DRN-3097636

Financial Ombudsman Service

The complaint

Mr A complains that Frenkel Topping Limited allowed the deputy acting for him to ‘completely deplete’ the funds he had invested with it, despite Frenkel Topping being aware that the money invested was intended to be a medium to long term investment to provide Mr A with financial security.

Mr A is represented in this matter by his new deputy (Mr L).

What happened

When Mr A was a baby, he suffered a serious brain injury following an assault. Very sadly this resulted in an impairment to his mental capacity. In 2011 Mr A received a Criminal Injuries Compensation Authority (CICA) award of over £484,000 for the injury he had suffered.

In mid-2009 Mr A’s mother (Mrs A) had been appointed as his property and finance deputy by the Court of Protection.

Frenkel Topping has told this service that:

Frenkel Topping was established specifically with the intention of supporting clients who had received compensation as a result of medical negligence, personal injury or as part of the criminal injuries compensation scheme and our staff have been providing advice in this area for nearly 40 years.

Frenkel Topping says it met Mr A and his mother, in her capacity as his deputy, in early 2012. It says that:

At the meeting both Mrs A and Mr A confirmed that they both agreed to investing in a defensive portfolio and explained they definitely did not need to access the money being invested for five, more likely ten years. They were happy that should the portfolio experience some losses earlier on that they would feel comfortable with this knowing that the portfolio will be invested for a further number of years and therefore short-term volatility should cause no concern.

Mr A invested a total of £120,000 of the money he had received from the CICA in a portfolio of investments, managed on a discretionary basis.

Between late 2012 and early 2017 Mrs A made numerous withdrawals, in her capacity as deputy for Mr A, from the funds Mr A had invested until there was virtually nothing left.

I understand that concerns were raised with The Office of the Public Guardian (OPG) in relation to Mrs A’s role as deputy. Subsequently the Court removed Mrs A from her role of deputy and Mr L was appointed as Mr A’s deputy by Court Order on 1 August 2018.

Very shortly after he was appointed as Mr A's new deputy, Mr L, complained to Frenkel Topping. He said the complete depletion of the investment portfolio would have a long-term detrimental impact on Mr A's finances and quality of life.

He said he felt Frenkel Topping should have queried the withdrawals and taken steps to identify whether the withdrawals were in Mr A's best interests. He said this was particularly the case as Mr A is a vulnerable customer.

Frenkel Topping didn't uphold the complaint. It said:
- it didn't think that Mr A was an eligible complainant; and,
- it thought the complaint had been brought too late, under the rules this service must follow.

I issued a jurisdiction decision (following an earlier provisional jurisdiction decision) on this complaint on 29 January 2021. In the decision I set out why I was satisfied that Mr A was an eligible complainant and why I was satisfied the complaint had been brought within the timescales this service must apply.

Once the jurisdiction decision had been issued an investigator considered the merits of Mr A's complaint.

Having done so, the investigator recommended that Mr A's complaint should be upheld.

He set out a detailed timeline with all the withdrawals that had been made from Mr A's portfolio. This showed that between late November 2012 and January 2017 Frenkel Topping arranged for Mrs A to make over 35 withdrawals from Mr A's investment portfolio until all the funds had been withdrawn. He said there was nothing to show that Frenkel Topping had queried any of these requests or flagged any concerns about the withdrawals with the OPG, Mr A's local Social Services office or the Police.

He explained that the industry regulator, the Financial Conduct Authority (FCA) requires businesses to establish and maintain adequate systems and controls for countering the risk that the business might be used to further financial crime.

Despite this, Frenkel Topping had allowed Mrs A, in her capacity as Mr A's deputy, to withdraw his entire investment portfolio in the space of just over four years without raising any concerns about whether this was in Mr A's best interests.

He noted that Frenkel Topping had said it specialises in giving investment advice to vulnerable customers, so ought reasonably to have been aware of how to raise any concerns about the actions of a deputy either with the OPG, the Police or Social Services.

Frenkel Topping said it was of the view that it was solely the responsibility of the OPG to monitor the conduct of court appointed deputies. And it said that as this was the case it did not think it was required to carry out any monitoring of the transactions Mrs A had made in her capacity as Mr A's deputy, or to flag any concerns.

Our investigator said he did not agree with Frenkel Topping's position. He said that, as an FCA regulated business, it was required to ensure it had adequate systems and controls in place to counter the risk that the business might be used to further financial crime.

He also noted that the Office of the Public Guardian website set out the process for reporting any concerns about a deputy or guardian. And he noted that the website included the example*; '...your concern could be about, for example, the misuse of money or decisions that are not in the best interests of the person they're responsible for'*. In view of this, he said

he could not reasonably agree with Frenkel Topping's position that it was solely the responsibility of the OPG to protect Mr A's interests.

He said that although Mrs A, in her capacity as Mr A's deputy, was authorised to make transactions on his behalf, Frenkel Topping should have considered whether the withdrawals were in-line with Mr A's stated investment objectives of *'growth over a long-term period'*. He said he felt it ought reasonably to have had concerns that the withdrawals might not be in Mr A's best interests.

He said he had reached this view as the information and evidence provided showed that Mr A wanted to invest £120,000 for growth and that he had significant cash reserves for day-to-day living and any other expenses. He said he was of the view that the pattern of withdrawals from Mr A's investment portfolio was totally at odds with Mr A's stated investment objectives. He felt this ought reasonably to have caused Frenkel Topping to have concerns about whether the withdrawals were in Mr A's best interests.

He said he had also reviewed Mr A's bank account statements. These showed that although the withdrawals were paid to the nominated account, it did not appear that the money had been used for the reasons Mrs A had given to Frenkel Topping.

He also noted that Mr A's new deputy had said it appeared that Mr A had received little, if any benefit from the money Mrs A had withdrawn from his investment portfolio. Having considered all the available evidence and information our investigator said he could not safely conclude that the withdrawals from Mr A's investment portfolio had benefited him.

In order to put matters right our investigator said Frenkel Topping should calculate what the current value of Mr A's portfolio would now be, if no withdrawals had been made. He said it should pay this amount directly to Mr A (as his investment portfolio had been closed), including any advice or management fees that had been deducted. He said this would allow Mr A's current deputy to reinstate Mr A's investment portfolio with a new provider.

Frenkel Topping did not accept our investigator's view, it said:

- it had no reason to query any of the three large withdrawals made from Mr A's portfolio (a total of £32,000 for *'building works'* and £16,000 for a caravan) and it said the other withdrawals, although not in line with Mr A's stated investment objectives were made *'on the written authority of the duly authorized Deputy'.*
- it asked this service to provide details of any criminal proceedings against Mrs A; and
- it asked for evidence that the money withdrawn had not been used for Mr A's benefit.

It summarised its position as follows:

Mrs A was properly appointed by Order of the Court of Protection and had the Court assessed, Deputy Security bond in place. The drawdown on the investment portfolio was not in accordance with the aims thereof but the withdrawal purposes were reasonable, the withdrawal funds paid into the Deputyship account and the Deputy provided with revised portfolio valuations at each withdrawal.

The withdrawal of funds from the investment portfolio and deposit thereof into the Deputyship account is not indicative of financial advantage or abuse. Withdrawal and deposit into an account not held in Mr A's name would give rise to a legitimate concern as to the discharge of the Deputy's fiduciary and statutory duties but that is not the circumstance of this case.

... each of the larger withdrawals were reasonable. There was a regularity and consistency of withdrawals from the portfolio and withdrawals were transferred to a Deputyship account maintained in the name of Mr A. No abuse can be inferred therefrom.

It also reiterated that Frenkel Topping was *'...established specifically with the intention of supporting clients who had received compensation as a result of medical negligence, personal injury or as part of the criminal injuries compensation scheme and our staff have been providing advice in this area for nearly 40 years.' And it said its staff were trained in 'investing for the vulnerable'.*

Our investigator reviewed Frenkel Topping's comments but said he remained of the view that Mr A's complaint should be upheld.

He noted that Frenkel Topping had asked for evidence that the money withdrawn from Mr A's investment portfolio had not been used to benefit Mr A.

Our investigator explained that he had carried out a review of the withdrawal requests Mrs A had made and had cross referenced these withdrawals against Mr A's bank records. Having done so, he said he was of the view that there was very little in the transaction history to show that the money Mrs A withdrew was used for the purposes claimed, or that the funds were used for Mr A's benefit.

