DRN-3059912

The complaint

Mrs M was a client of Master Adviser CFP Limited. The executor of Mrs M's estate complains that one of Master Adviser's representatives, who I will call Mr F, stole Mrs M's money which was intended to be used for investments the adviser had recommended to Mrs M. The executor says Master Adviser is responsible as the adviser was acting on its behalf.

The executor is represented in the complaint by Mrs M's daughter, Mrs D.

Background

I issued a provisional decision on this complaint on 4 March 2021. I set out why I thought we could consider the complaint, why it should be upheld and how things should be put right by Master Adviser.

Mrs D agrees with my provisional decision. Master Adviser does not. Lawyers acting for Master Adviser have made a number of points in response. I have considered all the points made but will deal with the main points rather than each one individually.

were the acts complained of done in the carrying on of a regulated activity?
Mrs D's evidence:

- The regulated activities of advising and arranging under Article 53 and 25 need to be in respect of particular investments. The ombudsman's conclusion that particular investments were involved is unsustainable and irrational.
- Mrs D's evidence is inconsistent, and her evidence is unreliable. For example Mrs D herself paid money directly to Mr F into something she described as a Client Deposit Account and which she has said she believed was for investing. This is contrary to her statement to the police that *"there is no way we would be paying [Mr F] directly any money.*" Accepting Mrs D's evidence is unreasonable and unfair.

the provisional conclusions about particular investments:

- Having reviewed the evidence in detail the ombudsman concludes that the blank cheques were ones in relation to which Mr F advised Mrs M to make an investment into a collective investment. However there is no rational basis for this conclusion – there is no evidence anywhere and no evidence offered by the ombudsman.
- It is unclear whether the ombudsman determines that the "collective" was Fidelity. If the ombudsman is suggesting that Mrs M believed/Mr F said that the blank cheque would be invested in Fidelity this is implausible because:
    - Mrs M had already written out a cheque to Fidelity on 17 April 2015. Why would she write a second one and leave it blank?
    - There would have been no need for Mr F to obtain references for Fidelity, where Mrs M had already written out a cheque to that payee and these had been successfully cashed.
- The ombudsman has not given any weight to Mr F's evidence where he said the blank cheques *"weren't investments, they were spent."* It's not rational to conclude that Mr F simply meant he had spent the money when he was specifically asked if

the money had been intended for investments and said the blank cheques weren't investments.

- The ombudsman service is obliged to act in an impartial and rational manner. It cannot make inferences of fact where there is no evidence to support them (and substantial evidence against them.) A much more plausible interpretation of the evidence would be that Mr F persuaded Mrs M to pay monies into a Client Deposit Account or Capital Adequacy Account because:
    - The agenda for the April 2015 meeting clearly states Mr F was discussing with Mrs M *"the most suitable product, fund or deposit account"* showing he was advising on deposit accounts.
    - Mr F used this "modus operandi" for Mr and Mrs D.
    - Mr F also used this "modus operand" for numerous other victims.
    - This would explain Mr F's evidence that the cheques were not for investments.
    - This would explain the reference to "collective" in the meeting agenda.
- If no particular investment was involved and Mr F did not undertake a regulated activity in relation to the blank cheques but simply stole Mrs M's money, Mr F cannot have agreed to give investment advice.
- PERG 2.7.21 provides that *"A person will need to make sure that it has appropriate authorisation at the stage of the agreement and before it actually carries on the underlying activity."* This confirms that the aim of Article 64 is to allow enforcement in situations where individuals break promises to provide financial advice prior to/without having authorisation. If the ombudsman were right on this point the activity of agreeing would allow the ombudsman service to claim jurisdiction over any matter where there is a question as to whether a regulated activity took place.

ostensible/apparent authority:

- Even if Master Adviser did represent Mr F had authority (which it denies) Mrs M must reasonably rely on any purported representation. Mrs D who assisted Mrs M had other legitimate investments with Master Adviser where Mr F gave her suitability letters, key features documents and product literature and she paid her money to the product provider. In this case cheques were paid to Mr F without any such documentation and they gave him blank cheques – something that no reasonable person should have done. It was unreasonable for Mrs M to believe this was something Mr F was doing under the auspices of Master Adviser.
- The case of *Anderson v Sense* [2018] EWHC, at paragraph 213 in the High Court, says where a victim of fraud by an agent financial adviser has signed the firm's terms and conditions which includes the warning that the firms cannot handle client money, this is a bar to the victim relying on an argument of ostensible authority.
- Mrs M signed Master Adviser's client service agreement on 1 December 2013. Mrs M had her money stolen by Mr F because she transacted with him outside the parameters of the agreement.
- The agenda for the April 2015 meeting shows Mr F assisting with tax returns etc and advising on deposits. Tax returns and deposits are outside the parameters of the client agreement, FCA regulation, and Master Adviser's responsibility. So it cannot reasonably be concluded that Master Adviser had ostensible authority for Mr F's acts and omissions.

vicarious liability:

- *Frederick v Positive Solutions* [2018] EWCA Civ 431 is the most recent and highest authority on vicarious liability in a financial advisory context.
- Financial advisory cases involving agency are different to standard commercial agency cases because of the regulatory framework overlaying duties and prescribing the relationship between principal and agent.

- In *Frederick* the Court of Appeal specifically considered an argument of vicarious liability and found, despite
    - the agent used the principal's online portal to transact the business
    - the business was substantively connected to the authorised business
    - and the two were temporally proximate

  the principal firm was not vicariously liable for the acts and omissions of the adviser. The Court of Appeal said the agent was engaged in *"recognisably independent business"* and that it would be a *"complete distortion of the true position of the facts"* to describe that activity in any sense as an *"integral part"* of the principal's business activities.
- Applying the same reasoning to this case, Mr F persuaded Mrs M to hand over blank cheques which he then paid into an account which he controlled. This was entirely separate to, and unknown to Master Adviser, nor could it be known to Master Adviser. This was a separate account opened and used for separate purposes. In no way could it be said that Mr F's fraud was an integral part of Master Adviser's business. Mr F was in no way working for Master Adviser's benefit in his scheme nor was the scheme within Master Adviser's knowledge as would be expected if the scheme was part of Master Adviser's business. The loss suffered by Mrs M was entirely distinct from and caused by factors unrelated to Master Adviser.
- The application of the general test for vicarious liability to a financial advisory context is a clear attempt to extend the current law. The ombudsman service does not make the law it must apply it and there is no evidence that the Courts have any inclination to take the law of vicarious liability in a financial advisory context in this direction, despite the Court of Appeal having the opportunity in *Frederick* and *Anderson v Sense*.
- If the ombudsman service seeks to publish a final decision in the terms of the provisional decision with regard to the general test the solicitors will take instructions in relation to judicial review.

merits:

- It is inappropriate for the ombudsman service to make a decision on the merits when the issue of jurisdiction has not been determined.
- In circumstances where Mr F has defrauded Mrs M and this was outside the scope of his actual authority without Master Adviser's knowledge, Master Adviser considers it unfair and ill-judged to find against it. Further, the ombudsman has failed to take account, when concluding that it is a fair outcome for Mrs M's estate to be compensated at the expense of Master Adviser, of the moral hazard involved in Mrs M acting under the supervision of her daughter and giving Mr F blank cheques without any documentation to justify their actions. This is essentially reckless and Master Adviser cannot see why it is a fair outcome for compensation to be awarded in such circumstances.

redress:

- Master Adviser takes issue with the ombudsman accepting that the portfolio would have been liquidated in June 2018. This means the estate fails to suffer from the fall experienced by the stock market as a result of the pandemic. It's not for the executors to decide when they would have encashed in a way that is favourable to them – no evidence has been produced to substantiate what has been said.
- The calculation of loss does not take into account any fees or charges so a complainant gets a better return than they would if they had been invested. This cannot be right.
- Master Adviser objects to the 8% interest rate used - it is not explained, and it is nonsensical.

further points:

- Master Adviser requires the Service's response via a further provisional decision before a final decision is issued.
- Masters Adviser has considerable sympathy for Mrs M. However this does not translate into a liability arising for Master Adviser as a result of the money which Mr F stole from Mrs M.

Master Adviser referred me to the details of Mrs D's own complaint. Her money was stolen in, it says, identical circumstances. She transferred money to Mr F's bank account. This means it was untrue when Mrs D said there was no way we would be paying money to Mr F direct. Master Adviser does not know why Mrs M agreed to pay money to Mr F but it does believe she did so knowingly.

my findings – jurisdiction

I've considered all the available evidence and arguments in order to decide whether we can consider this complaint.

For me to have jurisdiction, in broad terms, five tests must be passed, as follows:

1. Does the complaint relate to a firm we cover?
2. Does the complaint relate to an activity we cover?
3. Is the complaint made by an eligible complainant?
4. Is the complaint made in time?
5. Is the complaint within our territorial jurisdiction?

In this complaint there is no issue about points four and five and I will not refer to them again. In relation to the first three tests:

test 1:
The complaint relates to the conduct of an agent of Master Adviser. Master Adviser is a firm we cover. Complaints we may consider include complaints about the acts and omission of the agents for which the firm has accepted responsibility.

This means that we cannot consider the complaint if the act of the agent is not something Master Adviser is responsible for.

test 2:
We can consider complaints against a firm if it relates to an act or omission by a firm in carrying on a regulated activity or any ancillary activity including advice carried on by the firm in connection with the regulated activity.

Regulated activities are set out in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the RAO) and the activity must relate to an investment that is a specified investment in the RAO.

Advising on investments is a regulated activity but it has a particular definition in Article 53 of the RAO. If those requirements are not met the conduct will not amount to the regulated activity. I will return to this point in more detail below.

Arranging deals in investments is also a regulated activity under Article 25 RAO. And, under Article 64, so is agreeing to carry on the regulated activities of advising on investments and/or arranging deals in investments. Again, I will return to these points in more detail below.

test 3:
Put briefly, in-so-far as this type of complaint is concerned, we can consider the complaint if the complainant is a client or potential client of the firm in relation to the activity complained about.

In a situation like this the complainant won't be a client of the firm if the conduct complained about was conduct the firm is not responsible for.

to sum up so far:

So in order to be able to consider this complaint I need to make the finding that the complaint relates to an act or omission of Mr F, that Master Adviser is responsible for, in carrying on a regulated activity as defined in the RAO or an activity ancillary to it.

is a hearing necessary?

I set out my view on this point in my provisional decision. I note that Master Adviser has not commented on this part of my provisional decision. My view remains unchanged. I'm satisfied I can fairly determine the issues relevant to jurisdiction without a hearing. Both parties have had opportunity to present their case and I have arranged for additional questions to be asked in order to provide me with further information to assist me in gaining as full an understanding of matters as I can. I consider I have enough information to enable me to proceed fairly. In particular, I note:

- I'm satisfied I can reach a fair outcome using all the available evidence and I'm not persuaded hearing oral evidence would assist me.

- Master Adviser believes the ombudsman service has misunderstood the law and it's set out its position clearly in writing.

- The Court of Appeal has adopted a very flexible approach to what's fair in this context (*Financial Ombudsman Service v Heather Moor & Edgecomb Ltd*).

the basis for deciding jurisdiction:

I must decide whether we have jurisdiction to consider this complaint by applying our jurisdiction rules referred to as the DISP rules.

I cannot decide the issue of jurisdiction on the basis of what I consider to be fair and reasonable in all the circumstances. That is the basis on which the merits of complaint will be determined if, but only if, having applied the DISP rules, we have jurisdiction to consider it.

If there are any disputed issues of fact that I need to resolve I must decide them according to the balance of probabilities.

what is the complaint?

According to the FCA's Handbook definition, a complaint is any oral or written expression of dissatisfaction, whether justified or not, about the provision or failure to provide a financial service which alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience and relates to an activity of the firm which comes under the jurisdiction of the Financial Ombudsman Service.

The Financial Ombudsman Service is an informal dispute resolution forum. A complaint need not be, and rarely is, made out with the clarity of formal legal pleadings.

Having reviewed all the material, in my view the complaint is that:

- Mr F was Mrs M's trusted and long-term financial adviser acting on behalf of Master Adviser. He was consulted for further investment advice in 2015 after Mrs M had sold her home and released funds she wanted to invest.
- Mr F, when acting for Master Adviser, advised Mrs M to make investments.
- When doing so, Mr F asked for cheques in payment for those investments with the payee details left blank as they needed precise details which he did not have to hand and would complete later.
- Mr F made some investments as agreed, but he (or someone acting on his instructions) made four of the cheques payable to Mr F and he misappropriated that money instead of arranging the investments that should have been made with those four cheques.
- Master Adviser is responsible for this conduct and should compensate Mrs M for the loss Mrs M has suffered.

Mrs M died after the complaint had been made to Master Adviser and referred to the Financial Ombudsman Service. The complaint is now pursued by the executor of Mrs M's estate represented by Mrs D (who is Mrs M's daughter).

were the acts complained about done in the carrying on of a regulated activity?

As I said in my provisional decision, it seems to me that Mrs D says Mr F gave investment advice to Mrs M and stole her money in connection with that activity.

At the time of these events Master Adviser carried on the regulated activities of advising on investments, arranging deals in investments and agreeing to advise on and arrange deals in investments. In principle, the complaint appears to relate to these activities.

Master Adviser says Mr F was not advising on any kind of investment as the misappropriated money was spent by him not invested. It says that is what Mr F says and his evidence should be properly considered.

what is the regulated activity of advising on investments?

