DRN-3317145

The complaint

Mr and Mrs M say they received advice from a financial adviser in 2016. The adviser – I will call him Mr B - was an agent of Abacus Associates Financial Services Limited which is now Tavistock Partners (UK) Limited. They say the adviser recommended Mr and Mrs M disinvest their investments held in Standard Life and reinvest in the same again to save on costs and fees. They gave Mr B a cheque to make the reinvestment but the money was paid into a bank account controlled by Mr B who stole the money. Mr and Mrs M hold Tavistock responsible for their losses and claim compensation from it.

What happened

Much of what follows is not in dispute and so I've incorporated a lot of the background from the view issued previously by our investigator. Where there is a dispute about the facts, I'll make this clear.

Abacus and its agent:

Abacus Associates Financial Services (Abacus) has been a trading name of Tavistock since 4 January 2018 and Mr B's activity in relation to Mr and Mrs M was carried out in that name. So, in this decision, references to both Abacus and Tavistock should be taken as referring to Tavistock.

Abacus has been directly authorised by the Financial Services Authority from 2004 and the Financial Conduct Authority from 2013. According to Abacus' Business and Compliance Plan and Training and Competence Plan from 2012, it had permission to carry on a number of regulated activities including advising on investments, arranging deals in investments and agreeing to carry on a regulated activity. And its aim was

> *"to provide a quality service to both existing and new clients through its financial advisers."*

Abacus had 37 financial advisers one of which was Mr B who joined Abacus in April 2012 and was registered with the regulator as a CF30 approved person of Abacus.

Mr B was a self-employed agent of Abacus/Tavistock until May 2018 when he resigned. This means Mr B worked under the terms of agency agreement with Abacus rather than as its employee. Mr B was authorised by Abacus to advise on investments on its behalf. He was also appointed a supervisor responsible for a team of advisers based in the North of England. In turn he was under the supervision of the director and owner of the business.

In December 2018 Mr B was convicted of 14 counts of fraud after a police investigation

revealed he had stolen around £4.5 million. He is said to have used the money to fund a lavish lifestyle and gambling addiction.

Events in 2012

Mr and Mrs M say that in 2012 Mrs M was planning for retirement. She was informed by an adviser from the Teachers' Assurance that there were to be changes in legislation surrounding financial advisers. The adviser said that he was retiring and recommended a colleague, Mr B, who was moving to Abacus Associates Financial Services Ltd. As this recommendation came from a respected employee of an organisation trusted by the teachers' unions, Mr and Mrs M decided to take on Mr B's services.

Mr and Mrs M say they received an Abacus business card from Mr B in 2012 and met with Mr B on a number of occasions. They received a recommendation letter dated 21 November 2012. This confirmed that:

> *Abacus Associates Financial Services Limited is authorised to conduct investment business under the Financial Services & Markets Act 2000 and is regulated by Financial Services Authority.*

It was also recorded in the recommendation letter of 21 November 2012 that they wanted to invest a lump sum of £50,000 for capital growth. Mr B recommended Mr and Mrs M each open an ISA in their individual names for £11,280 and a joint unit trust of £27,440 to fund future ISA's. Mr B recommended the Abacus Associates Private Client Account Wrap which was described as follows.

> ***The Abacus Associates Private Client Account Wrap provided by Standard Life.*** [original emphasis]
>
> *The "Wrap" is an internet-based platform providing access to various products and tax wrappers with one easily accessible portal.*
>
> *Through these products and tax wrappers investors can access a full range of UK retail open-ended investment companies and unit trusts. In its simplest terms it is a piece of technology allowing investors and their advisers to use a streamlined administration system with funds purchased with charge discounts.*
>
> *The "wrap" is owned by Standard Life and the software is supplied by First New Zealand Capital.*
>
> *Standard Life is a leading UK financial services company providing pensions, investments and life assurance products. They recently demutualised and became a FTSE I 00 company listed in the London Stock Exchange.*
>
> *Through the wrap service a broad array of investment options are available to meet different needs. The range of funds is well over 1,900 from over 50 different providers.*
>
> *Standard Life through its buying power has been able to negotiate better terms and discounted charges for most of the funds. The funds through the platform are available via their core fund list which has the most aggressive discounts and platform funds which also have*

excellent terms.

The funds outside of these two areas are also available via normal OEIC and unit trust charges.

There is no initial charge for funds in the core or platform lists and no necessity to use Standard Life funds. The only initial deduction is for an initial adviser charge payment to Abacus Associates for arranging this investment.