In particular, he noted that Mr A's bank records showed that two payments of £9,000 were made to what appeared to be Mrs A's account following the £20,000 withdrawal for 'building work'. And he said Mr A's current deputy had confirmed to this service that very little work was carried out on Mr A's property and it appeared that the money had been used to improve Mrs A's home.

In relation to the caravan, he said Mr A's current deputy said he had attempted to recover this asset, but Mrs A had failed to disclose its current location. Mr A's current deputy said there was no evidence to show that Mr A was the legal owner of the caravan, or that he had the use of it. In the absence of anything to show otherwise our investigator said he couldn't reasonably find that this asset had been bought for Mr A's benefit.

Likewise, in relation to the withdrawals of over £4,000 for private medical procedures, Mr A's current deputy confirmed that Mr A had not had any private medical procedures. And in relation to the *'replacement of a stolen motorbike'* he said there was no evidence in the bank records to suggest that this withdrawal had been used to purchase a replacement motorbike from a commercial or private seller, nor was there anything to suggest that Mr A had owned a motorbike in the first place.

In view of this our investigator said he was of the view that the money Mrs A withdrew was not used for the purposes claimed, and that the funds were not used for Mr A's benefit.

Frenkel Topping reiterated that it did not accept our investigator's view. It made the following points:
- it said our investigator had not responded on the point it had made relating to the *'... interrelation of the provisions of s.19(6) of the Mental Capacity Act 2005, the Conduct of Business Sourcebook (COBS) 3.2.3 and 2.4.3 R which, as a matter of fact, identify the agent (Mrs A) as the client. '*
- it said it *'... cannot be responsible for policing the use of assets in the hands of the Deputy and that to impose such a responsibility would seek to make Frenkel Topping the de facto Deputy in direct conflict with the Order of the Court.'*
- it asked this service to *'...confirm the current stage of any OPG investigation and if any results of the OPG investigation had been disclosed'* and it asked*, 'Upon what information*

did the OPG instigate its investigation into the actions of the former Deputy and were supervisory visits with the Deputy carried out?'
- it asked this service to provide it with *'...evidence that the monies withdrawn by Mrs A have not been used in respect of Mr A...'*
- it reiterated its view that all the withdrawal requests it had processed from Mr A's investment portfolio were '*reasonable*'; and,
- it asked whether the Security Bond of £10,000 Mrs A was required to maintain had been utilised.

I issued my provisional decision on this complaint on 8 September 2021. In it I set out that, having very carefully considered all the evidence and information that had been provided, my provisional decision was that this complaint should be upheld.

However, my view on the merits of this complaint differed in some respects to that of our investigator. And the redress I thought Frenkel Topping should pay to Mr A also differed from that set out by our investigator, as new information had been provided by Mr A's current deputy in relation to the security bond. As this was the case, I set out my position on the merits of this complaint by way of a provisional decision.

I noted that both parties had provided a significant amount of information and arguments concerning the events complained about. I explained that I hadn't given a detailed response to all the points raised as this is an informal service for resolving disputes between financial businesses and their customers and I am not required to address every point raised. I explained that although I had considered all the submissions, I had focussed my comments on what I thought was most relevant and at the heart of this complaint.

Is Mr A an eligible complainant

I issued a provisional jurisdiction decision on 17 December 2020. In it I considered Frenkel Topping's claim that it did not have to investigate Mr A's complaint as he was not its client and was therefore not an eligible complainant. Frenkel Topping claimed that Mrs A was its client, not Mr A.

In the provisional jurisdiction decision I explained why in view of the extensive evidence to show that Mr A was Frenkel Topping's client, I was satisfied that he was an eligible complainant. I said I would consider any comments and evidence received by 17 January 2021 on this matter, but unless the information changed my mind, my jurisdiction decision would be that Mr A was an eligible complainant.

Frenkel Topping did not provide any new evidence at that time. I therefore issued a jurisdiction decision confirming that I was satisfied that Mr A was Frenkel Topping's client and was an eligible complainant.

However, in its April 2021 response to our investigator's view on the merits of this complaint, Frenkel Topping raised a point relating to the *'... interrelation of the provisions of s19(6) of the Mental Capacity Act 2005, the Conduct of Business Sourcebook (COBS) 3.2.3 and 2.4.3 R which*, *as a matter of fact, identify the agent (Mrs A) as the client'.*

In summary, Frenkel Topping claimed that Mrs A was its client, not Mr A, as The Mental Capacity Act 2005 s 19(6) says:

A deputy is to be treated as P's agent in relation to anything done or decided by him within the scope of his appointment and in accordance with this Part

And, the Financial Conduct Authority Conduct of Business Sourcebook (COBS) 3.2.3 R sets out:

(1) If a firm provides services to a person that is acting as an agent, the identity of its client will be determined in accordance with the rule on agents as clients (see COBS 2.4.3 R).

COBS 2.4.3 R sets out that:

1. If a firm (F) is aware that a person (C1) with or for whom it is providing services is acting as agent for another person (C2) in relation to those services. C1, and not C2, is the client of F in respect of that business.

In view of this Frenkel Topping said that it was of the view that Mr A was not an eligible complainant as Mrs A was acting as his agent.

However, I noted that COBS 2.4.3R goes on to say:

2. Paragraph (1) does not apply if:
(a) F has agreed with C1 in writing to treat C2 as its client: or
(b) C1 is neither a firm nor an overseas financial services institution and the main purpose of the arrangements between the parties is the avoidance of duties that F would otherwise owe to C2.
If this is the case, C2 is the client of F in respect of that business and C1 is not.

Having carefully considered this matter I said I remain satisfied that Mr A was Frenkel Topping's client. As I set out in my jurisdiction decision, Frenkel Topping's own records clearly set out, in writing, that it considered Mr A was its client, not Mrs A.

In particular, the money invested was from Mr A's CICA. The investments made were held in his name and the client agreement that Mrs A signed made clear this was in her capacity as 'Deputy for Mr A'. Likewise, the client investment reports provided to this service clearly set out under the heading 'client list' that the client was 'Mr A', with Mrs A recorded as his deputy.

In view of this I said I remained satisfied that Frenkel Topping's own written records clearly showed that it considered Mr A to be its client.

I also noted that even in its most recent submissions to this service Frenkel Topping said:
Frenkel Topping was established specifically with the intention of ***supporting clients who had received compensation as a result of medical negligence, personal injury or as part of the criminal injuries compensation scheme*** *and our staff have been providing advice in this area for nearly 40 years.*
(bold is my emphasis)

If Frenkel Topping believed that *'the deputy is always our client',* I said it was unclear why, even in its most recent submissions, it said it was established to support clients who had received compensation as *'...part of the criminal injuries compensation scheme... '*

And I said that even if I was wrong on this point, in line with DISP 2.7 Mr A was an eligible complainant and therefore entitled to bring a complaint against Frenkel Topping.

Was Frenkel Topping required to carry out any monitoring of the transactions Mr A's deputy requested?

Frenkel Topping raised a number of points to support its view that it was not responsible for carrying out any monitoring of the withdrawals made by Mrs A, in her capacity as Mr A's deputy.

In particular, it said it *'... cannot be responsible for policing the use of assets in the hands of the Deputy and that to impose such a responsibility would seek to make Frenkel Topping the de facto Deputy in direct conflict with the Order of the Court. '*

I said I accepted that there was no requirement on Frenkel Topping to monitor what Mrs A spent Mr A's money on once it was withdrawn from his investment portfolio. But I said I thought that Frenkel Topping was required to carry out monitoring of the transactions Mr A's deputy made, that it oversaw. And I said I was of the view that this included, but was not limited to, monitoring the withdrawals made from Mr A's investment portfolio so soon after it had been set up. I said I thought this was particularly important as Mr A is a vulnerable customer.

I noted that the industry regulator, the Financial Conduct Authority (FCA) sets out in its Senior Management Arrangements, Systems and Controls sourcebook (SYSC):

SYSC 6.1.1 R
A firm must establish, implement and maintain adequate policies and procedures sufficient to ensure compliance of the firm including its managers, employees and appointed representatives (or where applicable, tied agents) with its obligations under the regulatory system and for countering the risk that the firm might be used to further financial crime.