The events complained about were in 2015-2016. At that time this regulated activity was defined in Article 53 of the RAO as:

> *"*53. Advising on investments
>
> *Advising a person is a specified kind of activity if the advice is—*
> *(a) given to the person in his capacity as an investor or potential investor… and*
> *(b) advice on the merits of his doing any of the following…*
> *(i) buying, selling, subscribing for or underwriting a particular investment which is a security…, or*
> *(ii) exercising any right conferred by such an investment to buy, sell, subscribe for or underwrite such an investment."*

A number of points flow from this definition, including:

- The advice must relate to an investment that is a security. So the advice must relate to the right type of investment. An Investment such as units in a collective

investment schemes is a security. National Savings products are not. Bank or building society accounts and other types of deposits are also not securities.

- The investment must be a particular investment. The advice cannot be general advice such as financial planning generally. It must relate to the merits of buying (etc) a *particular* investment. So advice to invest in a type of investment such as "bonds" or "collectives" is (generally) not enough (though it might be that in context referring to "collectives" meant that a particular investment was being referred to).

- There must be advice. So there needs to be a recommendation of a course of action. The making of an investment for a client without first recommending the investment to the client is not therefore the regulated activity of advising on investments.

Advising on investments is not the only relevant regulated activity, as I have said. Arranging deals in investments is also a regulated activity. In 2015-2016 the regulated activity was defined in Article 25 as:

> 25. Arranging deals in investments
> "(1) Making arrangements for another person (whether as principal or agent) to buy, sell, subscribe for or underwrite a particular investment which is—
> (a) a security… is a specified kind of activity.
> (2) Making arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting investments falling within paragraph (1)(a) … (whether as principal or agent) is also a specified kind of activity."

The acts typically carried out by a financial adviser such as obtaining and assisting in the completion of an application form and sending it off, with the client's payment, to the relevant investment provider would come within the scope of Article 25(1), when the arrangements have the direct effect of bringing about the transaction. But such arrangements must relate to a particular investment.

Article 25(2) is broader in scope than Article 25(1). Under Article 25(2) arrangements need only relate to *"investments"* generally in contrast to Article 25(1) which requires *"a particular investment"* (which in 2015-2016 included a security).

And in 2015-2016 Article 64 said:

> ***"64. Agreeing to carry on specified kinds of activity***
> *Agreeing to carry on an activity of the kind specified by any other provision of this Part … is a specified kind of activity."*

So agreeing to carry on the activities of advising on investments or arranging deals in investments was also a regulated activity.

was there Article 53 advice on investments in this case? Or any other regulated activity?

When Mrs D's family found out about the fraud, they made enquiries with Mrs M's bank about cheques for more than £500. They have referred to ten cheques in this complaint. The cheques are:

	cheque number	cheque date	payable to	amount
1	3792	31 January 2014	National Savings &	£2,500

			Investments	
2	3851	12 March 2015	Post Office Ltd	£10,000
3	3858	17 April 2015	Mr F	£30,240
4	3859	17 April 2015	Fidelity	£30,000
5	3867	24 July 2015	Mr F	£45,720
6	3877	24 August 2015	National Savings & Investments	£10,000
7	3878	24 August 2015	Prudential	£75,000
8	3903	30 November 2015	Mr F	£45,000
9	3904	15 December 2015	Fidelity Investments	£25,000
10	3905	15 January 2016	Mr F	£25,000

The cheques give a framework for analysing events in this complaint.

Before I do that, I will note quickly that Master Adviser acknowledges Mrs M had been a client for some time before the disputed events and had existing investments taken out through Master Adviser with Fidelity and Scottish Widows.

Having looked again at the complaint, I think it is also worth mentioning that Mrs M's arrangement with Fidelity was not an investment in a single Fidelity fund. Rather Mrs M had a Fidelity Funds Network platform service with Fidelity which consisted of an ISA account and a general investment account in which different collective investment funds were held. The platform allowed for the holding of funds from both Fidelity and other investment businesses. And so, for example, a document provided by Master Adviser to the ombudsman service with its response to Mrs M's complaint, shows in April 2015 £15,240 was invested in Mrs M's ISA with Fidelity Funds Network divided amongst the following funds:

- Fidelity Global Property fund
- Invesco Perpetual Global Bond fund
- Invesco Perpetual Income & Growth fund
- JOHCM UK Equity Income Fund

The investment with Fidelity was not therefore as straight-forward as a single investment holding with a single investment company.

the first two cheques:

The first two payments are not in dispute, but they are part of the background to the disputed events.

Cheque number 3792 was dated 31 January 2014. It was for £2,500 and payable to National Savings and Investments. Mrs D says she has no record of this being associated with any meeting with Mr F. She believes Mrs M would have just actioned this herself as she was familiar with NS&I savings.

Mrs D says the cheque was completed and signed by Mrs M and there is no dispute about that.

Cheque number 3851 is dated 12 March 2015. The cheque was for £10,000 and payable to Post Office Ltd.

Mrs D says by January 2015 Mrs M had moved to her new flat. She wanted advice on investing money released by the sale of her former home.

Mrs D says Mrs M met with Mr F in her new flat. Mrs D attended the meeting. She has said:

> *"…we sat in the flat at the dining table, [Mr F] talked with my mother – I was present, but also intermittently doing my own lap top work, whilst joining in the chat when necessary."*

Mrs D says she has no record of the meeting – and there is no reason why she should. She has provided copies of emails in which the meeting was arranged. The emails from Mr F were from his Master Adviser email account. The meeting was on 13 February 2015.

Mrs D says Mrs M wrote out the cheque in full and signed it. There is no dispute about that. As mentioned, the cheque is dated 12 March 2015 so that is about a month after the meeting.

I asked Mrs D what she thought the payment was for. She said it was possibly for a Post Office savings account, but she did not know.

It is reasonable that Mrs D cannot recall all the details of a meeting some time ago she was not a full participant in. That same point applies to Mrs D's recollections of the other meetings I refer to below.

I also asked Mrs D about her writing out the later cheques when Mrs M had written out this cheque only a month before. Mrs D said her mother was capable of writing out the cheques, but arthritis meant it took her a long time especially if she felt under pressure writing in front of someone else. In relation to cheque 3851 Mrs D said:

> *"The cheque written in March was not written out in any meeting, she wrote that on her own in her own time without an audience."*

It is also the case that these two payments were for investments that were not securities and so do not come within the scope of the regulated activity of advising on investments.

the April cheques:

Cheque number 3858 dated is 17 April 2015 for £30,240 and was payable to Mr F. Mrs D says she wrote the amount of this cheque and Mrs M signed it. Mrs D says the payee of the cheque was left blank and was completed later by or for Mr F without the knowledge or consent of Mrs M.

Cheque number 3859 is also dated 17 April 2015. It was for £30,000 and was payable to Fidelity. Mrs D says she wrote the amount of this cheque and Mrs M signed it. Mrs D says the payee of the cheque was left blank and was completed later by or for Mr F.

Master Adviser has provided a document headed Cheque Payment Slip from Fidelity. It records a payment of £30,000 to Mrs M's account with Fidelity on which the "broker name" is recorded as Master Adviser. It is not recorded which fund (or funds) the payment was to be made to but the "product range" is recorded as UKUT/OEIC. The investment does therefore appear to be a security.

Master Adviser says from its (non-expert) examination of the copies of the cheques, it thinks the cheques of 17 April 2015 were written by someone different to the later cheques. It points out the dates are written in a different format to the later cheques. It says the cheques may have been completed in full by the same person which runs counter to Mrs D's version of events.

When responding to my provisional decision Master Adviser's lawyers said Mrs M had written out one cheque to Fidelity so question why she would write a second one and leave it blank if it was also intended to be invested with Fidelity. It is however Mrs D's position that Mrs M did not write the first of the April cheques out to Fidelity and that both cheques were left blank as to payee.

Mrs D says these cheques were written at a meeting in April at which she was present. Mrs D says she does not have a record of this meeting but points out that in the minutes of the November meeting Mr F referred back to meetings in April and August, and that the April meeting was this meeting where these April cheques were written.

I asked Mrs D what she thought the cheques were for. Mrs D said:

> *"…the cheques were for investments. The only reason* [Mr F] *was visiting my mother at all was to arrange for the investment of the proceeds from the sale of the house. The payees were left blank as I have repeatedly explained and as reiterated by* [my solicitors] *who said 'the reasons why the cheques were given to* [Mr F] *blank as to payee were that he was on each occasion either awaiting application forms from the investment providers or that he had left the forms in his office with payee reference details needed to be included in the cheques.*
>
> *It must be noted that neither myself nor my mother knew how seemingly 'complex' investments worked. We did not know how the cheques should be presented for investments; whether to Fidelity or directly to one of Fidelity's investment funds, to a particular account or payee and with such sums involved, we trusted that* [Mr F] *would as he always had, invest legitimately and correctly. In fact, from our perspective - to write a cheque simply to 'Fidelity' would have seemed too 'generic' a payee – hence our understanding for the requirement for specific references/payee details and specific applications which* [Mr F] *allegedly had."*

And in her statement to the police, Mrs D said the following (underlining in the original):

> *"17/04/15, £30,240 … it's <u>my</u> writing for the value and the date. It's <u>not</u> my writing for the payee. This says "*[Mr F]" *- there is no way we would be paying* [Mr F] *directly any money. Any money my mum gave was for investing…*

Mrs D saying there is *"no way we would be paying [Mr F] directly any money*" is not correct. As discussed further below, Mrs D did pay Mr F direct in her own dealings with Mr F with her husband – though it was a payment she thought was for an investment arrangement not a payment for Mr F's personal use. This does not however mean that Mrs M must have done the same thing or that all of Mrs D's evidence should be disregarded. It does mean that Mrs D's evidence must be carefully considered in conjunction with the rest of the evidence. All the evidence and arguments must be considered taking into account factors such as the consistency of the account and consistency with the other evidence and a view taken on the balance of probabilities.

I note that Mrs D does not expressly say in relation to the April cheques that she thought one of the investments was to be with Fidelity – though this is perhaps implied. Even if it is implied it is not clear what Mrs D thought the other payment was for other than an investment. Mrs D does not for example say one payment was for Fidelity for the X fund and the other for the Y fund, or, the other payment was for a separate investment with a named separate investment company.

Mrs D has not explained that she thought cheque 3858 was for a *particular* investment that Mr F recommended Mrs M invest in.

Nor has she said expressly that she thought cheque 3859 was in respect of an investment in Fidelity that Mr F had advised Mrs M to make.

Mrs D has said:

> *"The meeting with* [Mr F] *was held to discuss the investment of the equity from the sale of the house. Therefore, the money was to be invested in genuine investment funds – there was no other purpose to the meetings or the cheques."*

Mr F was an accomplished fraudster who was obviously plausible and persuasive. He has been convicted for defrauding around a dozen clients including Mrs D. Having read the summary of the case against him prepared by the police, it's clear all the victims thought they were making genuine investments notwithstanding that they were making payments to Mr F.

For example Mrs D herself agreed to pay Mr F for something he called a client deposit account that Mrs D has said was for investment. So the desire to invest the equity from the sale of Mrs M's house does not preclude the possibility that Mrs M agreed to invest in some arrangement, thinking it was a genuine investment or genuine arrangement for making investments, that she knew involved making the payment to Mr F personally. And Mrs M's long track record as a client of Mr F, and the high degree of trust she and her family placed in him, means she might have been persuaded to do so like his other victims (including Mrs D).

The lack of a clear description of specific advice to invest in specific investments seems consistent with Mrs M being given a presentation by Mr F that was both persuasive and plausible on the one hand and lacking in any firm detail on the other. When viewed in isolation, this does not sound like advice on the merits of buying or selling a particular investment that is a security as required by the definition of the regulated activity of advising on investments.

However, it does seem clear that Mr F arranged the £30,000 investment with Fidelity in April 2015 and that would seem to amount to the Article 25(1) activity of arranging deals in investments. And that may mean the complaint about the other payment can be considered if it was a matter that was connected to that regulated activity.

Also, as Mrs D has pointed out the April meeting was referred to in the minutes for the November meeting. So the April meeting seems to have been part of an ongoing process that included Mr F agreeing to review and advise upon Mrs M's existing investments which would include her investments held with Fidelity. This means there was likely to have been advice on specific investments: Mrs M's existing collectives held with Fidelity (or elsewhere if there were any). That is Article 53 advising on investments. And it seems to have been part of an ongoing process including reviewing and advising on existing investments that Mr F agreed to provide.

the July cheque:

Cheque number 3867 dated 24 July 2015 for £45,720 was payable to Mr F. Mrs D says she wrote the amount of this cheque and Mrs M signed it. Mrs D says the payee of the cheque was left blank and was completed later by or for Mr F without the knowledge or consent of Mrs M.

Master Adviser says this cheque does not appear to have been completed by the same person as the later cheques. Again it says this is counter to Mrs D's version of events.

There are minutes for a meeting dated 24 July 2015. It makes a lot of generic points without going into any real detail. It does not expressly say that an investment has been recommended as such. However, two points that seem to link that document to the cheque are that they are both dated 24 July 2015 and the cheque amount is £45,720 and that number has been written by hand at the top of the second page of the minutes (as well as the number 30 which has been crossed through).