The funds available in the platform include a number of Manager of Managers, Fund of Funds and also model portfolios created by Old Broad Street Research. Depending on an investors risk profile and objectives we will be able to recommend the correct funds or combination of funds.

The platform has competitive charges which are determined by the underlying funds used. There are also no switch charges. The charges taken by the fund management groups and Standard Life for running the wrap include discounts and rebates making them competitive compared to directly investing and also further rebates are available through the wrap as funds exceed £100,000.

We believe the wrap platform provides clients with consolidated information relating to their range of fund holdings and product wrappers whilst also providing annual tax statements and online access to their platform at any time. Switches can be carried out within the platform between products and fund managers at no costs.

The wrap provides an excellent opportunity for investors to have a more consolidated portfolio with instant valuations and the ability to move seamlessly between funds. The costs of the platform are competitive compared to individual products and also include nosurrender penalties.

Based on our research of other wrap providers we found the Standard Life offering to be very comprehensive with competitive charges and a workable internet based platform.

Based on their individual attitudes to risk, Mr B recommended a Medium Minus Portfolio for Mrs M, the Medium Plus Portfolio for Mr M and the Medium Portfolio for the investment held in their joint names. For ease of reference I will refer to these collectively as the Abacus Medium Portfolios.

Mr and Mrs M opted for the Premier Service. This would ensure they would meet Mr B at least once a year to review their investments and re-balance/re-structure their portfolios as required. It was also noted Abacus would be remunerated for their services via the ongoing adviser charging option which for the recommendation was 0.5% of the fund value (approximately £250 based on the initial investment of £50,000).

A client agreement document was signed and dated on 21 November 2012 by Mr and Mrs
M. I have set out some relevant paragraphs below:

INVESTMENT SERVICES

Abacus Associates Financial Services Limited is permitted to advise on and arrange (bring about) deals in investments.

We may contact you in the future by means of an unsolicited promotion (i.e. where you had not expressly requested it) should we wish to contact you to discuss the relative merits of an investment or service which we feel may be of

interest to you.

Abacus Associates Financial Services Limited ***does not handle clients' money.*** *We never accept a cheque made payable to us or handle cash (unless it is payment in settlement of charges or disbursements for which we have sent you an invoice).*

REGULATORY STATUS

Abacus Associates Financial Services Limited, 104-106 Widemarsh Street, Hereford. HR4 9HG is authorised and regulated by the Financial Services Authority. Our FSA Register number is 230342.

You can check this on the FSA's Register by visiting the FSA's website - www.fsa.gov.uk/register or by contacting the FSA on 0845 606 1234……

WHOSE PRODUCTS DO WE OFFER?

We offer products from the whole of market.

WHICH SERVICE WILL WE PROVIDE YOU WITH?

We will advise and make a recommendation for you after we have assessed your needs…..

ACCOUNTING TO YOU

We will confirm to you in writing the basis or our reason for recommending the transaction executed on your behalf.

We will also make arrangements for all your investments to be registered in your name unless you first instruct us otherwise in writing. We will forward to you all documents showing ownership of your investments as soon as practicable after we receive them; where a number of documents relating to a series of transactions is involved, we will normally hold each document until the series is complete and then forward them to you.

INVESTMENT OBJECTIVES & RESTRICTIONS

Following the issue of this document, any subsequent advice or

recommendation offered to you will be based on your stated investment objectives, acceptable level of risk and any restrictions you wish to place on the type of investments or policies you are willing to consider. Details of your stated investment objectives will be identified during our discussions with you and confirmed in the suitability report that we will issue to you to confirm our recommendation. Unless confirmed in writing, to the contrary, we will assume that you do not wish to place any restrictions on the advice we give you.

On 21 November 2012 Mr and Mrs M signed a form authorising Abacus to switch funds/rebalance or complete transactions on their behalf.

Events between 2013 to 2014

Mr and Mrs M met with Mr B on a number of further occasions. Some actions taken following recommendations made by Mr B included the following:

- Moving their existing ISA's from other providers to the Standard Life Wrap and into the individual portfolio's in their name.
- Making monthly contributions of £1,000 from November 2014 for Mrs M and from December 2014 for Mr M (with his first payment being £2,000) into their individual ISA's within the Standard Life Wrap.

The above were all invested legitimately in the Abacus Medium Portfolios within the Standard Life wrap.

Events in 2015

Mr and Mrs M were advised by Mr B to open a Standard Life SIPP. An Initial Adviser Charge, Ongoing Services and Payment agreement was signed on 12 March 2015 and the Basic Service was selected.