SYSC 3.2.6 R

A firm must take reasonable care to establish and maintain effective systems and controls for compliance with applicable requirements and standards under the regulatory system and for countering the risk that the firm might be used to further financial crime.

SYSC 3.2.6A R

A firm must ensure that these systems and controls:
1. enable it to identify, assess, monitor and manage money laundering risk; and
2. are comprehensive and proportionate to the nature, scale and complexity of its activities.

For the avoidance of any doubt, financial crime is defined as:
any kind of criminal conduct relating to money or to financial services or markets, including any offence involving:
(a) fraud or dishonesty: or
(b) misconduct in, or misuse of information relating to, a financial market: or
(c) handling the proceeds of crime: or
(d) the financing of terrorism:
in this definition, "offence" includes an act or omission which would be an offence if it had taken place in the United Kingdom.

In view of the above I said I was satisfied that Frenkel Topping was required to have adequate policies and procedures in place to meet its regulatory requirements to counter the risk that it might be used to further financial crime.

I said I was also mindful that FCA Principle 6 sets out that:

A firm must pay due regard to the interests of its customers and treat them fairly.'

I said it was unclear how Frenkel Topping could claim that it had treated Mr A fairly when it did not carry out any monitoring of the transactions made on his portfolio by his deputy.

Should Frenkel Topping's monitoring have flagged an issue with the withdrawal requests?

I said I felt the crux of Frenkel Topping's position on this was set out in its submission to this service, dated April 2021. It said:

The drawdown on the investment portfolio was not in accordance with the aims thereof but the withdrawal purposes were reasonable, the withdrawal funds paid into the Deputyship account and the Deputy provided with revised portfolio valuations at each withdrawal. The withdrawal of funds from the investment portfolio and deposit thereof into the Deputyship account is not indicative of financial advantage or abuse. Withdrawal and deposit into an account not held in Mr A's name would give rise to a legitimate concern as to the discharge of the Deputy's fiduciary and statutory duties but that is not the circumstance of this case.

Frenkel Topping went on to say:

Again, abuse cannot be inferred from the withdrawal of funds from one investment vehicle (the BM portfolio) to another (the Deputyship account). Such withdrawals may be unwise but do not constitute abuse. We do not know why the withdrawals alone, ignoring the benefit of hindsight, would suggest to you financial abuse.

Concerns about the possibility of financial abuse arise if and only if those funds are then withdrawn from the alternative investment vehicle (the Deputyship account) and used for purposes that are not in the best interests of the protected party.

I said I did not agree with Frenkel Topping's position.

I explained that in order to determine whether this complaint should be upheld I had considered whether the systems and controls that Frenkel Topping was required to have in place, to counter the risk that the business might be used to further financial crime, should have flagged the transactions that Mrs A was making on Mr A's portfolio. I also took into account that it is required to treat its customers fairly.

I carefully considered the information that Frenkel Topping had at the time Mrs A submitted the first withdrawal requests. I then considered whether, based on the information Frenkel Topping had, it should have had concerns that the withdrawals might not be in Mr A's best interests.

Information Frenkel Topping held in 2012

Frenkel Topping knew that in 2011 Mr A had received a Criminal Injuries Compensation Authority (CICA) award of over £484,000 for the injury he had suffered.

I noted that there was no dispute that Mr A is a vulnerable customer and was not able to monitor whether the transactions Mrs A was making on his behalf were in his best interests.

The suitability report issued by Frenkel Topping, dated March 2012, set out that Mr A had purchased a house close to Mrs A for £95,000. It noted he had also:
'...purchased another house that he has arranged tenants for at a cost of £109,000. The rent he receives from this property is £480 per month.

In addition to Mr A's home and the rental property, the adviser recorded the following information about Mr A's financial circumstances:

You currently hold £274,000 in a high interest Deputy account, and from this Mr A needs to spend £1,000 on solicitors' fees and a maximum of £5,000 on finishing his new house.

Mr A currently receives the following income:
£78.20 pm in benefits (£938.40 pa)
£480 pm rental income (£5.760 pa)
Total annual income of £6,698.40
Mr A's DLA benefit is currently being reviewed by our Welfare Benefits Adviser.
Mr A's annual expenditure requirements per annum are £6,000 (£500 pm).
You have confirmed that of the £268,525 left in the Deputy account you would like to invest £200,000 for medium to long term for growth.

We have recommended that you keep £68,525 in a cash deposit account within the Deputy account.

This equates to 11 years annual expenditure. We recommend this in the event of future volatility in the market you are able to access Mr A's funds to satisfy anticipated expenditure without the need to encash the investments.
(bold is my emphasis)

The adviser also confirmed in the suitability letter:

Mr A is not relying on investment performance to provide him with an income. His benefit and rental income is sufficient to meet his expenditure.

Investment advice

The adviser recommended that Mr A should invest £195,000 (£200,000 less an initial charge of £5,000 paid to Frenkel Topping) in a low risk portfolio, managed on a discretionary basis by a third party (Brooks Macdonald). The adviser set out that as well as an initial charge of £5,000 an annual management charge of 1.25%, plus VAT would be applied to Mr A's portfolio.

I said it appeared that, in addition to the 1.25% plus VAT annual management charge payable to the third-party discretionary portfolio manager, Frenkel Topping also took an annual management charge.

(I noted that the adviser said he had recommended a discretionary managed portfolio because it would allow Mr A to have*, '...access to multi asset classes that otherwise would not be available to him.'*

I said it was not clear to me why access to 'multi asset classes' was considered important for Mr A and I noted that there was nothing in the suitability report to show that the adviser had considered other, lower cost, investments nor was there anything to explain why discretionary portfolio management was considered appropriate for Mr A. However, as the suitability of the advice had not been complained about, I did not consider this matter any further as part of this complaint.)

The adviser also recommended that Mr A should make annual contributions of £3,600 gross (£2,880 net) into a Personal Pension Plan. The report set out that Frenkel Topping would receive a total of £1,080 in commission for this pension advice.

The adviser noted:
There is sufficient surplus income or capital in the event of any short-term requirements and confirmed that this expenditure will remain affordable in the future.

I said I felt this illustrated that, having reviewed Mr A's personal and financial position, the adviser was satisfied that Mr A would have '*sufficient surplus income or capital'* to fund the pension contributions.

reduction in amount invested in portfolio

In a letter dated 11 July 2012 Frenkel Topping noted that Mrs A, in her capacity as Mr A's deputy wanted to *'...reduce the monies to be invested into the Brooks Macdonald Fund Management from £200,000 to £120,000. This is due to saving £80,000 for building work, in your savings account.*

A total of £120,000 was then invested in a portfolio of investments for Mr A.

However, very shortly after the investment portfolio was set up, Mrs A made her first withdrawal request to Frenkel Topping in November 2012. She asked to withdraw £20,000 for *'building work'* from Mr A's investment portfolio.

I said I had not seen anything to show that Frenkel Topping queried this request for £20,000 less than six months after the money had been invested in the portfolio.

I said I had very carefully considered whether this request ought reasonably to have caused Frenkel Topping to have any concerns about whether the withdrawal requested by Mr A's deputy was in his best interests.

I said that at the time the request was made, in November 2012, Frenkel Topping knew:

- in March 2012 it had been told Mr A would need to spend a *'maximum of £5,000 on finishing his new house':*
- Mr A, and Mrs A in her capacity as his deputy, had confirmed that Mr A *'...definitely did not need to access the money being invested for five, more likely ten years.'*
- Mr A had kept over £68,000 on deposit and this money was intended to *'...satisfy anticipated expenditure without the need to encash the investments';* and,
- Mrs A had already reduced his initial investment by £80,000 to pay for 'building work only five months before this request for a further £20,000 for 'building work' was made.

I accepted it was possible that it could have been necessary to spend a total of over £100,000 on 'building work' on Mr A's new property (a property that had cost £95,000). But I said I was of the view that such a significant overspend - that was apparently not being funded from Mr A's cash deposits - should have caused Frenkel Topping to be concerned about Mrs A's management of Mr A's finances.

I said I felt this was particularly the case as Frenkel Topping had advised Mr A to retain cash reserves of over £68,000 only a few months before the withdrawal request was received.

I noted that when it advised Mr A on maintaining cash reserves it said:

We have recommended that you keep £68,525 in a cash deposit account within the Deputy account. This equates to 11 years annual expenditure. We recommend this in the event of future volatility in the market you are able to access Mr A's funds to satisfy anticipated expenditure without the need to encash the investments.