As mentioned, the minutes record a number of generic points. They said:

> *"These minutes will be attached to your file in demonstration of the points discussed and the suitability of any recommendation made.*
>
> *<u>Statement of Needs & Objectives</u>*
> *Before discussing the meetings specific points we reconfirmed [Mrs M's] overall needs and objectives sought from [Mr F's] advice*
>
> 1. *To set and review annually a house budget commensurate with your changing needs & identify any shortfall between the sum detailed (your budget) and all forms of income in payment.*
>
> 2. *To meet the identified shortfall utilising the most suitable product, fund or deposit account within the assets disclosed, so that the payments are tax efficient (Income, Gains or any other tax variant charged) to UK resident. To plan for the income to escalate in line with your future budget reviews, but planning purposes no less than 3% per annum.*
>
> 3. *To maintain the value of your asset base I real terms against inflation & the income withdrawals necessary to meet your objective over the duration of your lifetime …*
>
> 4. *To assess and agree a level of risk that you are willing to accept when investing the assets to meet your income objective. The level of risk should include product, platform or tax wrapper, inclusive of the geographic location of any holding as well as your previous knowledge and experience. To place & review the investments, appropriate to this disclosed level of risk using an agreed methodology to the selection process of any asset.*
>
> 5. *To assist & file your annual self-assessment tax return and advising in the event of any resulting HMRC enquiries.*
>
> 6. *To install a pre-arranged schedule of meetings to ensure all aspects of your financial plans, are reviewed and the investments rebalance where necessary.*
>
> 7. *To ensure that your level of involvement in the administration paperwork and maintenance of assets including those for your tax return are at a level congruent to your desire to be included.*
>
> *<u>General Administration as part of our scheduled reviews</u>:*
>
> 1. *[Mr F] reviewed the comparative valuation data and compared it to previous meetings values, whilst updating the information hold in our client financial analysis file.*
>
> 2. *[Mr F] confirmed the documentation held to verify identity and residence was valid.*
>
> 3. *[Mr F] confirmed Master Advisers terms of business and client services agreement (CSA) issued in the last quarter of 2013 was valid without variation to the service basis offered at this time*
>
> 4. *You confirmed your attitude to investment risk has not changed… We have discussed this subject at length over the years, which have seen you display a greater desire to accept risk despite your increasing age, but as a result of reduced budgetary pressure*

and responsibility since your husband's death, providing reassurance in the ability that you would continue un-affected – financially at least – for the remainder of your life by any market down turn and your increased capacity for loss with substantial emergency funds held on deposit. This will be continually reviewed, but for the purposes of providing a suitable description of such investment attitude it was agreed that you wished to be treated as follows:

Balanced *A Balanced Investor is looking for a balance of risk and reward, whilst seeking higher returns than might be obtained from a deposit account, recognises that this brings with it a higher level of risk and that the value of their investment may fluctuate in the short term. They would feel uncomfortable if the overall value of their investments were to fall significantly over a short period and would not be happy to see their capital eroded.*

5. *I have recommended a range of Investments since we met in 1996, & have filed your HMRC tax returns annually. This together with all advice being given regular [sic] structured reviews to ensure continued suitability since outset, would allow you to be deemed to hold a fair knowledge of financial planning*

<u>The Meetings specific Objectives & appropriate Recommendations</u>

…

- *Review Income & comparative Capital records in association with the valuation data*
- *Review **ALL Tax Return** queries from HMRC. What next?*
- *Review the "Bed & NISA" transactions executed prior to 05/04/2015 and replenish the funds used from the collectives*
- *Confirm all actions in regard to the NS&I pensioner bonds and increased Premium Bond allocation has been actioned since out meeting in April."* [original emphasis]

I asked Mrs D about this July cheque payment, pointing out that the minutes do not record the payment in an express way. And I asked what she thought this payment was for. Mrs D said:

"The Ombudsman is correct, the minutes do not record any express payment in that manner. [Mr F] arrived at the meeting with these pre-typed minutes using them like an agenda…

The fact that this document was given to us on the day is evidenced by the fact he has written on two different amounts – one of which is the amount for the cheque given that day, £45,720.

I would highlight, that this document refers repeatedly and in multiple ways to financial planning…

Were these minutes created after the meeting, which they are not…given that [Mr F] is a fraudster he would not have incriminated himself by referencing a spurious investment…

As per the April cheques, the cheque was for investments… As stated, the cheques were part of a supposed investment plan for my mother's financial future; as demonstrated by the 'minutes'…

The figures scribbled on the minutes by [Mr F] indicate that he had one figure in mind £30K and then changed his mind in the meeting, increasing the figure to £45,720. I cannot recall the specific argument as to why he increased the figure. But the figure of £45,720 was the amount given to him in a cheque at this meeting with the payee blank. Again, as before and as previously asserted in all the correspondence the cheque was for 'investments'."

Mrs D went on to make the general point:

"Please note also, that if we had known the payees, I could have completed the cheques in full for my mother – in which case I could then have sent them and the applications off in one go, as indeed I did with the NS&I cheque in August. Quite simply where the payees were

> *unknown* [original emphasis] *the cheques were left blank as to payee on his instruction to ensure they were correctly completed for the investment. As I stated in previous correspondence and in my police statement on one occasion at least, he rang the office, allegedly to talk to his secretary to get a reference that he had seemingly left behind. She was not available and so he hung up and stated,*
>
> > *'don't worry I'll fill it in later'.*
>
> *The investment process was under [Mr F's] control…"*

I note that Mrs D said above that when the payee was unknown the cheques were left blank. She does not say when the details of the payee were unknown.

I also note Mrs D refers to financial planning. As I mentioned above generic advice such as financial planning is not the same thing as the regulated activity of advising on investments.

In her statement to the police Mrs D said the following in relation to this cheque:

> *"- 24/07/15, £45,720. This signed by my Mummy with the value written by me. Again I did not write the payee "[Mr F]". There is no way we would pay him this money. I can only assume it was another blank cheque we trusted he would invest."*

As with the comment made by Mrs D in relation to the April cheque referred to above, the comment that the there is no way we would pay him this money is not correct as Mrs D did pay money to Mr F direct in her own dealings with Mr F. But as I said above his does not however mean that Mrs M must have done the same thing or that all of Mrs D's evidence should be disregarded.

Again Mrs D does not say, for example this payment was supposed to be for Fidelity or Prudential (or whatever) investment Mr F advised Mrs M to make. Rather Mrs D has signed the statement which says she could only *assume* it was a blank cheque they trusted Mr F would invest – that wording seems consistent with Mrs M and Mrs D not knowing exactly how Mr F was to invest the money but just trusting that he would invest in an investment he would consider suitable.

All of that said, the above minute does record a *"specific objective and the appropriate recommendation"* of replenishing *"the collectives".* This suggests to me that Mr F said he would top up some existing collective investment fund or funds as in the Fidelity platform.

The minutes do mention:

> *"To meet the identified shortfall utilising the most suitable product, fund or deposit account within the assets disclosed…*

Master Adviser says this indicates Mr F was advising on deposit accounts and that a more plausible interpretation of the evidence is that Mr F persuaded Mrs M to invest into a client deposit account or capital adequacy account.

It should however be noted that there is no reference to either a client deposit account or capital adequacy account in the minutes. Nor in any other document that purports to record the advice given to Mrs M that I have seen. Nor did Mr F refer to such accounts in relation to Mrs M in his police statement – which I will refer to below. And neither has Mrs D in any of the accounts she has given of events relating to Mrs M (unlike her own complaint.)

The reference to the most suitable product, fund or deposit is consistent with straight forward bank or building society deposit accounts and cash ISAs type accounts – the sort of

accounts a client might use for some of the cash reserve that a financial adviser would typically recommend a client hold.

I also note that Mrs M's recorded balanced attitude to risk is described in a way that includes:

> *…seeking higher returns than might be obtained from a deposit account, recognises that this brings with it a higher level of risk*

and that no reference to investing in a deposit is included in the meeting's specific objectives and recommendations section. There is a reference to NS&I pensioner bonds and premium bonds. And there is a reference to reviewing "Bed & NISA transactions executed before 5 April 2015 and *"replenish the funds used from the collectives"*.

Neither party has provided detailed information about the "Bed and NISA" exercise at that time since attention has focused on the cheques rather than any other fund transfers. But it may be that these words do indicate that there was advice to invest in particular (identifiable) investments.

It also seems that the minutes I have quoted above indicate that Mr F agreed to arrange an investment in Mrs M's collective investments. In my view this was the regulated activity of agreeing to arrange an investment.

Further it seems that Mr F agreed to give Mrs M further advice in that he was agreeing to continue to meet with her regularly, review her investments to ensure their continued suitability and recommend changes as necessary. This would seem to be the regulated activity of agreeing to advise on investments. And it would seem to show that these events are linked in the sense of being part of the regular reviews that Mr F had agreed to provide.

the August cheques:

Cheque number 3877 dated 24 August 2015 for £10,000 was payable to National Savings and Investments. Mrs D says this cheque was written out in full by Mrs D and signed by Mrs M. There is no complaint in respect of this payment.

Cheque number 3878 was dated 24 August 2015 for £75,000. Mrs D says this cheque was payable to Prudential. Mrs D says she wrote the amount of this cheque and Mrs M signed it. Mrs D says the payee of the cheque was left blank and was completed later by or for Mr F.

This cheque was never cashed and so there is no complaint about this Prudential matter as such. I have, however, still considered these August payments as they help to build up the overall picture.

The evidence relating to the August cheques is clearer in some respects. Mr F wrote to Mrs M on 21 August 2015. The letter included:

> *"Top up your existing Premium Bonds by the £10,000 extra that you are now allowed to maximise your holdings at £50,000. I have attached a letter and application for you to attach the cheque and send directly to the NS&I.*
>
> *…One of the reasons for the delay has been the procrastination of Scottish Widows as to whether they would allow the topping up of your existing Life Assurance Bond…which resulted…with a refusal on the basis that this is an old style 'legacy' product…*
>
> *…Prudential Investment Plan Application for you to sign where indicated, attach a cheque for the premium (I've suggested £75,000) and return to me in the envelope provided. This will be*

invested in the "PruFund Cautious Fund" commensurate to your risk profile. Furthermore I have recommend this action in line with our current client services agreement, i.e. without initial fees but 1% of the value to meet the ongoing need for advice. This is the very reason why you do not need to worry about any costs when I make my journeys up north; you've already contributed by letting your investment pay my fees!"

This is the only occasion when Mr F documented his recommendations to Mrs M in relation to the payments I have considered in this complaint. And even then, the letter is not itself a clear record of advice as such. The proposals are set out without any real explanation and it is said that a full suitability report would follow after Mrs M had decided how to proceed. That said, the letter is clear in its implication that Mr F thinks Mrs M should make two investments, he is recommending them, and Mrs M is asked to take certain steps if she agrees.

So on this occasion Mr F made the recommendation of named investments. He did not however say in his letter either how the cheques should be made out or that the Prudential cheque should be left blank. I asked Mrs D about this. She said:

"The Ombudsman is correct, the letter of 21 August 2015 does not state who the cheque should be made payable to, nor that the payee should be left blank. But that is precisely the point - we did not know to whom to address the cheque or what reference/payee to use. The only person we could rely on for that was [Mr F], all we knew was that it was destined for the Prudential, a well known investment name, but as to specifically whom it should be written out we did not know.

In the letter, 21 August 2015, he specifically requested that it be returned to him not sent direct to the Prudential. If we had known the payee details I would have been able to send it straight to the Prudential myself, as I did with the NS&I cheque of the same date. But we did not have the payee details and [Mr F] requested in writing, on MA headed paper, that we return it all to him in the envelope he provided.

Note the application for the Prudential Investment is enclosed with his letter, and states that my mother needs to attach a cheque for his suggested figure of £75,000. This he then says will be invested in the PruFund Cautious Fund. Note [Mr F] actually admits it will be invested. Thus, the form was duly signed and the cheque with the payee blank sent, as this was the way the system had operated in April and July. We did not know to whom it should be made payable: Prudential? PruFund Cautious Fund? Or some other key fund term? This is where we relied on [Mr F] to ensure correct completion and not make a mistake."

I will make a few observations on the August payments before moving on:

- Advice to invest in premium bonds is not regulated investment advice but given as one piece of advice to make two investments and so is linked to the regulated advice given in the letter.
- The reference to the Scottish Widows investment would tend to suggest that Mr F had been making enquiries about it and so had not yet recommended topping up the existing Scottish Widows bond. This would seem to rule out that bond as a possibility for the payment in April and July. And rule out the bond as the investment to be replenished in November (as discussed below).
- I do not think there is anything of note in Mr F saying the NS&I investment application should be completed and sent on with payment, but the Prudential application should be returned to him. Mr F was getting no commission or similar payment from NS&I but, as he said in his letter, intended to take commission/fees in relation to the Prudential investment so he would want to send that application off to Prudential to arrange that payment.
- The cheque for £75,000 was never cashed. I have not seen a copy of it – unlike the other cheques I refer to. Mrs D says she wrote out the cheque and left the payee

blank. There is no evidence I am aware of that either directly confirms or contradicts Mrs D on this point.

