FCA's Principle of "fairness"?

I ask - is being "reasonable" as defined, the exact same thing as being "fair"?

I ask - do the items of evidence I will present in Part 2 of this evidence answer such questions, based not on my opinion, but on clearly established legal and regulatory precedent?

Those questions, and others, take me to this comment:

*I believe that the current Provisional Decision of the "market investigation reference group" may seriously undermine, and in some instances potentially negate the core objectives and responsibilities of the Competition and Markets Authority itself, and those of both the Financial Conduct Authority and the Payments Systems Regulator. That belief is grounded in the evidence I asked to present.*

Part 2 - with the relevant evidence will follow.

Mike Fenwick ...

22 June 2016 (3)

Let me start this Item 3 (Part 2) by repeating these extracts from Item 3 (Part 1):

*Alasdair Smith: I do not speak for the CMA. The market investigation is an 18-month investigation conducted by an independent panel, and we are not accountable to the CMA management or part of the ongoing work of the CMA.*

*I believe that the current Provisional Decision of the “market investigation reference group” may seriously undermine, and in some instances potentially negate the core objectives and responsibilities of the Competition and Markets Authority itself, and those of both the Financial Conduct Authority and the Payments Systems Regulator. That belief is grounded in the evidence I asked to present.*

*“ To clarify the position on charges, the Provisional Decision on Remedies does not propose the introduction of caps. There is a proposal to require banks to set a monthly maximum charge for unarranged overdrafts on personal current accounts. It would be for the bank to set and publicise the charge. More detail can be found in pages 209-221 of the PDR. This, and proposals to improve the transparency of information about fees and charges, are aimed at ensuring consumers are more easily able to choose the provider and type of account that offers best value for them.”*

The extracts also show the way in which what is "reasonable" is to be assessed, and I draw specific attention to *(b) average fees charged by UK credit institutions in respect of the service.*

***Firms are responsible for making sure customers are treated fairly. Our principles (PRIN) include explicit and implicit guidance on the fair treatment of customers.***

***Principle 6 says: ‘A firm must pay due regard to the interests of its customers and treat them fairly’, but other principles also apply to this area of business behaviour.***

During the TSC session in November 2015, considerable time was spent on questions related to the cost of a bank account, Andrew Tyrie, Mark Garnier, Helen Goodman, all attempted to raise the issue. The questions that were raised, the answers which were elicited, are well known to the “team” so I do not intend to detail them here.

If it is truly the case that the “team” believe that the cost of a bank account cannot be determined then a serious issue arises. I believe that the “team” are incorrect in such a belief.

Consider a comment I made in an earlier e-mail, that if one uses a Basic Bank Account as one's focus, one's starting point, much can be learned over innovation, and the way in which to produce highly effective competition in the retail banking sector, on behalf of millions of consumers.

It is my belief that the “team” failed to recognise that opportunity and chose to focus on areas to the exclusion of basic bank accounts, and that very major opportunity has been lost, not just to those with BBAs, but to all banking consumers. I offer these extracts from the TSC session:

*Q109 Stephen Hammond: I just want to make sure we put this on the record, because it is quite important about the basic bank accounts. You clearly said that these are being provided at below economic cost and at a loss. Therefore, there is no reason to suppose that there will ever be competition in this market. That must be your view.*

*Alasdair Smith: Yes, these accounts have been provided as a result of a deal between the banks and the Government, because they would not have been provided by the market.*

If one starts from a basic bank account what begins to emerge over the cost of a bank account, sometimes in very specific detail? I made reference to a letter issued to Andrew Tyrie by the Group Chief Executive of Lloyds Bank (the letter, dated 25 October 2011, can be found in the TSC archived material), this is an extract:

*As you will be aware, each time a customer of ours makes a cash withdrawal or a balance-check at another bank's ATM, we incur an interchange charge to that bank. These charges are typically 21 pence per transaction in branch ATMs, rising to 35p pence per transaction for ATMs in prime locations, e.g. mainline railway stations.*

Sadly, the “team” seem very clearly to have determined to the potential detriment of millions of consumers that BBAs would never be an area of competition.

As that very simple example may illustrate, costs can be determined, they are known even at the highest levels in a bank, and once they are known, ways can be determined to introduce competition.