I said I must also consider that Frenkel Topping had been told that Mr A would be spending a 'maximum' of £5,000 on finishing his house.

I said I didn't think it was necessary for Frenkel Topping to be certain that Mrs A was not acting in Mr A's best interests. I said I was of the view that it only needed to have a concern that the withdrawals being made might not be in his best interests. And I said that, given Mr A is a vulnerable adult, I felt Frenkel Topping should have been particularly mindful of the need to ensure that it acted on any information it had that might reasonably suggest that his deputy was making financial decisions that were unlikely to be in Mr A's best interests.

I said I did not think Frenkel Topping's position that; '*The drawdown on the investment portfolio was not in accordance with the aims thereof but the withdrawal purposes were reasonable'* met the regulatory requirement to treat Mr A fairly.

I said Frenkel Topping had allowed Mrs A to withdraw Mr A's entire investment portfolio without raising any concerns about whether this was in the best interests of Mr A - who it knew to be a vulnerable adult.

I noted that Frenkel Topping had said it would only have had cause for concern if the withdrawals Mrs A was making were not paid to an account held in Mr A's name. I said I didn't think its position was fair or reasonable as it knew that as Mr A's deputy Mrs A would have had access to Mr A's banking accounts. In view of this I said I could not see how it considered this was the only risk it needed to monitor.

Having carefully considered this matter I said I could not reasonably find that Frenkel Topping's position was sufficient to meet the regulatory requirement to ensure Mr A was treated fairly.

I explained that I was of the view that withdrawing money from Mr A's investment portfolio, so soon after it had been invested was not in Mr A's best interests. Based on information Frenkel Topping had gathered about Mr A's personal and financial circumstances I said I was satisfied that it knew he ought to have had more than sufficient deposit-based savings to be able to pay for any 'building work' without encashing investments so early, and quite possibly, crystallising an investment loss.

I said I thought such an investment loss, suffered on a pot of money designed to provide for Mr A's long term financial security, ought to have prompted Frenkel Topping to query the withdrawal and, perhaps, whether the recommendation it had made was still suitable for Mr A's needs.

I noted that the Office of the Public Guardian website set out, Frenkel Topping only needed to have a 'concern' *'...about, for example, the misuse of money or decisions that are not in the best interests of the person they're responsible for',* in order to make a report to the OPG.

Likewise, I said Frenkel Topping could have reported its concern that Mrs A might be making financial decisions that were not in Mr A's best interests to his local Social Services office or to the Police.

I said I couldn't see how, based on the very limited information Frenkel Topping had about the reason Mrs A had requested the withdrawal, that it could reasonably have been satisfied that the withdrawal was likely to be in Mr A's best interests. I said this was particularly the case as the withdrawal was made so soon after Mr A's investment portfolio had been

arranged and Mr A should have had £68,000 on deposit that he could have used to pay for any additional building work that was necessary.

I then considered that in late January 2013, Mrs A asked for a further £10,000 to be withdrawn from Mr A's portfolio, in addition to the £20,000 she had already withdrawn.

(I noted that Frenkel Topping said it couldn't process this request immediately as Brooks MacDonald, the discretionary portfolio manager, required evidence of the £10,000 Court of Protection Bond Mrs A should have arranged when she was appointed Mr A's deputy in 2009. It explained that the withdrawal Mrs A had requested could not be processed until Brooks Macdonald had received written confirmation that the bond was in place.)

So, I said that by late January 2013 Frenkel Topping knew that not only had Mrs A apparently agreed to an overspend of £100,000 on the building work that in July 2012 it had been told was going to cost a' maximum' of £5,000', but now wanted to withdraw a further £10,000 from Mr A's investment portfolio.

I noted that once this request was processed Mrs A would have withdrawn £30,000, a total of 25% of Mr A's total investment portfolio within six months of the portfolio being set up. I said I was mindful that Frenkel Topping would have been aware that less than a year earlier Mr A had told it that he *'... definitely did not need to access the money being invested for five, more likely ten years.'*

Having reviewed the information that was available to Frenkel Topping at the time, I said I thought that, by no later than January 2013, Frenkel Topping ought reasonably to have been aware that there might be cause for concern about the withdrawals Mrs A was making from Mr A's investment portfolio. I reiterated that the OPG website sets out*; '...your concern could be about, for example, the misuse of money or decisions that are not in the best interests of the person they're responsible for.'*

Having carefully considered all the information that Frenkel Topping had available to it at that time, I said I felt it should have flagged its concerns with either Mr A's Social Services department, the Police or reported its concern to the OPG no later than January 2013, when it received the second withdrawal request.

I noted that the OPG website set out the process for reporting any concerns about a deputy or guardian. Frenkel Topping only needed to contact the OPG, to flag its concerns. There was no requirement on it to carry out any investigation nor were there any onerous reporting requirements.

I said I was satisfied that Frenkel Topping was required to carry out monitoring of the transactions on Mr A's investment portfolio in line with the regulatory requirements as set out in the Senior Management Arrangements, Systems and Controls sourcebook. I noted it was also required to ensure that it treated Mr A fairly in line with FCA Principle 6:

A firm must pay due regard to the interests of its customers and treat them fairly.'

I said my provisional decision was that Frenkel Topping's failure to promptly identify and then report that the transactions Mrs A was requesting might not be in Mr A's best interests resulted in the loss of Mr A's entire investment portfolio.

As Frenkel Topping was aware this money had been intended to provide Mr A with long term financial security. If this money was lost or mis-appropriated, Mr A had little, if any prospect of being able to replace it.

I noted that in its submissions to this service Frenkel Topping said:
The withdrawal of funds from the Investment portfolio and deposit thereof into the Deputyship account is not indicative of financial advantage or abuse. Withdrawal and deposit into an account not held In Mr A's name would give rise to a legitimate concern as to the discharge of the Deputy's fiduciary and statutory duties but that Is not the circumstance of this case.

I said I disagreed with Frenkel Topping's position. I said I did not accept that its responsibilities under the FCA requirements were limited to simply monitoring if the withdrawals were paid to an account held in Mr A's name.

I said Frenkel Topping was required to treat Mr A fairly. And I said I thought that to meet this requirement it should have monitored the withdrawals from Mr A's investments. Had it done so it would have been aware that these withdrawals were clearly not in-line with Mr A's stated investment objectives - and should not have been necessary - given the information Frenkel Topping held about Mr A's personal and financial circumstances.

Based on the information that was available to it at the time the withdrawals were made, I said I was satisfied that Frenkel Topping had sufficient information to have given rise '... *to a legitimate concern'* that the withdrawals, even if they were being used for the reasons Mrs A gave at the time, were unlikely to be in Mr A's best interests.

I said I was at a loss to understand why a business that claimed it staff were trained in *'Investing for the vulnerable'* simply stood by and allowed a vulnerable client's deputy to drain his entire investment portfolio. I noted that at no point had Frenkel Topping raise any concerns about the withdrawals. Nor had it considered that it might be in Mr A's best interests if it flagged the withdrawals with either the OPG, Social Services or the Police.

I said there was no downside to Frenkel Topping taking a risk averse approach and flagging its concerns. As a result of its failure to do so I said Mr A had suffered a significant financial loss.

I said I was mindful that if, at any point between late 2012 and early 2017 when all the money had been withdrawn, Frenkel Topping had flagged that the withdrawals that were being made from Mr A's portfolio might not be in his best interests and it had notified the OPG, Social Services or the Police of its concerns, it would have been possible to reduce the financial loss he suffered.

evidence requested by Frenkel Topping

In its response to our investigator's view Frenkel Topping asked this service to provide *'...evidence that the monies withdrawn by Mrs A have not been used in respect of Mr A…'*And it reiterated its view that all the withdrawal requests it had processed from Mr A's investment portfolio were *'reasonable'.*

I noted that the investigator had carried out a detailed review cross-referencing the withdrawals made from Mr A's investment portfolio against the bank records available. This indicated that it was unlikely that the money Mrs A withdrew from Mr A's investment portfolio was used for the purposes Mrs A had given.

I said I accepted that Frenkel Topping could not have known that this was the case. But I said I didn't think that whether the money was spent on medical procedures, a caravan, holidays, a motorbike etc was centrally relevant to this complaint. I also said I did not think it would be appropriate for this service to share Mr A's bank records with Frenkel Topping.