- Mrs D has said that Mrs M wrote out for herself the cheque for NS&I in March 2015 and remained capable of doing so but preferred not to in meetings because her writing had slowed down due to arthritis. Mrs D says she therefore wrote out the cheques for her mother. That all makes sense. But this payment does not fit in with Mrs D's explanation as there was no meeting, but Mrs D says she wrote the cheques for Prudential and N&SI. I have seen a copy of the NS&I cheque and it does seem to have been written out as to the amount in the same way as the disputed cheques (meaning it was not written by Mrs M).
- Mrs D says they operated the same system in relation to Prudential as in relation to the April and July payments, but there are some noticeable differences:
    - The intended investment is clearly documented in August. It was not in relation to the payments in April and July.
    - Mrs D can identify which investment was recommended in August but she has not been able to tell me what investments were recommended to Mrs M in April and July.
    - This transaction was carried out by post not in person at a meeting.
    - There is a reference to an application form in relation to this investment. Application forms are normal part of making a normal or orthodox investment. There is no reference to application forms in relation to the other investments in the account of events given by Mrs D or in any of the documents I have seen (apart from the November minutes referred to below which mention an application form without specifying what the application form was for).
- According to Mrs D's version of events her mother trusted Mr F sufficiently to hand to him signed cheques for payments of £30-40,000 plus with the payee left blank at their meetings. In relation to the Prudential matter, Mrs D's version of events is that she was prepared to put a signed cheque for £75,000 that was blank as to the payee in the post because they were unsure who to make the cheque payable to.
- Application forms usually say who the payment should be made payable to.
- Mrs D has said that 'blank' cheques were given to Mr F at meetings because he was usually in a hurry in meetings and would not have some detail or an application form with him. On this occasion he posted the form. There was no hurry. Mr F could have been phoned or emailed and asked about the payee for the cheque rather than send a blank as to payee cheque through the post where there was a danger it could have been intercepted and stolen.

Some of these points mean that the version of events given on behalf of Mrs M seems implausible in relation to the Prudential investment.

Further I note that in the police statement Mrs D signed there is a different version of events in relation to the August cheques. In the police statement Mrs D said:

> *"On 24/08/15 cheque number 3878 was written to the "Prudential". This was written and intended to be invested by [Mr F]. This cheque was not cashed/invested. I had a letter and email from [Mr F] saying he would invest it but he did not. I can only presume he was too scared to take such a large value.*
>
> *24/08/15, £10,000. All in my writing. This was legitimately invested. This cheque was written in the same meeting as above. [Mr F] said he didn't have the reference for the Pru cheque and he would have to take it away."*

The above explanation fits in with the general overall version of events given by Mrs D but not the specifics of the August 2015 payments and the letter of 21 August 2015. Mrs D has explained that she did not write out her police statement and rather she gave an account to a

police officer who then wrote out a summary of what she said. That may account for the inconsistency, but it is the case that Mrs D signed the police statement to say it was true to the best of her knowledge and belief.

The implausibility and inconsistency on this point do tend to have an undermining effect on Mrs D's version of events. I will return to this point below, but as a final point on the Prudential investment it should be noted that as well as recommending the investment Mr F agreed to arrange the investment. So there is clear evidence here of Mr F carrying on regulated activities.

the last three cheques:

Cheque number 3903 was dated 30 November 2015 for £45,000. This cheque was payable to Mr F. Mrs D says she wrote the amount of this cheque and Mrs M signed it. Mrs D says cheques 3903, 3904 and 3905 were all written at the same time by her with the payee and date left blank at Mr F's request. Mrs D says the cheque was made payable to Mr F by or for him without Mrs M's knowledge or consent.

Cheque number 3904 dated 15 December 2015. This cheque was for £25,000 payable to Fidelity Investments. Mrs D says the cheque was made payable to Fidelity International by or for Mr F.

Cheque number 3905 dated 15 January 2016 for £25,000. This cheque was payable to Mr F. Mrs D says the cheque was made payable to Mr F by or for him without Mrs M's knowledge or consent.

Master Adviser says:

- The payee "[Mr F]" is in different writing on the 30 November 2015 cheque compared to the 15 January 2016 cheque.
- The writing of the amount on the cheque dated 15 December 2015 is different to the other two cheques.
- The signature of the 15 January 2016 cheque is different to the others – it suspects this may have been forged by Mr F.

Before moving on I think the final point made by Master Adviser is unlikely. I am not aware of any other allegation of forged signatures against Mr F – though that does not mean he did not do it. But to do it he would have to get a completely blank cheque from Mrs M and that seems unlikely and Mrs D is not aware of Mrs M losing control of her cheque book. I think a more likely explanation is that Mrs M's writing had become more inconsistent by that time as she was elderly and suffered from arthritis.

Be that as it may, Master Adviser says its points are all contrary to Mrs D's version of events.

The first cheque is dated 30 November 2015 which does seem to be the date of a meeting between Mr F and Mrs M in relation to which Mr F provided minutes. Most of the 'minutes' are more in the form of an agenda in essentially the same format at the July meeting quoted above. Under the heading "this Meetings specific objective & the appropriate Recommendations" is the following:

- *"Confirm all actions in regard to the NS&I pensioner bonds and increased Premium Bond allocation has been actioned since our meetings in April & AUGUST* [original emphasis]
- *Review Income & comparative Capital records in association with the valuation data*
- *Review **ALL Tax Return*** [original emphasis] *queries form HMRC. What Next?*
- *Review and replenish the funds used from the collectives"*

The minutes finish with the following:

> *"1x Application*
>
> *3 x Cheques (Maximum Phase to 2016)*
>
> *The above confirm my agreement to the points discussed & desire to execute the transactions necessary"*

I asked Mrs D about this. She said:

> *"…these cheques, like the others, were part of the on-going investment planning* [original emphasis] *for my mother's financial future following the sale of the house. The August letter, taken together with the emails, the minutes/agendas/- refer to a continuous narrative showing what we believed to be an investment strategy.*
>
> *…No application was given to us by [Mr F], the only application of which I am aware was the Prudential in August.*
>
> *[Mr F] merely wanted to schedule the cheques for key dates for investments. This seemed quite legitimate since we had supposedly lost out on the Prudential investment date. …Achieving scheduled dates appeared then to be critical to the investment process and hence his alleged need for three spaced out cheques for the investments…"*

In her statement to the police Mrs D said the following about the last three cheques:

> *"The last 3 cheques were all written at the same time. All written by me, signed by Mummy. He told us we needed to "stagger" the investments. He said we needed three different dates for windows opening and shutting on investments. As such they were all left blank. I can now see they were filled in afterwards*
> *£45,000 to [Mr F] on 20/11/15*
> *£25,000 to Fidelity on 15/12/15 (legitimately invested)*
> *£25,000 to [Mr F] on 15/01/16.*
> *Again there is no reason for [Mr F] to have this money and Mummy did not give him permission to take it."*

Again I note that neither in the statement to the police or when I asked Mrs D what she thought the cheques were for did Mrs D identify the specific investments she thought the payments were for. She does not mention the client deposit account of capital adequacy account though she does refer to such an account in relation to herself.

I note that the minutes do link all three cheques referring to phased investments over time rather than say three different investments to be made at the same time. And I note the reference to "the collectives" in the minutes which tends to rule out the possibility of a payment to Mr F personally for, say, a capital adequacy account or client deposit account. I also repeat the point that Mrs M did have a Fidelity Funds Network platform account in which collective investments with Fidelity and some other find providers

As with the April cheques it may be the reference to replenishing collectives indicates that there was advice to investment in a particular (identifiable) investment.

And in relation to the Fidelity investment in December 2015 there is evidence Mr F did arrange that investment as Master Adviser has provided a document from Fidelity headed "Cheque payment Slip Fidelity Copy UKUT" which records the payment of £25,000 to Fidelity with the broker recorded as Master Adviser. The product type is again recorded as

"UKUT/OEIC" so again the payment seems to be for an investment in securities. So there is evidence Mr F carried on the regulated activity of arranging deals investments.

the police summary of the case against Mr F and Mrs D's comments on it:

The police prepared a summary of the case against Mr F. It summarises the offences committed against other victims (some of whom were couples or other family groups) including Mrs M and Mrs D.

The summary included the following in respect of the first victim numbered 1 in the summary:

> *"[Mr A] explains that over the years he made a number of transfers directly to the personal bank account of [Mr F]. [Mr A] is unsure now as to how many transfers he made or what each of these transfers were for, but he is clear that he was told it was for an "investment"."*

There is a reference to NS&I in inverted commas in the summary that suggests that it may have been represented that the fraudulent payments were linked to bogus NS&I investments.

In relation to victims numbered 2, 3, 4, 5, 7, 9 and 10 the term *"capital adequacy"* or *"capital adequacy account"* was used in connection with the payments made to Mr F. The victims thought they were making investments. One victim also referred to promissory notes and one to *"peer-to-pension"*. Another referred to an Inheritance Tax Bond. And another victim referred to a client account.

Mrs D referred to a *"client deposit account"* in relation to her own, but not her mother's dealings, with Mr F.

When commenting on the police summary, Mrs D said the following when drawing attention to differences between her own complaint and her mother's (Mrs M's):

> *"…I am not a financial expert and had little to offer the discussion [when Mr F visited Mr and Mrs D] other than the fact that our funds needed to be invested to cover the cost of school fees. My husband deals with complex spreadsheets on a daily basis, I therefore left the detailed discussions of the meetings to my husband and [Mr F]. However, I was involved when a decision, action or errand had to be taken for example expediating the CHAPS. I did say [Mr F] used a lot of jargon and also that the CDA was an investment.*
>
> *For the detailed knowledge of the details pertaining to the CDA issue and our complaint I defer to my husband who states:*
>
> > *'The non-existent 'Client Deposit Account' was the fraudulent means by which [Mr F] persuaded us as novice investors, to pay £35,000. The Client Deposit Account was not an investment opportunity itself but was, we believed, an internal account within Master Adviser. We were led to believe that this account formed part of a parcel of investment advice that would be invested in bona fide OEICs in the same manner as previously.'*
>
> *The point is made clear in the final line of my witness statement added as a clarification point which states, 'To clarify – I understood the CDA money would eventually be invested but it was to be placed in account with Master Adviser'.*
>
> *My mother's complaint differs significantly in that she did not make any direct payment to [Mr F] (cheques were fraudulently filled out by [Mr F] himself) neither did she nor I believe the cheques were for any purpose other than genuine investments in reputable funds managed by Master Adviser. At no time at all was there any discussion of investing in CDA or similar*

*nor did we think that any money was to be paid directly to [Mr F] – his own letter, August 2015, clarifies that he his paid **via investment fees** such as Prudential."* [original emphasis]

I should point out that though Mr and Mrs D refer to the client deposit account as being an account within Master Adviser it is the case that the £35,000 was paid to Mr F's personal bank account by Mr and Mrs D. I do not say this means they understood there was no connection between Mr F and Master Adviser in relation to that account. I just make the point here that I am aware, and had noted in my provisional decision, that Mrs D paid money to Mr F personally that she thought was to be invested which is contrary to her assertion that there is "no way" she or her mother would have paid money to Mr F personally.

In relation to Mrs M specifically, I note the references in the police summary to cheque payments made directly to Mr F and Mrs D "*believes these payments would have been for investment opportunities".* And the following points made by Mrs D above:

- *"they* [Mrs M's cheques] *were all intended for investment… Fidelity, NS&I, Post Office and… the Prudential";*
- "*genuine investment in reputable funds managed by Master Adviser".*

This evidence consistently indicates that Mrs M understood that her cheques were to be invested by Mr F. Conversely, there is no clear evidence to show that Mrs M agreed that Mr F could use these cheques for his own purposes or pay them into an account of his own, such as a capital adequacy account or a client deposit account.

More broadly, the police summary, together with Mrs D's comments on it, indicate that Mr F used a variety of vehicles and methods to defraud his victims, as follows:

1. Direct transfers to Mr F's personal bank account;
2. Capital adequacy account;
3. Promissory notes;
4. Peer-to-pension;
5. Inheritance Tax Bond
6. Client deposit account;
7. Blank payee cheques given to Mr F.

what did Mr F say about his fraudulent methodology in his police statement?

It is clear that Mr F was deceiving a number of his clients. He was skilled at deception since his frauds were numerous and not discovered for some time.

Generally Mr F appears to have cooperated with the police. That said, I think Mr F had a distorted view of things and seemed to be deceiving himself about the extent of his wrong-doing. Therefore while he did not seem to be lying about his actions within his confession, I do not consider that his account of events necessarily has to be accepted as 100% accurate and reliable in all respects.

Mr F is not completely clear about how he deceived his clients. He was open in admitting he did so and that he made up things like the "client deposit account" and referred to "capital adequacy accounts" to give his fraudulent schemes more credibility.

Mr F refers to a methodology similar to that alleged by Mrs D in his second interview on the second day he was interviewed, noted as being at 1:03:44 on the recording. Mr F was talking about a different victim, who was not Mrs M, and he said:

> *"[name given] was like my sister, she was born on the same day as me, we went to school together. Her mum begged me to look after her. I looked after her mum, in fact her mum was one of the first ones I made a mistake in writing in a cheque in the name of me. I had no intention of defrauding her or anything else like that…"*

Mr F does not refer to writing in a cheque in his own name elsewhere – but the way in which he refers to it above is instructive.

Mr F says: "*her mum was one of the first ones I made a mistake in writing in a cheque in the name of me."* In my view, *"writing in a cheque in the name of me"* describes blank cheque fraud, where Mr F has written his name as payee, such as Mrs M says she experienced. Mr F describes this victim as "*one of the first ones*", which is consistent with the existence of a number of other victims defrauded via blank cheques. If this victim was the only victim, then Mr F would not have said that she was *"one of the first ones,"* because there would have been no other victims. In my view, therefore, although Mr F did persuade some clients to pay money into a so-called 'Client Deposit' or 'Capital Adequacy' account, this evidence indicates that Mr F also perpetuated fraud via writing his name as payee in blank cheques.

what did Mr F say about his dealings with Mrs M?