Kenya, and the introduction of M-Pesa is only one example, where access to and usage of the most basic form of banking, simply using a mobile phone – does not rely on banks, and thereby escapes the high internal profit seeking economic costs which banks, due to their own choices not those of the consumer, choose to adopt.

However, I now wish to address the area upon which the “team” appear to have focussed.

When one is assessing the current proposals from the “team” on charges as they apply to unarranged overdrafts, costs play a vital part, specifically when one has knowledge of past precedents set in regulatory actions taken by the FSA, and particularly where determinations of “fairness” as opposed to “reasonableness” are being sought.

If costs are not known issues arise, and I am not confident the “team” have recognised this, not confident because of the exchanges they had with members of the TSC on the very specific question and subject of costs.

I start here - ***Principle 6 says: ‘A firm must pay due regard to the interests of its customers and treat them fairly’*** - how importantly do the FCA, and its predecessor the FSA, regard that principle, one of “fairness” - and very specifically when it relates to “charges”, including those which may precipitate an “unarranged overdraft”?

29<sup>th</sup> October 2009 - GMAC-RFC Limited fined £2.8million for unfair treatment of customers in arrears and repossessions and will pay up to £7.7m customer redress.

<http://www.fsa.gov.uk/pages/Library/Communication/PR/2009/147.shtml>

Extract from FSA Press release:

The case sets a precedent.

Extracts from FSA Final Notice:

1. The firm breached Principle 6 during the Relevant Period in that it failed to pay due regard to the interests of its customers and treat them fairly.

(3) applied certain charges to a customer’s account that were unfair in that they did not accurately reflect the actual cost of administering an account in arrears;

4. had not arrived at a cost-based approach to the calculation of its arrears charges and therefore could not be sure that they were reasonable compared to the actual cost incurred;

(Insert – may I ask that Sheila Scobie, as a representative of the CMA take note of that date - 29<sup>th</sup> October 2009 – it has a very important relevance to the date of a Supreme Court Ruling to which I will make later reference.)

12<sup>th</sup> April 2010 - Kensington Mortgage Company Limited fined £1.225 million for unfair treatment of some customers in arrears and will pay estimated £1.066 million customer redress

<http://www.fsa.gov.uk/pages/Library/Communication/PR/2010/065.shtml>

Extracts from FSA Final Notice:

1. Kensington breached Principle 6 during the Relevant Period in that it failed to pay due regard to the interests of certain of its customers and treat them fairly.

4.32. The excessive or unfair charges imposed by Kensington were:



(1) a fee for a returned direct debit which was charged on each re-presentation of the direct debit by the Firm regardless of the number of times it had already been returned unpaid;

2) a fee for a cancelled direct debit, which was excessive in light of the associated administration costs

15<sup>th</sup> July 2010 - Redstone Mortgages Limited fined £630,000 for unfair treatment of some customers in arrears

<http://www.fsa.gov.uk/pages/Library/Communication/PR/2010/120.shtml>

Extracts from FSA Final Notice:

1. Redstone breached Principle 6 during the Relevant Period in that it failed to pay due regard to the interests of its customers and treat them fairly.

4.20. The excessive or unfair charges imposed by Redstone were:

1. a fee for a returned direct debit which was charged on each re-presentation of the direct debit by the Firm regardless of the number of times it had already been returned unpaid;

22<sup>nd</sup> February 2011 - The Financial Services Authority (FSA) has today announced that it has fined DB Mortgages, part of the Deutsche Bank Group, £840,000 for irresponsible lending practices and unfair treatment of customers in arrears, and secured redress of approximately £1.5 million for DB Mortgages' customers.

Extracts From Final Notice:

5. The Firm breached Principle 6

4.28. During the Relevant Period, DBM failed to take sufficient steps to ensure that arrears fees and charges were based on a reasonable estimate of the cost of the additional administration caused by the customer being in arrears, for example no sufficient activity-based costing exercise was undertaken during the Relevant Period.

29. In addition, DBM levied a number of unfair charges on customers in arrears, including:

- 1) a fee for a returned direct debit which was repeatedly charged by DBM;

I will leave the "team" to form their own views on those items, I can provide more if requested, I will leave it also to others to whom these notes will be passed to form their views, but I offer these two very simple views:

Knowledge of and the appropriateness of costs seems crucial – yet at the TSC session, the "team" answered as they did.