I said that as my view was that, by no later than January 2013, Frenkel Topping should have flagged with an appropriate authority that withdrawals were being made from a vulnerable adult's investment portfolio that were not in-line with his stated objectives and were likely to be detrimental to his financial security. I said I didn't think Frenkel Topping needed to know whether Mrs A was spending the money on the things she had said the money was required for. It only needed to have a concern about *'...the misuse of money or decisions that are not in the best interests of the person they're responsible for.'*

I said that by late January 2013, Frenkel Topping was aware that Mrs A had apparently agreed to an over-spend of £100,000 on building work for Mr A's property - work that Mr A and Mrs A, in her capacity as his deputy, had said would cost a maximum of £5,000 to complete. And Mrs A was now requesting a further £10,000 from Mr A's investment portfolio, despite Mr A having kept over £68,000 on deposit, money that had been intended to *'...satisfy anticipated expenditure without the need to encash the investments'.*

I said my view was that if Frenkel Topping raised its concerns with either the OPG, Social Services or the Police in January 2013 I thought the subsequent withdrawals - over 30 in total - would not have gone ahead as the OPG would have been able to act to protect Mr A's interests.

I said I had, however, carefully considered whether the redress Frenkel Topping needed to pay to Mr A should be reduced if it could be shown that he had received some benefit from the money that was withdrawn.

I said I didn't think it would be fair or reasonable for the redress to be reduced to take account of this because it would be extremely hard to say with any certainty what benefit, if any, Mr A had received.

I said I must also take into account that Mr A's current deputy had confirmed that there was nothing to show that the money was used to provide benefit to Mr A.

I was mindful however that there were some 'bigger ticket' items on the list of reasons Mrs A gave when she made the numerous withdrawals. In particular Frenkel Topping had referred to a caravan that was apparently purchased for Mr A.

Mr A's new deputy said it appeared the caravan was not purchased in Mr A's name and Mrs A had refused to disclose the location of the caravan. I said if it did prove possible to recover the caravan and it could be sold, I had allowed for this in the redress I had set out. Likewise, I said I had also allowed for the possible recovery of any of the items that might have some re-sale value in the redress I had set out.

I proposed that if, after the redress had been paid to Mr A, and within twelve months of my final decision, Mr A's current deputy was able to recover any of the items Mrs A said were purchased for Mr A with the money withdrawn from his investment portfolio (caravan, motorbike etc), and these items could be sold, the amount recovered (after any costs incurred) should be refunded to Frenkel Topping by Mr A's current deputy.

I said I had set a time limit of twelve months from the date of my final decision as I was mindful that Mr A's current deputy had been working to recover the caravan since 2018. But I said I would reconsider this time limit in the light of any submissions either party might make in response to my provisional decision.

OPG investigation

I noted that Frenkel Topping had asked this service to *'...confirm the current stage of any OPG investigation and if any results of the OPG investigation have been disclosed'.* It also asked, *'upon what information did the OPG instigate its investigation into the actions of the former Deputy and were supervisory visits with the Deputy carried out?'*

I explained that this service is not party to any investigation that the OPG might be carrying out into the actions of Mrs A in her capacity as Mr A's deputy. Nor does this service have information on any criminal proceedings against Mrs A.

I said I didn't think the findings of any such investigation were relevant to this complaint. The complaint Mr A's deputy had referred to this service, on Mr A's behalf, related to Frenkel Topping's failure to carry out any monitoring of the withdrawals that were made from his investment portfolio. This is the issue I considered.

security bond

Frenkel Topping asked this service to confirm whether the security bond Mrs A was required to maintain of £10,000 had been utilised.

Mr A's current deputy confirmed that it made an application to call in the security bond in late 2018. In January 2019 the Court issued an order directing the OPG to call in the bond.

The Court directed that Mr A's current deputy should receive the funds from the security bond on behalf of Mr A for his use and benefit. The £10,000 was received by Mr A's current deputy in April 2019.

In view of this I said I would take this into account when considering the redress Frenkel Topping should pay.

I explained however, that I didn't think it would be fair or reasonable for the full value of the security bond to be deducted from the redress Frenkel Topping should pay to Mr A.

I noted that Mr A's current deputy had confirmed that Mr A had a total of around £1,250 in deposit-based savings on 1 August 2018 when his current deputy was appointed.

He also confirmed that Mr A's property was sold in May 2021 for £112,000. This was £17,000 more than the price the property was purchased for in March 2012. Mr A's current deputy told this service that he felt the increase in value *'...can be attributed to general inflation within the housing market and is not a reflection of an increase in value from the building works. Indeed, the deputy visited [Mr A's property] prior to the sale and confirmed that the condition was poor. This view was reiterated by the estate agents acting in the sale and potential buyers.*

In view of this I said it appeared that little, if any, of the additional £100,000 Mrs A said was required for 'building work' by late 2012 was spent on Mr A's property.

As it appears that Mrs A, in her capacity as Mr A's deputy, did not spend around £265,000 of Mr A's CICA award for his benefit I said I thought the £10,000 security bond funds should be split proportionately between the money that was invested in the discretionary portfolio and the £145,000 in deposit based savings that had also been lost. (I calculated the lost deposit-based savings by adding the £80,000 Mrs A held back for 'building work' to the £68,525 Mr A held in a deposit-based account at the time the advice was given in 2012, giving a total of £148,525.)

I rounded the deposit-based savings that had been lost down to £145,000 to take account of the £1,250 that was left in Mr A's deposit accounts when his current deputy took over in April 2018.

I said that, as I had already explained, I thought Frenkel Topping should have notified the OPG, Social Services or the Police, that Mr A's deputy might be making decisions that were not in his best interests by no later than January 2013. As it appeared that the £20,000 Mrs A withdrew in November 2012 for 'building work' was not spend on Mr A's property I said I thought 37.74% of the security bond funds (£3,774) should be deducted from the redress Frenkel Topping should pay to Mr A. I calculated this figure as the £100,000 in Mr A's investment portfolio in January 2013 represented 37.74% of the total amount of money (£265,000) that Mr A had lost as a result of the actions of his former deputy.

summary

I said there was no dispute that Mr A was a vulnerable customer and was not able to monitor the transactions Mrs A was making on his behalf.

In view of this I said it was therefore all the more important that Frenkel Topping was vigilant in monitoring the transactions that were being made on Mr A's behalf to ensure that they appeared to be in his best interests, in light of the facts as it understood them.

As I had set out above, I said I was satisfied that Frenkel Topping was required to have adequate systems and controls in place to counter the risk that it might be used to further financial crime. It was also required to ensure that it treated its customers fairly. I said I couldn't reasonably find that Frenkel Topping had treated Mr A fairly in this matter.

I noted that Frenkel Topping holds itself out as an expert in *'...supporting clients who have received compensation as a result of medical negligence, personal injury or as part of the criminal injuries compensation scheme and our staff have been providing advice in this area for nearly 40 years. '*

I said I thought that any such 'expert' could reasonably be expected to have robust monitoring arrangements in place to ensure that transactions made on behalf of its vulnerable clients were in-line with the information it held about the client's circumstances and stated objectives. And where its monitoring identified concerns, I thought it could reasonably be expected to flag these concerns with a relevant authority.

Having very carefully considered all the evidence and information that had been provided I said my provisional decision was that this complaint should be upheld and I set out how I thought Frenkel Topping should put matters right for Mr A.

Frenkel Topping did not accept my provisional decision. It raised a number of detailed points and said it felt my decision *'…imposes a duty on Frenkel which is flatly at odds with both the facts and established law.'*
It summarised its position as follows:
- Frenkel was entitled, indeed obliged, to act on Mrs A's instructions unless put on inquiry that she was misappropriating funds.
- There was no "monitoring" duty owed. The duty imposed by the Provisional Decision is both wrong in law and would be unworkable for both regulated entities and deputies alike.
- Applying the correct approach, there is simply no basis for saying that such a duty (which would require a high threshold when dealing with a court appointed Deputy) was triggered. Frenkel was not obliged to test or scrutinise any explanations given, but in any event there was nothing about the explanations that should have put on Frenkel that Mrs A was defrauding her son.

- Further, the approach to causation and loss turns orthodox principles on their head. It has not been shown that these payments were not used to Mr A's benefit.