Mr F could not remember (or at least did not say) what he had said to Mrs M to persuade her to make the payments he misappropriated – though he does not deny taking her money. When asked about the misrepresentation, Mr F does not deny that there was one, he says he cannot remember what it was. The relevant part of the recorded statement was transcribed as follows:

Police officer 2:	*Can we ask you what those investments were?*
Mr F:	*They weren't investments, they were spent.*
Police officer 2:	*Or what was the representation? I mean we haven't spoken to* [Mrs M] *cos she's not a well lady*.
Mr F:	*No, I know* [inaudible]
Police officer 2:	*So the* [Mrs D] *thirty-five to one side, it's the* [Mrs D] *payments*
Mr F:	*To tell the truth, I can't honestly remember. By then, '15, '16 I was in a blur. I knew that everything was going tits up. All I do know is the fact that I'm responsible for her not being very well*
Police officer 2:	*She doesn't know about this*
Mr F:	*Mmm, yeah but* [Mr and Mrs D] *do and I love them like, again*
Police officer 2:	*So you can't remember at all what the representations were to* [Mrs D]
Mr F:	*Not without the file because that one's all on file. The files are at Master Adviser I think. I'm not sure.*

Lawyers acting for Master Adviser say that this evidence indicates that the blank cheques weren't investments, and that it isn't rational for me to conclude that Mr F had simply spent the money.

However, in my view, on the balance of probabilities, when Mr F said the money was "*spent*", he was not suggesting that the money was given to him to spend rather than to invest for Mrs M. He was acknowledging that he should have invested the money, but he did not do so. Instead, he spent the money. In other words, the money was supposed to be invested but the investments were never made – "*they weren't investments*" – because Mr F spent the money.

Other points can be drawn from the above comments and one other made in respect of the misappropriation of Mr and Mrs D's money. In his first police interview Mr F had said he did not think he would have taken money from Mr and Mrs D. In his second interview he corrected that. He said:

Mr F:	*I didn't think I had but now I've remembered this thirty-five thousand and so I will correct myself on tape that I, seriously there must be so little documentation on that which is unlike me. Have you noticed it's unlike me that every single one I've put something in the background. So all I will say on that is I acknowledge that I did not mean to lie and that I will find*
Police officer 1:	*Ok. And balance of the money paid by* [Mrs M]*?*
Mr F:	*I will find those two files cos it's quite clear that there's a hole in either my Dropbox or something on that one.*

So for some unexplained reason Mr F's own record keeping was different in respect of Mrs M and Mrs D compared to other victims.

I also note Mr F does not for example say he did, or would have, referred to (say) a capital adequacy account because that is what he usually did.

And as I have mentioned above, Mr F has referred to writing cheques in his own name on other occasions, and he does not expressly rule that out in relation to Mrs M. Though, in fairness, he was not asked to rule in or rule out any particular approach; but the point remains that Mr F has said nothing in relation to Mrs M that contradicts the version of events put forward by Mrs D.

my findings on the facts:

Having reviewed all the evidence, I do not consider that Mrs M intended to pay her money to Mr F personally. I consider it is more likely than not that Mr F persuaded Mrs M to give to him cheques that were blank as to payee and that Mr F made the cheques payable to himself.

I do not think the point made by Master Adviser about the hand writing on the cheques is strong. When first made by Master Adviser, it said it was considering obtaining a handwriting expert's report to a back-up its point. No such expert report has been produced to me. To my (non-handwriting expert) eye it seems possible that Mr F did complete the payee details on the cheques as alleged. And it seems entirely possible that Mr F will have sought to copy the writing on the cheques when completing the payee and that his results would not have been completely consistent.

This explanation that Mr F completed the cheques instead of investing in legitimate investments has been given on behalf of Mrs M from the outset and it seems to fit the evidence of the cheques. Also, given what is now known about Mr F, the account is plausible in relation to the four payments made to Mr F and is consistent with available evidence. I say this because I think Mr F wrote his name on cheques on some other

occasions in relation to other victims. This is clear from the following comment I noted above:

> *"…her mum was <u>one of the first ones</u> I made a mistake in writing in a cheque in the name of me."* (my emphasis)

The difference with Mrs D's own case is notable. At the time Mrs D and Mrs M made their complaints, Mrs M was unwell and then died, and so Mrs M was represented by her family. In particular, Mrs D had been involved with Mrs M's dealings with Mr F, and Mrs D therefore provided us with her own account of those dealings.

From the beginning, Mrs D described two different factual scenarios. Mrs D said that she was persuaded to invest with Mr F in something he called a 'client deposit account', but that Mrs M was defrauded via blank cheques intended for investment but made out in Mr F's name and misappropriated. Master Adviser essentially ask me to find that Mrs D's complaint is true, but that Mrs M in fact paid monies into the 'client deposit account' and therefore Mrs M's complaint is false.

It is not clear why the family would make a false complaint in relation to Mrs M. I note from her own complaint that Mrs D believed that the client deposit account represented a reasonable and legitimate basis for making a complaint against, and claiming compensation from, Master Adviser. Therefore, if Mrs M had also paid money into this 'client deposit account', it seems very likely that Mrs M (via Mrs D) would have said so.

Further, if Mrs M had invested in a client deposit account, I cannot see that, at the time of the initial complaints, Mrs D would have been aware of any benefit to either Mrs D or to Mrs M in putting forward a 'blank cheque' complaint instead. At the time, I cannot see that Mrs D would have had grounds to believe that either she or Mrs M stood to gain anything by making a false 'blank cheque' complaint.

And I cannot see that Mr F completing the payee of the cheques in his own name without authority instead of making legitimate investments version of events is contradicted by any of the available evidence.

Certainly I do not consider the following:

> Police officer 2: *Can we ask you what those investments were?*
>
> Mr F: *They weren't investments, they were spent.*

means that Mr F was saying the money was given to Mr F personally to spend in whatever way he saw fit. If he had meant that, it's likely that he would have said so rather than say he could not remember what representation he had made in order to get the money.

Also if Mr F had a single consistent way of defrauding his clients – say the use of a client deposit account or similar – he could have said so. But Mr F did not have only one way of tricking clients out of their money as can be seen from his comments about cheques above.

All Mr F meant was that there was no investment to show for the money and that by the time he was being questioned, he had spent the money. He was not saying the money had not been given to him on the understanding he would invest it.

Therefore, it seems to me that Mrs M complains that Mr F wrote his name on her blank cheques because, on the balance of probabilities, this is what happened. Finding that Mr F

filled out his name on blank cheques is not however the end of the matter because the way in which Mr F persuaded Mrs M to give him those blank cheques is also important.

Mrs D says Mr F advised Mrs M to make investments but told her to leave the cheques blank as to payee and he would fill in the details of the investment company later.

I have mentioned above that some parts of Mrs D's account do not seem plausible. And some parts of the account have not been consistent. However on balance I think Mrs D's version of event is, in essence, reliable. It is a version of events that for the large part has been consistently given, while differing from Mrs D's own complaint when it seems unlikely that Mrs M or Mrs D would have understood the possible significance of the differences in their dealings with Mr F.

There is evidence that Mrs M consulted Mr F, her existing financial adviser, for advice on how to invest money she had released by selling her home. And there is evidence that Mr F agreed to advise Mrs M and keep things under review by keeping in contact and having a number of meetings rather than a one-off advice meeting.

There is no evidence that Mrs M knowingly made any cheque payment to Mr F for some kind of arrangement like a *"capital adequacy account"* or *"client deposit account"* from Mr F, in any of the documents from the time or the account of events given by Mrs D. Nor does Mr F say that is how he persuaded Mrs M to give him her money.

It is therefore my view that the four disputed cheques were handed to Mr F at meetings with the payee left blank as alleged and later completed by or for Mr F without Mrs M's knowledge or consent. *And* that Mrs M did this because Mr F said he would compete the details of the payee later and that Mrs M was led to believe by Mr F that the payee would be a legitimate investment with a legitimate company.

The evidence is thin in relation to what investment Mrs M thought she was investing in. Or, put another way, what (if any) particular investment Mr F recommended Mrs M invest in.

I am satisfied there is no evidence that Mrs M thought she was paying the money to Mr F personally to spend on himself for his own purposes. Or to Mr F personally (or to Master Adviser) for any kind of account such as a "capital adequacy account" or "client deposit account" or any deposit or saving scheme as in the case of *Anderson v Sense Network*. Or to Mr F personally or to Master Adviser as client money for him or it to hold on her behalf in order to invest for her with third parties.

When looked at in isolation there is little evidence relating to the investment Mrs M intended in relation to the April payment of £30,240. There is no documentary evidence showing the reason for the payment.

There is more evidence in relation to the July payment of £45,720. The minutes of the meeting refer to reviewing and replenishing funds from the collectives. It is not clear if Mr F recommended investing in a particular collective investment by name, but I consider it more likely than not that he was recommending that Mrs M invest more money in her existing collective investments held with the Fidelity platform to replenish them. The topping up of an existing investment would also seem to account for the apparent lack of details about the investment and account for the lack of any application forms for a new investment.

There is similar evidence in relation to the last three payments from which payments of £45,000 and £25,000 were taken by Mr F. On that occasion an application form was mentioned without specifying what investment the application was for. And Mrs D says there was no application form.

When the April payment is considered again in the light of the payments in July and November it does seem more likely than not that the payment to Mr F was made in the way Mrs D has alleged, as with the July and November payments.

I therefore consider that Mr F advised Mrs M to make an investment into collective investments in Fidelity in April, July and November. I think there is reason to think he was recommending investing in an existing collective investment with Fidelity but not Scottish Widows since it could not be topped up. And Fidelity seems to have been Mrs M's only holding of collectives. The advice was therefore advice to invest in a particular investment even if Mr F did not name the investment he recommended and agreed to arrange for Mrs M. This is the regulated activity of advising on investments and agreeing to arrange.

Alternatively, what if Mr F was just trusted to make suitable investments into Mrs M's existing investments without first identifying the particular investment and getting Mrs M's agreement. I think, given the vague (as regards the intended investments) account of events given by Mrs D, that this was a real possibility. So if I am wrong about Mr F recommending and agreeing to arrange particular investments, I am still satisfied that Mr F was carrying on the activity of agreeing to advise on investments – that is Mrs M's existing collective investments which amounted to known particular investments. This is because Mr F agreed to advise Mrs M on investments including her particular investment as part of the advice process he agreed with her.

Master Adviser says Mr F cannot have agreed to give investment advice if no particular investment was involved and Mr F did not undertake a regulated activity in relation to the blank cheques. But the point is that even if the new investment that Mr F recommended as part of his fraud cannot be identified as a particular investment, Mr F nevertheless agreed to advise on Mrs M's existing investments. I am satisfied that Mr F agreed to advise Mrs M on whether or not to sell or add to (buy more of) those existing investments as part of the review he agreed to undertake. Which included:

> *to assess and agree a level of risk that you are willing to accept when investing the assets to meet your income objective…. To place & review the investments, appropriate to this disclosed level of risk…*
>
> *…to install a pre-arranged schedule of meetings to ensure all aspects of your financial plans, are reviewed and the investments rebalance where necessary.*

And I am satisfied that Mr F carried out his fraud as part of that process in which he agreed to advise Mrs M on her existing investments.

So to sum up it is my finding that Mr F advised Mrs M to invest:

- £30,240 in April 2015
- £45,720 in July 2015
- £45,000 in November 2015, and
- £25,000 in November 2015 with the investment to be made later on a phased basis.

That was the regulated activity of advising on investments if Mrs M was advised to invest in collectives and that term identified particular investments which it would have done if Mrs M's only collective investments were with Fidelity.

And/or Mr F agreed to arrange investments in relation to each of those investments.

And/or in 2015 Mr F carried on the regulated activity of agreeing with Mrs M to advise of investments when agreeing to give Mrs M advice including reviewing her existing investments in 2015. And his giving of investment advice without identifying a particular investment was advice that was ancillary to that regulated activity.

And/or in 2015 Mr F carried on the regulated activity of arranging deals in investments in arranging investments with Fidelity in April and November 2015. And his giving of investment advice without identifying a particular investment was advice that was ancillary to that regulated activity.

In the event Mr F misappropriated Mrs M's money while carrying on those regulated activities of advising on investments, and/or arranging deals investments, and /or agreeing to advise on investments and/or arrange deal in investments or activities ancillary thereto.

It is therefore my view that Mrs M's complaint, that Mr F failed to recommend and arrange suitable investments as agreed is a complaint made in connection with and/or ancillary to regulated activities as set out above.

was Mr F acting as Master Adviser's agent when the regulated activities were carried on?

Mr F was an agent of Master Adviser. He was appointed by it to act as a self-employed independent financial adviser acting on its behalf in January 2010. And he was registered as a CF30 adviser of Master Adviser on the FCA register at the time of these events.

Mr F carried on the above regulated activities when purporting to be an adviser of Master Adviser. For example in the minutes for the meeting in July and November he referred to the Master Adviser terms of business applying. He also wrote the August letter on Master Adviser note paper and referred to the payment of "our fees" from the investment.

While the August investment was different in that it was recorded in a letter and the investment was not made it can still be seen as part of a linked set of dealings between Mr F and Mrs M in 2015.

Mr F also communicated from his Master Adviser email account during those dealings in 2015. This included Master Adviser's details in the body of the email not just in the address line.