The FSA/FCA treat Principle 6 very importantly, and it is the repeated reference to the “fairness” aspect which is crucially important, and it demonstrably (in the eyes of the regulator) ranks much higher than the idea/concept of “reasonableness”.

I ask - Does that latter statement have validity?

I ask - Does one criteria outrank the other?

I ask - Have the “team” had discussions with the FCA to test its validity, and a ranking profile?

I ask – will the FCA amend its Principle 6, and remove any reference to “fairness” and replace it with “reasonableness”? The criteria adopted in PAD and in UK legislation.

Let me continue and repeat this:

The extracts also show the way in which what is "reasonable" is to be assessed, and I draw specific attention to *(b) average fees charged by UK credit institutions in respect of the service.*

Examples of Good and Bad Practice – FSA

[http://www.fsa.gov.uk/pages/Library/Other\\_publications/Miscellaneous/2009/mortgage\\_arrears\\_1/fees.shtml](http://www.fsa.gov.uk/pages/Library/Other_publications/Miscellaneous/2009/mortgage_arrears_1/fees.shtml)

Extracts:

Good Practice:

Treating Customers Fairly (TCF) implications of fees and charges are considered in arrears-handling practices, for example:

- where Direct Debit requests are repeatedly refused, the lender suspends the Direct Debit to avoid further unpaid Direct Debit fees being incurred;
- Staff are given objectives that include minimising charges when a less expensive or no-charge alternative is available.

Bad Practice:

- The lender does not undertake a regular assessment of fees and charges to ensure they are less than or equal to the additional cost of administering accounts in arrears.
- Arrears charges cover more than the administrative costs involved.
- Customers are in effect charged for specific arrears-related administrative tasks more than once. For example, through being charged task-specific fees on top of a monthly arrears management fee.

I ask – how important is it that banks can identify costs?

But this last extract seems to me to be of crucial importance, under the heading of Poor Practice:

- Arrears fees and charges are determined by benchmarking against those set by other firms, without reference to the firm's own costs.

I ask - if benchmarking is an example of Poor Practice in the eyes of the regulator, can that be squared with a criteria of "reasonable", where the assessment of "reasonable" uses exactly such a benchmarking technique, namely - *(b) average fees charged by UK credit institutions in respect of the service.*?

I ask – if the regulator has set precedent, and followed that precedent on many other occasions, where the "firm's own costs" are the factor upon which they may issue judgements and impose fines, how are they to balance their judgements when set against a wholly different standard?

I ask – have these issues been discussed with the FCA by the "team"?

I have set myself the ambition of having these notes in the hands of the "team" and of Sheila Scobie as a representative of the CMA by Wednesday the 22<sup>nd</sup> of June 2016 – thereby falling within their deadline and not therefore needing any extension. I do however remain grateful that it was offered – again an item for the "audit trail"

However as explained, I have also have to have regard for my family, and that means that I cannot take forward other comments and evidence that I believe has its importance.

Let me mention two:

I believe there may be a challenge arising from a Human Rights perspective, and related to the differences that arise between the precise wording and requirements of the PAD, and the manner in which UK legislation has been adopted. If you view the video session held in Glasgow you may understand why I make that suggestion.

I have attached one document to this e-mail, the Press Release from the Supreme Court. It was always left open for the OFT, by the Supreme Court, to pursue the question of the fairness or otherwise of bank charges.

That position remains open to the CMA to this day. I believe I can provide the evidence upon which the CMA could successfully proceed – that will be wholly dependent on whether it concludes it has a responsibility to do so.

I have decided, not because of lack of time, but because of the manner in which such matters should become public, that I will not publish that evidence in these notes. However, whilst this has a direct bearing on the CMA - I would ask that the "team" take note as it may affect their proposals.

Instead, I repeat my original request for a meeting, and direct that request as I did originally in my letter to the CMA, and perhaps Sheila Scobie, as their representative, could arrange for a response be given to that request.

I ask – as my final question – do the CMA consider themselves as acting in the consumer's interest, and in pursuit of that are they willing to participate in a meeting which should last for no more than a few hours?

Mike Fenwick ...