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.

Having done so I remain of the view that Mr A's complaint should be upheld. I'll explain why.

Was Frenkel Topping required to act on Mrs A's instructions

In its response to my provisional decision Frenkel Topping said its position was that, *'… (absent being on notice of fraud by Mrs A) [Frenkel Topping] was not just entitled but obliged to act on Mrs A's instructions.'*

It said it had reached this view as it felt:
In relation to withdrawal requests, Frenkel's position was not different to an investment bank or a stockbroker. It was obliged to act on the instructions received unless put on notice that the withdrawal was an attempt to misappropriate funds. The nature of that duty is not impacted by the fact that Mr A lacked capacity (and hence could be described as vulnerable), because the instructions came from Mrs A who was his statutory agent.

It is not clear to me why Frenkel Topping has focussed on this issue in its response to my provisional decision. My provisional decision did ***not*** say that Frenkel Topping was required to refuse to act on Mrs A's instructions.

As I set out in some detail in the provisional decision, my view is that based on the information Frenkel Topping held about Mr A's personal and financial circumstances and his financial objectives, it ought reasonably to have had concerns about the withdrawal requests Mrs A made so soon after the investment portfolio had been arranged. And I said that Frenkel Topping should have flagged these concerns with either the OPG, the Police or Social Services.

I would refer Frenkel Topping to the wording I used in my provisional decision:

…I think Frenkel Topping's failure to promptly identify and then report that the transactions Mrs A was requesting might not be in Mr A's best interests resulted in the loss of Mr A's entire investment portfolio.

…by no later than January 2013, Frenkel Topping should have flagged with an appropriate authority that withdrawals were being made from a vulnerable adult's investment portfolio that were not in line with his stated objectives and were likely to be detrimental to his financial security. I don't think Frenkel Topping needed to know whether Mrs A was spending the money on the things she had said the money was required for. It only needed to have a concern about '...the misuse of money or decisions that are not in the best interests of the person they're responsible for.'

…if Frenkel Topping had raised its concerns with either the OPG, Social Services or the Police in January 2013 I think the subsequent withdrawals - over 30 in total - would not have gone ahead as the OPG would have been able to act to protect Mr A's interests.

As I did not say Frenkel Topping should have refused to act on Mrs A's instructions I do not intent to consider the comments it has made on this issue any further.

Was Frenkel Topping required to carry out any monitoring of the withdrawals from Mr A's investment portfolio

In its response to my provisional decision Frenkel Topping said that its view was that as Mr A lacked capacity, *'…Frenkel's contractual counterparty was Mrs A in her capacity as Deputy for Mr A;'.* It said that it therefore felt that, in a '…*strict legal sense, it is correct to refer to Mrs A as 'the Client';'*

But it said it did accept that *'…Mr A (though lacking legal capacity) was still in practice an underlying client, because it was his aims and objectives that were relevant when identifying appropriate investments to recommend; that is why Mr A is on occasion referred to as 'the Client' in Frenkel's documentation.'*

But it said it did not accept that Frenkel Topping *'…owed a duty to Mr A to monitor the withdrawals from the investments and to satisfy itself that the withdrawals were likely to be in Mr A's best interests…'* based on the information it held about his personal and financial circumstances. It said it felt it had *'no such duties'.*

It said its position was that:
'The duty owed by Frenkel in relation to withdrawals was the same as those as a banker or broker, namely a Quincecare duty.'

And it claimed that:
'There is simply no basis to impose an ongoing monitoring duty on Frenkel or suggesting some wider failing to follow SYSC. Similarly, there is no basis to convert an obligation on Frenkel to act in the 'best interests' (within the meaning of the COBs) of Mr A when making investment recommendations into a continuing and much wider duty to consider Mr A's general best interests when acting on withdrawal requests. Mrs A was there to protect Mr A's 'best interests' (as defined in the 2005 Act). That was not the task of Frenkel. If a financial adviser in the position of Frenkel was really to have such a wide ranging and onerous continuing obligation, then it would in effect have the duties of a trustee (or a deputy). That is not the role of a financial adviser, nor would the Deputy wish to pay the fees that would result.

I have carefully considered the points Frenkel Topping has made regarding whether it was required to carry out any monitoring of the withdrawals being made from Mr A's investment portfolio, so soon after it had been set up.

I am mindful that Frenkel Topping is required by its regulator, the FCA, to conduct its business with 'due skill care and diligence' (Principle 2, FCA Principles for businesses), to 'pay due regard to the interests of customers and treat them fairly' (Principle 6) and 'it must take reasonable care to organise and control its affairs responsibly and effectively with adequate risk management systems.' (Principle 3).

I also note that in FG21/1 'Guidance for firms on the fair treatment of vulnerable customers' the FCA set out:
4.50 Some vulnerable customers need additional support in making decisions, or rely on others to make some decisions on their behalf…Where appropriate firms should provide straightforward options to enable legitimate and legal delegated access and support, ***whilst maintaining robust safeguards to reduce the risk of abuse.'***

Frenkel Topping's position is that the only safeguard it was required to have in place was to check whether withdrawals were paid to an account held in the client's name. I don't think this is a fair or reasonable position.

As I set out in my provisional decision, at the time the first withdrawal was requested, in late 2012, less than six months after Frenkel Topping had arranged Mr A's investment portfolio, it knew that Mr A should have had over £68,000 on deposit. I would remind Frenkel Topping that in its suitability report dated March 2012 it said:

We have recommended that you keep £68,525 in a cash deposit account within the Deputy account. This equates to 11 years annual expenditure. ***We recommend this in the event of future volatility in the market you are able to access Mr A's funds to satisfy anticipated expenditure without the need to encash the investments.***

I think it is fair and reasonable to say that a business that holds itself out as having been '*established specifically with the intention of supporting clients who had received compensation as a result of medical negligence, personal injury or as part of the criminal injuries compensation scheme'* ought reasonably to have had legitimate concerns about such a large withdrawal request so soon after the portfolio had been set up. Particularly as Mr A should have had large deposit-based savings available to him to '*satisfy anticipated expenditure without the need to cash in investments'.*

Frenkel Topping says its position is that it was solely the role of the OPG to monitor Mrs A's actions in her capacity as Mr A's deputy. It appears to believe that the possibility of one of its clients being at risk of financial (or other) abuse by their deputy is not something it needs to consider.

I think this position shows a lack of skill care and diligence on Frenkel Topping's part. As the FCA guidance I have set out above makes clear, financial businesses are required to maintain ***'robust safeguards to reduce the risk of abuse'.*** Although the regulatory guidance I have referred to was published after Mrs A had withdrawn Mr A's entire investment portfolio, as the guidance sets out, it is intended to make clear what the Principles mean for regulated businesses and businesses *'..must meet the standards set by our [the FCA's] Principles and treat customers fairly.'*

As a business that holds itself out as an expert in advising vulnerable customers, I think it is unfair and unreasonable for Frenkel Topping to claim its duty to Mr A ended after it had given its initial advice.

I think this is a particularly unreasonable position as I understand it was receiving an ongoing advice fee of 1.25% per year (plus VAT) from Mr A's investment portfolio. It appears it was happy to charge Mr A for ongoing services but claims it did not have any*'… duty to Mr A to monitor the withdrawals from the investments and to satisfy itself that the withdrawals were likely to be in Mr A's best interests…'* based on the information it held about his personal and financial circumstances. It claims it had *'no such duties'*.

Having carefully considered this matter I remain satisfied that Frenkel Topping should have monitored the withdrawals made from Mr A's investment portfolio. As I set out in my provisional decision the SYSC requirements set by the industry regulator require Frenkel Topping to '…*establish, implement and maintain adequate policies and procedures sufficient to ensure compliance of the firm including its managers, employees and appointed representatives (or where applicable, tied agents) with its obligations under the regulatory system and for countering the risk that the firm might be used to further financial crime.*
SYSC 6.1.1 R

Likewise, I am satisfied that its responsibility to treat Mr A fairly did not end after it had given its initial investment advice – particularly as it continued to take ongoing fees from Mr A's investment portfolio.

I would also add that I do not think monitoring the withdrawals would have been particularly onerous. It could have been as simple as checking the withdrawals requested in November 2012 and January 2013 against Frenkel Topping's records of Mr A's personal and financial position to see if he had said he intended to make large withdrawals from his investment portfolio so soon after it was set up.