And Mr F arranged the two Fidelity investments that were made by Mrs M in 2015 through Master Adviser and it was recorded as the broker for both payments by Fidelity, indicating it received them from Master Adviser.

The evidence indicates Mr F appeared to be acting in his capacity as an independent financial adviser for Master Adviser throughout, notwithstanding his approach of having very close and friendly relationships with his clients. There is nothing to suggest that Mr F was operating on his own account in all or part of his dealings with Mrs M. For example there is no suggestion in relation to this matter that Mr F was operating a separate business or, in relation to Mrs M, that he was operating personal investments that were separate to Master Adviser. As I have said above, in Mrs M's case her payments were intended for legitimate investment companies, not Mr F personally. And Mr F wrongfully and without consent made the cheques out to himself instead of arranging the investments he had agreed to arrange while purporting to act as an independent financial adviser for Master Adviser.

was Master Adviser responsible for the acts Mrs M complains about?

Agency is a relationship between two parties where they agree that one will act on behalf of the other so as to affect its relations with third parties. The one on whose behalf acts are to be done is called the principal. The one who is to act is called the agent. In other words, the principal authorises the agent to act on its behalf.

The creation of that authority can take a number of forms. And it is usual for the authority to be limited in nature. The law recognises different forms of agency.

In this case there is a written agency agreement which gives express actual authority to Mr F.

It is the case that an agent also has implied authority to do what is necessary for, or ordinarily incidental to, the effective execution of his express authority.

actual authority?

There is no evidence (or even any suggestion) Master Adviser authorised Mr F to commit fraud.

Master Adviser says Mr F committed a fraud in breach his agreement with it. He was not authorised to commit the fraud. He had no authority to hold client money.
He was only permitted to deal in investments Master Adviser authorised its advisers to deal in. And he was not permitted to represent himself as an authorised agent of Master Adviser except in the course of proper performance of his duties.

There is a general point that an agent (Mr F) is required to try to act in the principal's (Master Adviser's) best interests. Here, Mr F's conduct was motivated by his intention of stealing Mrs M's money and preventing her from discovering the theft. And stealing money from Master Adviser's client that was supposed to be invested through Master Adviser was clearly not trying to act in Master Adviser's best interests. Mr F was not therefore acting within his actual authority.

apparent (or ostensible) authority

In an agency relationship, a principal may limit the actual authority of his agent. But if the agent acts outside of that actual authority, a principal may still be liable to third parties for the agent's acts if those acts were within the agent's apparent authority. This is the case even if the agent was acting fraudulently and in furtherance of his own interest – provided the agent is acting within his apparent authority.

This type of authority was described by Diplock LJ in *Freeman & Lockyer v Buckhurst Properties (Mangal) Ltd* [1964] 2 QB 480:

> "*An "apparent" or "ostensible" authority…is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.*

> *In ordinary business dealings the contractor at the time of entering into the contract can in the nature of things hardly ever rely on the "actual" authority of the agent. His information as to the authority must be derived either from the principal or from the agent or from both, for they alone know what the agent's actual authority is. All that the contractor can know is what they tell him, which may or may not be true. In the ultimate analysis he relies either upon the representation of the principal, that is, apparent authority, or upon the representation of the agent, that is, warranty of authority...*"

Although Diplock LJ referred to "contractors", the law on apparent authority applies to any third party dealing with the agents of a principal – including consumers like Mrs M.

what kinds of representation are capable of giving rise to apparent authority?

Apparent authority cannot arise on the basis of representations made by the agent alone. For apparent authority to operate there must be a representation by the principal that the agent has its authority to act. As Diplock LJ said in *Freeman*,

> *"The representation which creates "apparent" authority may take a variety of forms of which the commonest is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal's business with other persons. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of his principal's business has usually "actual" authority to enter into.*"

In *Martin v Britannia Life Ltd* [1999]12 WLUK 726, Parker J quoted the relevant principle as stated in Article 74 in Bowstead and Reynolds on Agency 16th edition:

> "*Where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf he is bound by the acts of that other person with respect to anyone dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no such actual authority.*"

In the more recent case of *Anderson v Sense Network* [2018] EWHC 2834 Comm, Jacobs J endorsed Parker J's approach:

> "*As far as apparent authority is concerned, it is clear from the decision in* Martin *(in particular paragraph 5.3.3) that, in order to establish apparent authority, it is necessary for the claimants to establish a representation made by Sense [the alleged principal], which was intended to be acted on and which was in fact acted on by the claimants, that MFSS [the alleged agent] was authorised by Sense to give advice in connection with the scheme…*
>
> *I also agree with Sense that there is nothing in the "status" disclosure – i.e. the compulsory wording relating to the status of MFSS and Sense appearing at the foot of the stationery and elsewhere – which can be read as containing any relevant representation as to MFSS's authority to do what they were doing in this case: i.e. running the scheme and advising in relation to it. The "status" disclosure did no more than identify the regulatory status of MFSS and Sense and the relationship between them. I did not consider that the Claimants had provided any persuasive reason as to how the statements on which they relied relating to "status disclosure" could lead to the conclusion that MFSS was authorised to provide advice on the scheme that was being promoted. In my view, a case of ostensible authority requires much more than an assertion that Sense conferred a "badge of respectability" on MFSS. As* Martin *shows, it requires a representation that there was authority to give advice of the type that was given…the relevant question is whether the firm has 'knowingly or even unwittingly led a customer to believe that an appointed representative or other agent is authorised to conduct business on its behalf of a type that he is not in fact authorised to conduct'. …*

> *Nor is there any analogy with the facts or conclusions in* Martin*. That case was not concerned with any representation alleged to arise from "status" disclosure. In* Martin*, the representation by the principal that the agent was a financial adviser acting for an insurance company was regarded as a sufficient representation that the adviser could advise on matters (the mortgage in that case) which were ancillary to insurance products. In the present case, there is nothing in the "status disclosure" which contains any representation that MFSS or its financial advisers could operate or advise in connection with a deposit scheme that MFSS was running.*"

The representation may be general in character. In *Armagas Ltd v Mundogas SA* [1985] UKHL 11, Lord Keith said:

> "*In the commonly encountered case, the ostensible authority is general in character, arising when the principal has placed the agent in a position which in the outside world is generally regarded as carrying authority to enter into transactions of the kind in question. Ostensible general authority may also arise where the agent has had a course of dealing with a particular contractor and the principal has acquiesced in this course of dealing and honoured transactions arising out of it.*"

must the third party rely on the representation?

The principal's representation that its agent has its authority to act on its behalf will only fix the principal with liability to the third party (here Mrs M) if the third party relied on that representation.

In *Anderson*, Jacobs J summarised the approach to be taken as to whether or not there is sufficient evidence of reliance on the representation as follows:

> "*a relevant ingredient of a case based on apparent authority is reliance on the faith of the representation alleged: see Bowstead and Reynolds on Agency 21st edition, paragraph [8-010] and [8-024];* Martin *paragraph 5.3.3. In* Martin*, Jonathan Parker J. held that the relevant representation in that case (namely that the adviser was authorised to give financial advice concerning a remortgage of the property) was acted on by the plaintiffs 'in that each of them proceeded throughout on the footing that in giving advice [the adviser] was acting in every respect as the agent of [the alleged principal] with authority from [the alleged principal] so to act'.*"

On the particular facts of that case, Jacobs J placed weight on the fact the majority of the claimants had never heard of the defendant, Sense Network, and that those who had heard of it made their decision to invest in the relevant scheme before they saw the stationery which they later said contained the representation on which they relied.

As the case law makes clear, whether or not a claimant has relied on a representation is dependent on the circumstances of that individual case.

Here, I must consider whether, on the facts of this individual case:

- Master Adviser made a representation to Mrs M that Mr F had Master Adviser's authority to act on its behalf in carrying out the activities Mrs M complains about, and

- Mrs M reasonably relied on that representation in entering into the transactions now complained about.

Having considered the law in this area, including Lord Keith's comments in *Armagas*, so far as representations are concerned I need to decide whether Master Adviser placed Mr F in a position which would objectively generally be regarded as carrying its authority to enter into

transactions such as recommending the investment in existing collective investments and arranging such investments or agreeing to advise on or arrange such investments.

I also need to decide whether Mrs M relied on any representation Master Adviser made. Having considered Parker J's comments in *Martin*, if Mrs M proceeded throughout on the footing that Mr F was acting in every respect as the agent of Master Adviser with authority from Master Adviser so to act, then this suggests I should conclude that Mrs M relied on Master Adviser's representation.

did Master Adviser represent to Mrs M that Mr F had the relevant authority?

I must consider whether Master Adviser placed Mr F in a position which would objectively carry Master Adviser's authority for Mr F to conduct business of the *type* he purported to conduct.

It is not in dispute that Mr F had dealings with Mrs M while purporting to be an adviser with Master Adviser. It says Mrs M had investments with Scottish Widows and Fidelity recommended by Mr F on its behalf. Master Adviser accepts Mr F, Mrs M's long-standing financial adviser with Master Adviser, recommended she invest in the platform arrangement with Fidelity in which she invested in collective investment funds.

Mrs M consulted Mr F again in 2015. At that time Mr F was registered by Master Adviser as one of its CF30 financial advisers on the FCA register, which is freely available to the general public, by Master Adviser.

In his role as a financial adviser Mr F was given business stationery and terms of business and access to Master Adviser's email account and business systems. Mr F was therefore able to write to Mrs M, and email Mrs D on behalf of Mrs M, to arrange meetings at which Mr F carried on the regulated activity of advising on investments (at least in relation to Mrs M's existing collective investments) and agreeing to arrange investments and so on.

In at least two of the meetings Mr F had with Mrs M in 2015 he has recorded that he referred Mrs M to the Master Adviser's terms of business Mrs M had signed in 2013 and reminded her that it still applied to their dealings. This was the terms of business in which Master Adviser set out its terms for advising its client Mrs M through its advisers such as Mr F, its CF30 adviser.

It was in Master Adviser's interest for the general public including Mrs M to understand that it was taking responsibility for the advice given by its financial advisers. I am satisfied that Master Adviser intended Mrs M to act on its representation that Mr F was its financial adviser. And that he had authority to advise on investments such as the collectives held with Fidelity. Master Adviser represented that he was so authorised when he first recommended the investments with and through Fidelity and that remained the case at the time of the events in this case when Mr F was agreeing to advise on those investments and advising Mrs M to replenish, or make further investments into, her collectives.

I further consider that the provision of financial advice was a key part of Master Adviser's business. I do not see how Master Adviser could have carried out its business activities at all if the general public had not treated registered individuals like Mr F as having authority to give investment advice on behalf of Master Adviser.

It is my view that all of these points taken together mean Master Adviser did represent to Mrs M that Mr F was authorised to recommend and arrange investments such as collective investment funds such as those held with Fidelity and Prudential to persons, such as Mrs M,

who sought Master Adviser's advice and to help such persons then implement the recommendation by making the necessary arrangements.

did Mrs M reasonably rely on Master Adviser's representation?

Mrs M dealt with Mr F because he had been her financial adviser for many years when her husband dealt with Mr F at Master Adviser. She continued to deal with him in that capacity, as her financial adviser with Master Adviser, after her husband died. Mrs M signed a new terms of business agreement with Master Adviser in 2013.

Mr F's relationship with the family was friendly but it was based upon Mr F being the family's financial adviser. And he held that role in his capacity as an adviser with Master Adviser.

The service Mr F seemed to be carrying out of advising on investments in the light of Mrs M's changed circumstances, including reviewing her existing investments, and recommending further investment in mainstream collective investments such as those offered by Fidelity and Prudential, and agreeing to arrange such investments was entirely consistent with the role of an independent financial adviser for Master Adviser.

Master Adviser refers to the case of *Anderson v Sense Network*. It says that the *Sense* case provides that where a victim of fraud by an agent financial adviser has signed a terms of business which included the warning that the adviser cannot handle client money and the victim does anything other than pay money to the product provider, this is a bar to the victim relying on an argument of ostensible authority. I do not agree with that summary or consider I am compelled to come to the same conclusion in this case as in *Anderson v Sense* as the facts are materially different.

The victims in the *Sense* case knew they were paying money to the agent. It is my finding in this case that Mrs M did not know she was paying the agent. She thought she was paying money to the product provider. So the prohibition on handling client money in the terms of business has no bearing on whether Mrs M was reasonably relying on the representations of authority made by Master Adviser in relation to the conduct as it appeared to Mrs M.

Further, I do not agree that the terms of business clearly set out the boundaries of Master Advisers responsibilities so that Mrs M would have been made clearly aware that some of the services Mr F provided were not carried out on its behalf. Master Adviser refers to Mr F saying he would discuss the most suitable product, fund or deposit account and assist with and file tax returns. It says deposit accounts and tax returns are not matters it deals with. But the terms of business does not say that. Nor does it even say what products or service it does provide. Rather the terms of business say things such as:

> *"Our relationship*
> *Any advice or recommendation that we offer you will be based on your stated objectives, circumstances and take into account any restrictions you wish to place on the type of products you would be willing to consider."*

And:

> *"…we may contact you in the future…should we wish to discuss the relative merits of a particular product or service which we feel may be of interest to you."*

I cannot see that the term 'product' or 'services' is defined in the terms of business anywhere that would make it clear to Mrs M that Mr F was not authorised to advise on, say, savings accounts and/or NS&I investments. And certainly many financial advisers do recommend such products despite that advice not being regulated. I accept that the completion of tax

returns is not so common, but not that the terms of business agreement should reasonably have caused Mrs M to realise that Mr F was not authorised to deal with tax returns and that he was therefore providing some services on behalf of Master Adviser and some that were not; and that she could not reasonably rely on the representations of authority from Master Adviser in relation to the disputed advice.