If monitoring had been carried out should the withdrawals have given Frenkel Topping cause for concern

In its response to my provisional decision Frenkel Topping claimed that '*there were no reasonable grounds for believing that Mrs A was attempting to misappropriate the funds.'*

It said it felt that *'…if the withdrawal forms and associated email explanations provided by Mrs A are read with an open mind and a presumption of good faith (which must be the starting point when dealing with a court appointed Deputy), then there is simply nothing about those email explanations that ought to have put Frenkel on inquiry that Mrs A (a court-appointed Deputy and mother) was seeking to defraud her own son. There were no reasonable grounds to suspect that funds were being misappropriated.'*

I think Frenkel Topping is rather missing the point in its response on this matter. It appears to have totally overlooked all the information it held about Mr A's personal and financial circumstances when making its claim that there were *'no reasonable grounds'* for concern about the withdrawals Mrs A made.

I note that in relation to the withdrawal requests made in November 2012 and January 2013 for 'building works' of £20,000.00 and £10,000.00 respectively Frenkel Topping says *'…there is nothing about a withdrawal by a Deputy, for the stated reason of paying for building works, that ought to have made Frenkel suspect that she was acting fraudulently. Patients lacking capacity due to injury often require modifications to their homes to allow for independent living; building works often exceed their original estimates.'*

But it has failed to provide any explanation as to why it has disregarded all the fact find information it held about Mr A's personal and financial circumstances. I would remind Frenkel Topping that at the time the portfolio was arranged in mid-2012 it knew Mrs A had already kept £80,000 back (from the £200,000 Mr A initially intended to invest) for 'building work'. In addition to this Mr A should have had deposit-based savings of over £68,000 and it had been told that Mr A intended to spend ***'…a maximum of £5,000 on finishing his new house.***

When this information is taken into account, I think that any business acting with due skill care and diligence, particularly when dealing with a vulnerable customer would have had 'reasonable grounds' for concern about large withdrawal requests made so soon after '*…both Mrs A and Mr A confirmed that …they definitely did not need to access the money being invested for five, more likely ten years.'*

I note that Frenkel Topping said in its response to my provisional decision:
The original investment portfolio assumed investment for 5 to 10 years; the withdrawals were made over a 5 year period. That of itself does not suggest fraud. In any event (in very large part) explanations were given for the withdrawals; nothing further was required.

It does not appear to me that in saying this Frenkel Topping has addressed Mr A's legitimate complaint. For the avoidance of doubt, in its own words, at the time the advice was given Frenkel Topping said: '*…both Mrs A and Mr A confirmed that …they definitely did not need to access the money being invested for five, more likely ten years.'*

I don't think any reasonable person would say that draining the entire investment portfolio in less than five years was in-line with Mrs A and Mr A's stated position that he ***'…definitely did not need to access the money being invested for five, more likely ten years.'*** And I am conscious that the very first withdrawal, in November 2021, was for a substantial sum. I am not satisfied that Frenkel Topping has adequately explained how its actions met the regulatory requirements to treat Mr A fairly and act with due skill care and diligence.

Frenkel Topping's comments on individual withdrawals

I note that in its most recent response Frenkel Topping said:
'*The approach of the Provisional Decision is absurd. Take for example the annual pension payment of £2,880.00 made on 16 May 2014. The Provisional Decision proceeds on the basis that this is a misappropriation of funds which should never have happened, when it is a payment into Mr A's pension plan. This approach defies analysis.'*

Frenkel Topping's own records clearly show that Mr A's pension was made paid up in May 2014 as the payment request was returned by Mr A's bank unpaid in May 2014. It is disappointing that Frenkel Topping has falsely claimed that any such payment was made into Mr A's pension in May 2014, when its own records show this was not the case.

It also said it felt 'much had been made' in the provisional decision of the fact that the withdrawals were not in-line with Mr A's stated investment objectives. It said it was *'completely unclear'* why Frenkel Topping should have concluded that,
'…it was not in Mr A's best interests to withdraw funds from his investment portfolio to 'purchase a caravan, (ii) go on holiday,(iii) visit Wembley to watch his favourite team, (iv) purchase a laptop for college, (v) to pay for bike or car repairs, (vi) to buy a season pass - and so on.

Again, I think that Frenkel Topping has misunderstood its obligations to treat Mr A fairly, and has mischaracterised what I said in the provisional decision about why it should have been concerned, particularly by such a substantial withdrawal for building works. Frenkel Topping's role was not to determine (or 'conclude') whether the withdrawal requests Mrs A was making were in Mr A's best interests. It only needed to have a reasonable concern that Mrs A might be making decisions that might not be in Mr A's best interests. As the OPG set out in its website *'...your concern could be about, for example, the misuse of money or decisions that are not in the best interests of the person they're responsible for'*. It then needed to flag its concern with the OPG, or another appropriate authority.

Given that it knew Mr A had over £68,000 in deposit-based savings in mid-2012 and this money was intended to '…*satisfy anticipated expenditure without the need to encash the investments'* I think any reasonable person would have had legitimate concerns that Mr A was apparently unable to fund holidays, season tickets etc from his deposit-based savings. This completely contradicted the information provided a short time before.

As I set out in my provisional decision I think that by no later than January 2013, Frenkel Topping should have flagged with an appropriate authority that withdrawals were being made from a vulnerable adult's investment portfolio that were not in line with his stated objectives and may be detrimental to his financial security. I don't think Frenkel Topping needed to know whether Mrs A was spending the money on the things she had said the money was required for. It only needed to have a concern about *'...the misuse of money or decisions that are not in the best interests of the person they're responsible for.'*

And I remain of the view that if Frenkel Topping had raised its concerns with either the OPG, Social Services or the Police in January 2013 the subsequent withdrawals - over 30 in total

including the withdrawals allegedly made to purchase a caravan, pay for medical procedures, holidays etc, would not have gone ahead as the OPG would have been able to act to protect Mr A's interests.

Is this service required to provide proof that the withdrawals did not benefit Mr A

In my provisional decision I set out that I was of the view that by the time Mrs A made the second withdrawal request in January 2013 Frenkel Topping ought reasonably to have flagged concerns with the OPG that the withdrawals might not be in Mr A's best interests.

I said my view was that had the OPG been notified that Mr A's deputy might be requesting withdrawals that were not in his best interests it would have been able to act to protect Mr A's interests and subsequent withdrawals would not have been made.

I said I had, however, carefully considered whether the redress Frenkel Topping needed to pay to Mr A should be reduced if it could be shown that he received some benefit from the money that was withdrawn.

I said I didn't think it would be fair or reasonable for the redress to be reduced to take account of this because I felt it would be extremely hard to say with any certainty what benefit, if any, Mr A received.

I said I had also taken into account that Mr A's current deputy had confirmed that there was nothing to show that the money was used to provide benefit to Mr A.

Frenkel Topping said it did not accept my position on the redress payable. It said my position:
'…turns the common law principles of causation on their head. It is for the Complainant (here Mr A's current Deputy) to establish that the payments were not used to Mr A's benefit. If they were used for Mr A's benefit, then there cannot possibly be any loss. At the moment, it is unclear what payments were used for Mr A's benefit and what, if any, may not have been. Frenkel has been shut out of that process and denied the opportunity to assess and test the evidence relied upon. That is both legally wrong and unfair.'

In order to provide as much transparency as possible this service sought permission from Mr A's current deputy to provide copies of the bank records for Mr A that had been provided to this service. These were the records our investigator used when he cross referenced all the withdrawal requests Mrs A made against Mr A's bank records.

It is somewhat frustrating that despite having claimed it had been '*shut out'* and that it required the '*opportunity to test and assess the evidence relied on'* Frenkel Topping subsequently said:
'It has always been our position that our Firm takes instructions from the deputy (i.e. Mrs A in this case) on behalf of P (Mr A) and action such instructions as she had the court appointed authority. How she actually spent the money on compared to what she told us she was planning spending the money on are entirely unrelated and not our responsibility to 'police'. We therefore have no comment to make on the bank statements provided as it is beyond our remit and authority as we have explained since this claim commenced.

We are therefore returning the copy bank statements back to you because at no point do we ever have access to a deputies bank statements and therefore we should not be privy to what is contained in those statements. We once again confirm that our responsibility lies with dealing with the instructions of the court appointed deputy, moreover we do not have responsibility to audit what drawn down monies are actually spent on by the deputy.