In my view, on balance, the evidence does indicate that Mrs M reasonably proceeded on the basis that Mr F was acting in every respect as the agent of Master Adviser with authority from Master Adviser so to act. In my view Mrs M reasonably relied on the representation made by Master Adviser that Mr F was authorised by it to act as an independent financial adviser on its behalf and provide the service of advising on and arranging investments, the services he purported to provide to Mrs M in this complaint.

my finding on agency

It is my finding that Master Adviser is responsible for the acts and omissions of Mr F in relation to events in 2015 I have discussed above, on the basis of apparent or ostensible authority for the reasons I have set out above.

vicarious liability

Vicarious liability is a common law principle of strict, no-fault liability for wrongs committed by another person.

Not all relationships are capable of giving rise to vicarious liability. The classic example of a relationship which can give rise to vicarious liability is the employment relationship, but Mr F was not an employee of Master Adviser. However, the employment relationship is not the only relationship capable of giving rise to vicarious liability.

Broadly, there is a two-stage test to decide whether vicarious liability can apply:

- Stage one is to ask whether there is a sufficient relationship between the wrongdoer and the principal.

- Stage two is to ask whether the wrongdoing itself was sufficiently connected to the wrongdoer's duties on behalf of the principal for it to be just for the principal to be held liable.

These are general principles. They are discussed and applied in a series of Supreme Court decisions including:

- Various Claimants v Catholic Child Welfare Society [2012] UKSC 56 ("the Christian Brothers")
- Cox v Ministry of Justice [2016] UKSC 10
- Mohamud v WM Morrison Supermarkets plc [2016] UKSC 11
- Armes v Nottinghamshire County Council [2017] UKSC 60
- WM Morrison Supermarkets plc v Various Claimants [2020] UKSC 12
- Barclays Bank v Various Claimants [2020] UKSC 13

It has long been recognised that an employer can be vicariously liable for the fraudulent acts of an employee acting in the course of their employment. There is no requirement that the fraud be for the benefit of the employer. This was confirmed by the House of Lords in *Lloyd v Grace Smith & Co* in 1912. In that case a law firm was held to be vicariously liable for the

fraud of a solicitor's clerk who dishonestly persuaded a client to transfer property over to him.

There is however debate about whether the general tests I mentioned above apply in cases involving vicarious liability, agency and fraudulent misrepresentation or "deceit".

The case of *Frederick v Positive Solutions* [2018] EWCA Civ 431 is a Court of Appeal decision that concerned fraud and an agent who was a financial adviser. It involved dishonest mortgage applications submitted by the agent in the name of the claimants to raise money to enter into a property development project with the agent. The Court of Appeal said that even if it is assumed that the *'unitary modern law of vicarious liability'* as set out in the *Christian Brothers* and the *Cox* cases applied, the case did not satisfy the two-stage test. The adviser was engaged on a recognisably independent business of his own.

The Court of Appeal went on to say:

> "77. In the circumstances, it is not necessary to go further and determine whether… reliance based torts such as deceit or misrepresentation committed by an agent are in a distinct category from other cases such the *Christian Brothers* case, *Cox* or *Mohamud* , so that the principal cannot be vicariously liable unless the agent had actual or ostensible authority…."

The Court of Appeal decision was in March 2018 and that decision was to be appealed. It was listed for hearing in the Supreme Court in February 2019 but that hearing did not take place.

In November 2018 the Court of Appeal considered another vicarious liability case involving fraud and agency. The case was *James Scott Winter v Hockley Mint Limited* [2018] EWCA Civ 2480. The *Frederick* case was referred to in argument in the case.

In the *James Winter* case the Court did not avoid the point. It said:

> 48. *Armagas* [v Mundagas [1986] 1 AC 717] is binding authority of the House of Lords that, where a claimant has suffered loss in reliance on the deceit of an agent, the principal is vicariously liable if, but only if, the deceitful conduct of the agent was within his or her actual or ostensible authority.

In July 2019 the Court of Appeal made a decision in another case involving vicarious liability, fraud and financial services. That case involved appointed representatives rather than common law agency – though some of the issues involved are similar. That case was *Anderson v Sense Network*. Both the *Frederick* and the *James Winter* cases were referred to in argument in that case but the *James Winter* case is not referred to in the judgment. The court said:

> *64. In my judgment, there is no substance in the appeal on vicarious liability. The judge made clear findings that Midas was carrying on its own business and it is not open to the appellants to go behind those findings. Sense also carried on its own business which comprised providing the regulatory umbrella for independent financial services firms. When Midas and its advisers provided financial advice, they were doing so as part of Midas's own recognisably independent business. In no sense could it be said that they were carrying out activities assigned to them by Sense as part of Sense's business and for Sense's benefit.*
>
> *65. It is unnecessary to express any view on further submissions made on behalf of Sense that these principles of vicarious liability are not applicable in the case of commercial agents, particularly as regards the issue left open by this court in Frederick v Positive Solutions (Financial Services) Ltd [2018] EWCA Civ 431 at [77], and I do not do so.*

It would not seem to be right to speculate about what if anything the Supreme Court would have said about vicarious liability and fraudulent misrepresentation if it had heard the *Frederick v Positive Solutions* case. It seems to me that until the Supreme Court considers the point, or the courts otherwise give clear guidance to the contrary, the position would appear to be as set out in the House of Lords decision of *Armagas* as confirmed by the Court of Appeal in the *James Winter* case.

All of that said, for the reasons already discussed above it is my view that Mr F's conduct in advising Mrs M to invest in collective investments, agreeing to arrange those investments, and purporting to make those arrangements was conduct that was within his apparent authority. Accordingly, I consider that Master Adviser is vicariously liable for that conduct even if apparent authority is the only criterion for fixing vicarious liability to all the statements and actions concerned.

However I think there is significant uncertainty about the correct test in a case such as this one. I say that for three reasons:

1. the agent's dishonesty in this case manifested itself not just in fraudulent misrepresentations but also in a course of dishonest physical conduct (receiving and paying into his own bank account a cheque that did not belong to him);
2. Mrs M had the benefit of the client's best interest rule, a regulatory provision which is designed to protect consumers against a spectrum of misconduct, including but not limited to dishonest misconduct, which applies irrespective of whether the conduct also involves the tort of deceit;
3. the Court of Appeal has applied the general test for vicarious liability to dishonest conduct where the particular legal wrong relied upon is something other than the tort of deceit: see *Group Seven Ltd v Notable Services [2019] EWCA Civ 614*, where the general test was applied in finding a principal vicariously liable for dishonest assistance in a breach of trust and for conspiracy to use unlawful means.

Those points suggest to me that it is most likely that the more general test for vicarious liability (not just the apparent authority test applicable to the tort of deceit) also applies in this case in relation to Mr F's handling of the cheques and to the question of Master Adviser's responsibility for all his statements and conduct under s.138D FSMA. So I have also considered the general two stage test.

the stage 1 test:

In *Barclays Bank plc v Various Claimants* Lady Hale reiterated that, when faced with a case where vicariously liability may be imposed:

> "*The question therefore is, as it has always been, whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment with the defendant. In doubtful cases, the five "incidents" identified by Lord Phillips [in the Christian Brothers case] may be helpful in identifying a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability. Although they were enunciated in the context of non-commercial enterprises, they may be relevant in deciding whether workers who may be technically self-employed or agency workers are effectively part and parcel of the employer's business. But the key, as it was in Christian Brothers, Cox and Armes, will usually lie in understanding the details of the relationship. Where it is clear that the tortfeasor is carrying on his own independent business it is not necessary to consider the five incidents.*"

In this case Mr F was not an employee. He was a self-employed agent of Master Adviser. But he was not carrying on his own independent business like the doctor in the *Barclays* case. Or like the appointed representative Midas in the *Anderson v Sense Network* case.

Mr F was carrying out work for Master Adviser. He was throughout purporting to be an adviser acting for Master Adviser. He was registered by Master Adviser with the regulator to carry on the controlled function CF30 and he carried on that controlled function of an adviser on its behalf. Mr F gave advice on Master Adviser's behalf and he recommended and arranged investments such as investments with Fidelity and Prudential. He was part and parcel of Master Adviser's business of giving financial advice. And I am satisfied their relationship was akin to employment.

In these circumstances, I consider that a relationship existed between Mr F and Master Adviser such that Master Adviser may be held vicariously liable for his actions. But even if this was one of the "doubtful cases" that Lady Hale referred to, I consider that the five incidents Lord Phillips identified in the *Christian Brothers* case would still point towards the relationship being one to which vicarious liability could apply. Those five points are:

> *"(i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability;*
> *(ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer;*
> *(iii) the employee's activity is likely to be part of the business activity of the employer;*
> *(iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee;*
> *(v) the employee will, to a greater or lesser degree, have been under the control of the employer."*

I note:

- Master Adviser is considerably more likely to have the means to compensate Mrs M's estate than Mr F. Master Adviser can be expected to have insured against that liability and may even have been required to hold professional indemnity insurance as a condition of its authorisation by the Financial Conduct Authority.

- Master Adviser had assigned to Mr F the activity of giving investment advice and arranging investments on its behalf. The acts Mrs M's complaint is about – the failure to recommend and arrange a suitable investment for her as agreed – was therefore carried out as a result of activity Mr F undertook on Master Adviser's behalf.

- Mr F's activity was very much part of Master Adviser. Master Adviser's purpose was to provide independent financial advice and arrange the investments it recommends. That advice was only provided by its advisers, such as Mr F, who was registered with the regulator as one of Master Adviser's CF30 approved persons.

- In assigning to Mr F the activity of giving investment advice on its behalf, Master Adviser created the obvious risk that he might do so not only negligently but also dishonestly.

- Mr F was to a very large degree under the control of Master Adviser. The FCA's rules required Master Adviser to properly supervise all of its approved persons, including Mr F. Master Adviser had processes and procedures Mr F was required to follow including for example only recommending the investments it had approved.

However, the fact that the relationships in question are capable of giving rise to vicarious liability does not mean that Master Adviser is automatically liable for everything Mr F did. To decide whether Master Adviser is liable in the circumstances of this complaint (according to

the general tests), I must also consider whether the act complained of is sufficiently connected to Mr F's duties on behalf of Master Adviser – the stage two test.

the stage two test

Under this test there are two important questions:

- What was the field of activities Master Adviser had assigned to Mr F?

- Was the act complained of so closely connected with the acts Mr F was authorised to do such that, for the purposes of Master Adviser's liability to Mrs M, that act may fairly and properly be regarded as having been done by Mr F while acting in the ordinary course of his duties for Master Adviser?

Mrs M asked Mr F to give her investment advice – or rather to continue to give her investment advice as he had been doing for a number of years when he advised Mr and Mrs M. Mr F was registered on the Financial Conduct Authority's Register as an 'approved person' able to give such advice on Master Adviser's behalf. For the purposes of the application of the stage two test to Mrs M's complaint, I consider that the field of activities assigned to Mr F by Master Adviser should be described as the giving of investment advice and arranging recommended investments (and agreeing to do both).

In considering the 'close connection' part of the test:

- This complaint is about the investment advice Mr F gave and his failure to arrange the investments he recommended.

- The advice given was of a type authorised by Master Adviser and Mr F was authorised to arrange investments of the type he recommended.

- Mr F was outwardly purporting to act on behalf of Master Adviser, and Mr F used his Master Adviser email address and business stationery to correspond with Mrs M before the meetings at which the advice was given, and she handed over her cheques intended for investment in legitimate investments that were misappropriated by Mr F.

- Mr F had agreed with Master Adviser that he would follow certain processes when giving investment advice and arranging the investments he recommended, and he did not do so.

- I would not expect an ordinary consumer in Mrs M's position to have noticed and heeded the deficiencies in the advice process. Mr F had been Mrs M's adviser for some time but for most of that time her husband had taken the lead role in dealing with Mr F. After Mr M's death Mr F continued in the role of trusted family financial adviser.

- I do not consider that Mrs M, or an ordinary consumer in the position of Mrs M, could reasonably have known that Mr F, a trusted long-term financial adviser, who said he would complete the details of the cheques, had no intention of arranging the investment he was recommending seemingly on behalf of Master Adviser.

- The Supreme Court considered the position of a wrongdoer's motive in *Morrisons*. It made clear that the wrongdoer's motive is a relevant consideration. But

> the point about motive is not whether Mr F was motivated by personal greed to act dishonestly but rather whether he was acting dishonestly when going about his "employer's" business or whether he was pursuing private ends. In this case Mr F was pursuing Master Adviser's business. He arranged the April and December investments with Fidelity where Master Adviser was recorded as the broker. He did wrongfully perform his duties in relation to the other investments. But he wasn't for example moonlighting or pursuing a personal vendetta against either Mrs M or Master Adviser. He was just dishonestly performing his duties as a Master Adviser investment adviser.

I consider that the field of activities Master Adviser had assigned to Mr F was the giving of investment advice and the arranging of recommended investments and agreeing to do both. And having taken all the evidence into account, I am satisfied that the acts complained of – the failure to recommend *and* arrange a suitable investment as agreed - was indeed so closely connected with the acts Mr F was authorised to do such that, for the purposes of Master Adviser's liability to Mrs M, that advice and failure to arrange as agreed may fairly and properly be regarded as having been done by Mr F while acting in the ordinary course of his duties for Master Adviser.