As Frenkel Topping has declined to provide any comments, despite having had the opportunity to *'test and assess the evidence relied on',* and having re-reviewed the bank statements in question, I remain satisfied that there is nothing to show that Mr A benefited from the withdrawals made from his investment portfolio by Mrs A. As our investigator explained, it appears large amounts were simply transferred from Mr A's bank account to another account, presumed to be Mrs A's own account.

I am mindful that Frenkel Topping says, '*it is for the Complainant (here Mr A's current Deputy) to establish that the payments were not used to Mr A's benefit.'* However, this service's jurisdiction is inquisitorial, not adversarial.

As this is the case, in our consideration of complaints neither party bears the burden of proof. I simply have to be satisfied about causation and loss on the balance of probabilities – that is to say what I think is most likely to be the case. As I explained above, based on the evidence available and the submissions from Mr A's current deputy I don't think I can safely find that Mr A received any benefit from the funds Mrs A withdrew from his investment portfolio.

But, as I set out in my provisional decision, I am mindful that there were some 'bigger ticket' items on the list of reasons Mrs A gave when she made the numerous withdrawals. In particular, Frenkel Topping referred to the caravan that was apparently purchased for Mr A.

Mr A's new deputy told this service that it appeared the caravan was not purchased in Mr A's name and Mrs A had refused to disclose the location of the caravan. In my provisional decision I said that if it did prove possible to recover the caravan and it could be sold, I had allowed for this in the redress. Likewise, I said I had also allowed for the possible recovery of any of the items that might have some re-sale value in the redress I had set out.

I proposed that if, after the redress had been paid to Mr A, and within twelve months of my final decision, Mr A's current deputy was able to recover any of the items Mrs A said were purchased for Mr A with the money withdrawn from his investment portfolio (caravan, motorbike etc), and these items could be sold, the amount recovered (after any costs incurred) should be refunded to Frenkel Topping by Mr A's current deputy.

I said I had set a time limit of twelve months from the date of my final decision as I was mindful that Mr A's current deputy had been working to recover the caravan since 2018. But I said I would reconsider this time limit in the light of any submissions either party might make in response to my provisional decision.

In its response to my provisional decision Frenkel Topping said:
… there is no logic to the suggestion that refunds of items recovered within 12 months should be paid back to Frenkel. The simple reality is that the effect of this Decision (if upheld) is that Mr A's current Deputy will have no incentive to effect any such recovery. So, inevitably it will never happen.

I appreciate Frenkel Topping's concern, although I remain of the view that Mr A's current deputy would have continued his best efforts to recover the items Mrs A may still hold that were purchased with Mr A's money. In order to address Frenkel Topping's concern on this point I have removed the time limit (for the recovery of the items) in the redress set out below. I think this is a fair and reasonable adjustment to the redress.

What would the OPG have done if it had been notified of concerns

My view on this complaint is that, by no later than January 2013, Frenkel Topping should have contacted the OPG or another appropriate body, to flag concerns about the

withdrawals Mrs A was requesting. In my provisional decision I said that I thought it was more likely than not that the OPG would have acted to prevent further withdrawals from being made.

This service contacted the OPG to establish what steps it would be able to take if it was notified of concerns that a deputy might be making financial decisions that were not in the best interests of the person they are responsible for. The OPG said:
'… if money was being misappropriated by a deputy, we would have considered asking the deputy to report any large financial transactions and if we felt that there was an immediate risk of assets being withdrawn or depleted, our Investigations Team can request that an account be frozen within 24 hours.

Clearly it is not possible to be certain that the OPG would have frozen Mr A's account to prevent Mrs A from withdrawing more of his money, as Frenkel Topping did not, at any point, notify the OPG that Mrs A might be making decisions that were not in Mr A's best interests.

But, on the balance of probabilities I think that if Frenkel Topping had notified the OPG in January 2013, when it received the second withdrawal request from Mrs A (for £10,000 for 'building work') that she was requesting large withdrawals from a portfolio that both she and Mr A had confirmed he would not need to access for at least five years - and that Mr A should have had deposit based savings of over £68,000 to meet any additional expenditure – I think it is reasonable to say that, on the balance of probabilities, the OPG would have acted promptly to protect Mr A's interests and would have prevented Mrs A from moving his money out of his account.

And I think that if Frenkel Topping had flagged concerns with the OPG in January 2013 the subsequent withdrawals – over 30 in total – would not have gone ahead as the OPG would have been able to act to protect Mr A's interests.

Throughout this final decision and my provisional decision, I have referred to Mr A's 'best interests'. I have used this wording as it is the same wording used by the OPG on its website when describing how to report any concerns about a deputy or guardian. '…*your concern could be about, for example, the misuse of money or decisions that are not in the best interests of the person they're responsible for'*.

I have not attached any special meaning to the term 'best interests' and I have simply used it to mean that Frenkel Topping ought reasonably to have had concerns about the withdrawals Mrs A was making from Mr A's investment portfolio.

summary

As I have set out in some detail, I don't think Frenkel Topping should have refused to process the withdrawal requests that Mrs A made in her capacity as Mr A's deputy. But I do think it should have monitored the withdrawal requests that were being made and it should have flagged concerns about these requests with the OPG, or other suitable third party by no later than January 2013 when it received the second large withdrawal request.

Had Frenkel Topping done so I remain of the view that the OPG would have been able to act to protect Mr A's interests and, on the balance of probabilities I am satisfied that the further losses Mr A suffered would have been prevented.

Putting things right

What the business needs to do to put matters right

Fair compensation

In assessing what would be fair compensation, my aim is to put Mr A as close to the position he would probably now be in if Frenkel Topping had promptly identified that the withdrawals Mrs A was making from his investment portfolio might not be in his best interests and it had notified the OPG, or other suitable third party of its concerns.

As I set out above, I think Frenkel Topping ought reasonably to have had concerns about whether the withdrawal requests were in Mr A's best interests by no later than January 2013 when it received the second withdrawal request.

What should Frenkel Topping do?

To compensate Mr A fairly, Frenkel Topping must:

• Calculate what the value of Mr A's investment portfolio would have been at the date of this decision if no further withdrawals had been made after the first withdrawal of £20,000 in November 2012.

• Add to this figure any fees and commission it received for the advice it gave Mr A on investing the £120,000 in the discretionary portfolio. This should include both initial and ongoing fees and commission.

• deduct from this figure £3,774 (37.74% of the security bond Mr A's current deputy was able to call in).

In addition, Frenkel Topping should pay interest at 8% simple per year on the total amount from the date of the final decision to the date of settlement, if compensation is not paid within 28 days of the business being notified of acceptance.

Income tax may be payable on any interest awarded.

The redress should be paid directly to Mr A as the discretionary portfolio was closed in early 2017. This will allow him to take investment advice and set up suitable investments with a new provider.

Frenkel Topping should provide Mr A with a copy of its calculations in a clear, easy to understand format.

For the purposes of calculating the redress due Frenkel Topping should give a nil value to the items Mrs A said were purchased for Mr A with the money withdrawn from his investment portfolio (caravan, motorbike etc).

In return for this, Frenkel Topping may ask Mr A's current deputy to provide an undertaking to account to it for the net amount of any payment he may receive for these items if they are recovered. The undertaking should allow for the effect of any tax, costs and/or charges on any amount received.

Frenkel Topping will need to meet any costs in drawing up the undertaking. If Frenkel Topping asks Mr A's current deputy to provide an undertaking, payment of the compensation awarded may be dependent upon provision of that undertaking.

However, should the amount produced by the calculation of fair compensation exceed £150,000, and Frenkel Topping does not accept my recommendation that it pays Mr A the balance plus any interest on the balance as set out above, I don't think Mr A's deputy should provide any undertaking in relation to the items Mrs A said were purchased for Mr A.

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 Frenkel Topping pays the balance.

Determination and award: I uphold this complaint. I consider that fair compensation should be calculated as set out above. My decision is that Frenkel Topping should pay the amount produced by that calculation up to the maximum of £150,000 plus any interest set out above.

Recommendation: If the amount produced by the calculation of fair compensation exceeds £150,000, I recommend that Frenkel Topping pays Mr A the balance plus any interest on the balance as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 25 February 2022.

Suzannah Stuart
Ombudsman