For the reasons given above, I am therefore satisfied that Master Adviser is vicariously liable for the advice to Mrs M to invest in collectives and the failure to arrange that recommended investment, as agreed, by Mr F.

statutory responsibility - section 138D(2) Financial Services and Markets Act 2000

The FCA can make general rules which apply to authorised persons with respect to the regulated and other activities they carry on: Section 137A of FSMA.

Section 138D(2) of FSMA says:

> "*A contravention by an authorised person of a rule made by the FCA is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty*."

Rights of action under section 138D(2) of FSMA were only available in relation to contravention of specific rules made by the FCA under FSMA.

One such rule in place at the time of the events Mrs M's complaint is about was COBS 2.1.1(1)R, which said:

> "A *firm* must act honestly, fairly and professionally in accordance with the best interests of its *client* (the *client's best interests rule*)."

If Mrs M suffered a loss as a result of an actionable rule such as this being breached by Master Adviser, she (or now her estate) would have a right of action against Master Adviser for breach of statutory duty as a private person. But she would have no such right against Mr F, because he was not himself a 'firm' or an 'authorised person'. His status as Master Adviser's CF 30 advisor only allowed him to perform particular functions (including advising on investments and arranging deals) in relation to regulated activities that Master Adviser carried on and for which Master Adviser was answerable under the FCA rules.

For the reasons I've given above, I am satisfied that when Mr F advised Mrs M to invest and failed to arrange the investments he agreed to make, he was acting in his capacity as Master Adviser's approved person for the purpose of carrying on Master Adviser's regulated

business. He was not carrying on a business of his own notwithstanding the fact that he stole Mrs M's money.

Mrs M was Master Adviser's "client" for the purposes of the client's best interests rule in COBS. That term applies to anyone to whom a firm provides a service in the course of carrying on a regulated activity, and includes potential clients. So my finding that Master Adviser, through Mr F, undertook regulated activities for Mrs M means she was its client.

That means Master Adviser is subject to the client's best interests rule in respect of Mr F's actions. If Mr F failed to act honestly and failed to arrange the investments he agreed to arrange then (subject to the recognised defences) Master Adviser is responsible in damages to Mrs M under the statutory cause of action provided by section 138D(2) of FSMA. I therefore consider that section 138D(2) of FSMA provides an alternative route by which Master Adviser is responsible for the acts complained of.

summary of my findings on jurisdiction

Having carefully considered all of the circumstances, as well as the legal authorities, I am satisfied that:

- Master Adviser is responsible for the acts complained about through apparent (or ostensible) authority.

- Master Adviser is vicariously liable for the acts Mrs M's complaint is about.

- Master Adviser has statutory responsibility under section 138D(2) of FSMA for the acts complained about if there was a breach of the client best interests rule.

I am therefore satisfied that Master Adviser is responsible for the acts Mrs M's complaint is about. And I now consider the merits of the complaint.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

The comments I made above about the need for a hearing in relation to jurisdiction apply equally to my consideration of the merits. For essentially the same reasons it is my view that I can fairly determine the issues of merit without a hearing.

I am also satisfied that Master Adviser has had opportunity to comment on the merits of the complaint and that it is fair and appropriate to move on to deal with merits in this decision.

Mrs M consulted Mr F, her existing adviser, an independent financial adviser with Master Adviser, for investment advice following her change in circumstances of moving to a smaller property and releasing equity which she had available to invest. Mr F agreed to advise Mrs M.

Mr F recommended some investments with National Savings and Investments. He explored the possibility of investing within an existing Scottish Widows investment, but it would not, apparently allow further investments. Mr F also recommended an investment with Prudential but in the event that investment was not made.

Mr F also arranged two further reinvestments with Fidelity – a company Mrs M already had investments with or through as recommend by Mr F in the past.

The complaint is not really about any of those matters. The complaint is about the four "investments" in April (£30,240), July (£45,720), November 2015 (£45,000) and January 2016 (£25,000) totalling £145,960.

The precise details are not clear (as discussed above) but it is my finding (for the reasons given above) that Mr F recommended investing most likely within Mrs M's existing collective investments held within the Fidelity platform. He either recommended those investments as particular investments or he recommended the investment in suitable alternative collective investments in more general terms. In either event Mr F had agreed to advise on Mrs M's existing investments and he gave either the particular investment advice or the non-specific advice as part of that process.

As part of that process Mr F told Mrs M and Mrs D that he needed some detail in relation to the payee of the cheque that he did not have with him and so the payee should be left blank and he would compete the cheques with the correct payee details for the investment he was recommending that Mrs M make. And, in relation to each, Mrs M thought the investment was to be directly made with a legitimate collective investment with a third-party investment company not with Mr F personally.

Instead of arranging the suitable legitimate collective investments as agreed Mr F completed the payee sections in his own name and stole Mrs M's money.

It is my finding that Mr F, when carrying out his duties as Master Adviser independent financial adviser towards Mrs M, failed to act honestly, fairly and professionally in accordance with the best interests of his client Mrs M.

Mr F's conduct in failing to recommend and arrange suitable investments for Mrs M and instead stealing her money caused her loss of £145,950 plus reasonable investment growth on those funds.

is it fair and reasonable for Master Adviser to compensate Mrs M for her loss?

I have said above that Master Adviser is responsible for Mr F's conduct. My decision is not about Master Adviser's conduct, about for example whether it did enough to supervise Mr F. That is not the test.

Master Adviser did not actually authorise Mr F to steal Mrs M's money. And it did not receive it. So is it fair to require Master Adviser to compensate Mrs M for her losses?

Master Adviser has argued that it's unfair to require it to pay compensation when Mrs M, with the assistance of her daughter Mrs D, handed blank as to payee cheques to Mr F.

I have found that Master Adviser is responsible for Mr F's conduct in relation to Mrs M, because I consider the law would impose liability on Master Adviser for his actions. So it is not necessarily unfair to require Master Adviser to pay compensation for the losses caused by Mr F's dishonesty. I don't have to follow the law but, bearing in mind the legal position, I do think it fair and reasonable to take as my starting point that I should ask Master Adviser to compensate Mrs M for the effect of Mr F's actions unless there is good reason why it shouldn't do so.

Master Adviser says the conduct of Mrs M and Mrs D was reckless – that it was so careless of Mrs M and Mrs D to give Mr F the blank as to payee cheques that it's unfair and unreasonable to require it to pay compensation as those loses could have been avoided with reasonable care.

I accept that some people in a similar situation would not have handed over blank as to payee cheques to Mr F. However Mr F had been Mrs M's and Mrs D's trusted family adviser for many years. Mrs D was not a full participant in the meetings. The advice was being given to Mrs M and she was still looking after her own affairs and making her own decisions. Mrs M trusted Mr F after she and her husband had dealt with him for many years. So too had Mrs D. They knew him to be a founder of Master Adviser which they thought was a reputable, award winning IFA firm.

Mrs D had herself trusted Mr F enough to arrange a payment to him some years before in respect of a "client deposit account" arrangement which she thought to be a reasonable arrangement that was operating satisfactorily. So the idea that her mother was trusting Mr F to complete the cheques later did not cause her undue concern given that Mr F seemed to have a plausible explanation for dealing with things in that way.

I do not think that Mrs M's conduct, or Mrs D's conduct, can be said to have been reckless or unreasonable in the very particular circumstances of Mrs M's complaint. I do not consider that Mrs M's conduct in agreeing to provide the cheques and Mrs D's conduct in writing out the cheques, was, in the particular circumstances, conduct that means it is fair and reasonable for Master Adviser not to pay compensation for the loss caused by Mr F's conduct for which I have found it responsible.

In my view it is fair and reasonable in all the circumstances to require Master Adviser to compensate the estate of Mrs M for the financial losses she suffered.

I note that Mrs M was not aware of the loss she suffered as her family wished to protect her from the distress it would have caused her. In the circumstances I do not think it is right to award the estate any further compensation for the distress Mrs M would have suffered if she had known of Mr F's deceit and her loss.

The executor has explained that but for Mr F's acts the money would have been invested and would have remained invested until 28 June 2018 when all the other investments held with Master Adviser were liquidated and the estate distributed. Master Adviser say that the executor selected this June date so that any compensation awarded would not have to take into account the pandemic-related fall in the stock market.

However, Mrs D provided a copy of an email from the executor dated 27 June 2018 instructing Master Adviser to sell the investments it held for Mrs M. Master Adviser is aware that the executor has said that he encashed other holdings with Master Adviser in June 2018 – it has seen the exchange of emails in which the point was made to the ombudsman service. Master Adviser had opportunity to, and did, comment on what the executor said. Master Adviser did not however dispute that it was indeed asked to liquidate Mrs M's investments in June 2018. And I do not see any reason not to accept what the executor has said. The timing seems reasonable – around six months after Mrs M's death and a couple of months after the Grant of Probate had been issued. The timing is not the product of hindsight and the wish to avoid later market losses during the pandemic.

I accept that if Mr F had invested Mrs M's funds as he agreed to do the investments would have been encashed by the executor on 28 June 2018 as he has argued.

Our normal practice in relation to compensation where the consumer no longer has an investment is set out on our website where we say the following to firms:

> *"We'll usually tell you to calculate the investment loss up to the date the customer ceased to have the investment.*

This means comparing the customer's position at that date with the position they'd have been in if they hadn't taken out the unsuitable investment.

In addition to the compensation for the investment loss, we're likely to tell you to pay interest on the investment loss up to the date you pay compensation."

So in accordance with our usual policy I consider that fair compensation should be calculated up to 28 June 2018 in the way I describe below and then interest should be paid in the way I also explain below.

Master Adviser say the rate of interest I have awarded is irrational. I have however awarded interest in accordance with our usual published practice:

"If we uphold a complaint, we may tell you to compensate the customer for being 'deprived' of money they should have had. This would include being deprived of an investment return they should have had from a suitable investment.

The compensation is usually in the form of interest payable from the date of the loss up until the date the money is paid to the customer.

…We usually tell businesses to pay interest at the statutory rate, which is currently 8% simple. …"

In this case I am satisfied that the estate has been deprived of the investment return it would have received in late June 2018 if Mr F had made legitimate investments for Mrs M as he agreed to do. And following our usual policy I have awarded 8% interest on the investment return the estate was deprived of from that time.

Putting things right

In assessing what would be fair compensation, I consider that my aim should, in principle, be to put Mrs M (now her estate) into the position she would probably now be in if she had not entrusted Mr F with advising her and arranging her investments.

It seems reasonable to say Mrs M would have invested the same sums at the same time as the four misappropriated cheque payments. It is the case that Mr F's advice was tainted by his concealed dishonest motive. It is not possible to say if he would have recommended the same investment, or something different, if he had been acting in Mrs M's best interests. But I am satisfied that what I have set out below is fair and reasonable given Mrs M's circumstances and objectives when she invested.

what should Master Adviser do?

To compensate Mrs M fairly, Master Adviser must:

- Compare the performance of Mrs M's £30,240, £45720, £45,000 and £25,000 "investments" with that of the benchmark shown below and pay the difference between the *fair value* and the *actual value* (which should be assumed to be zero) of the investment up to and including 27 June 2018.

- Master Adviser should also pay interest from 28 June 2018 to the date of my final decision as set out below.

- If compensation is not paid within 28 days of Master Adviser being notified of acceptance of my final decision, Master Adviser should pay interest at a rate of 8% simple per year from the date of my decision to the date of settlement.

Income tax may be payable on any interest awarded.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
n/a	the investment was not arranged, and the investment money totalling £145,950 was stolen	for half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	Three working days from the date of each of the following cheques: £30, 240 dated 14 April 2015, £45,720 on 24 July 2015, £45,000 on 30 November 2015, and £25,000 on 15 January 2016.	28 June 2018	8% simple per year from the end date to the date of my final decision

actual value

This should be taken to zero.

fair value

This is what an investment of made of each of the above payments would have been worth at the end date had it produced a return using the benchmark.

why is this remedy suitable?

I have chosen this method of compensation because:

- Mrs M was assessed as a balanced risk investor.
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is a mix of diversified indices representing different asset classes, mainly UK equities and government bonds. It would be a fair measure for someone who was prepared to take some risk to get a higher return.
- From 28 June Mrs M's investment would have been surrendered and the proceeds distributed with the rest of her estate.

My final decision

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £150,000, I may recommend that Master Adviser CFP Limited pays the balance.

determination and award: My final decision is that I uphold this complaint and consider that fair compensation should be calculated as set out above. I require Master Adviser CFP Limited to pay the amount produced by that calculation up to the maximum of £150,000 plus any interest set out above.

The compensation and interest is to be paid with 28 days of Master Adviser being notified of the acceptance of this decision. If the compensation plus interest is not paid within that time 8% simple interest per year is to be paid on the amount due under my determination and award from the date of this decision to the date of payment.

recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that Master Adviser CFP Limited pays the estate of Mrs M the balance plus any interest on the balance as set out above.

I also recommend that the compensation and interest due under my recommendation is to be paid with 28 days of Master Adviser being notified of the acceptance of this decision. If the payment under my recommendation is not paid within that time 8% simple interest per year should to be paid on the amount recommended from the date of this decision to the date of payment.

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mrs M to accept or reject my decision before 1 November 2021.

Philip Roberts
Ombudsman