This was invested legitimately as per the recommendations.

Events in 2016

Mr and Mrs M say that in March/April 2016 Mr B told them that he had been looking at different ways to invest their money. He said that as Abacus was now a large company, they were looking to streamline and reduce charges by '*cutting out the middleman'*. As they had Abacus Portfolios in a Standard Life Wrap Mr B said they would incur less charges on any investments made.

Mr and Mrs M say that Mr B told them he would arrange for the proceeds from their existing investments in the Standard Life Wrap to be transferred to their bank account. Once this was completed, Mr B asked Mr M to call him so that he could arrange for their monies to be re- invested.

Mr and Mrs M say they were asked to write a cheque in favour of Abacus Associates. Mr and Mrs M say they weren't financial astute and so they didn't understand the intricacies of how the streamlining worked. However, their understanding was that monies would be invested within a Standard Life wrap in Abacus Medium Portfolios as per before but with reduced costs because of the "streamlining".

Mr and Mrs M have provided a copy of their bank statements confirming that £104,488 was received into their joint account between 14 June 2016 to 16 June 2016 from the surrender of the investments within their Standard Life Wrap.

Mr and Mrs M have also provided bank statements which shows that a cheque for the sum of £104,488 was paid out of the account. They have also provided a copy of the cheque which confirms this was in favour of Abacus Associates. Tavistock has confirmed that their investigations show this sum was paid into Mr B's bank account which he had been privately operating in the name of Abacus Associates.

In addition, Mr and Mrs M were making regular payments to their Standard Life investments. They say Mr B said that as part of the streamlining between Standard Life and Abacus the monthly payments would be paid to Abacus.

Mr and Mrs M's bank statement shows that a monthly sum of £2,000 was paid to Abacus

Associates on 30 June 2016 and the last payment was made to Abacus Associates on 29 August 2017.

Mr and Mrs M have confirmed to our service that they didn't receive any letters for the June 2016 transactions and that all the dealings were done at home. However, they have provided copies of their testimony to the police and details of their dealings with Mr B.

Mr B also sent a document entitled "*Your Wrap Information*" for Mrs M's investments in 2017. This purported to show that a sum of £65,652 was invested in a Personal ISA Portfolio. This was very similar to a valuation summary as at 15 March 2013 (when the monies were legitimately invested).

Events in 2017

Mr and Mrs M made two further payments to Mr B in 2017 of £15,000 (totalling £30,000) which they say they made following advice received from him.

Mr and Mrs M have provided a copy of a recommendation letter dated 21 March 2017. The recommendation letter explained that having reviewed their existing cash savings Mr and Mrs M wanted to move £15,000 to an account which paid a better rate of interest. With this in mind Mr B recommended that they invest the sum in the Abacus Associates Private Client Cash Account (the cash account).

The recommendation letter explained cash account was a platform providing access to various product and tax wrappers with one easily accessible portal. This allowed customers to have a multi fund portfolio managed by their advisor at a much lower cost than would be available if they invested directly with individual companies. However it was also possible to leave the money in a cash account which paid 3% per annum variable. It was noted that Abacus participated in the Financial Services Compensation Scheme (FSCS) and the cash deposits were protected up to the value of £75,000.

Mr and Mrs M say they initially made a payment of £15,000 for investment within the cash account. They have provided a copy of their bank statement and cheque showing this payment of £15,000 via a cheque was paid out of their joint account on 20 March 2017. The cheque was made payable to Abacus Associates. They have also provided an "Account Summary" sent to them by Mr B which is headed "Mr and Mrs M" and showing that a sum of £15,000 was held in a Standard Life account. We now know this to be a

forgery.

Mr and Mrs M say they made a further payment of £15,000 which was also to be invested in the cash account. They have provided a copy of their bank statement showing that a further cheque payment of £15,000 was made on 15 May 2017. They have provided a copy of the cheque which confirms it was written in favour of Abacus Associates.

Mr and Mrs M said they needed monies from home improvements and a sum of £5,000 was returned to them by Mr B. They understood this to be from the investment held within the cash account. They received this payment in August 2017.

Also in 2017 Mr B helped set up a will for Mr and Mrs M and a cheque payment was made to Abacus Associates directly. I understand this was set up correctly and legitmately.

Complaint in 2018

In September 2018 Mr and Mrs M contacted Abacus at their Hereford Office to make an enquiry as to the whereabouts of Mr B. This is because he had started to not keep

appointments, had been postponing visits and not answering calls. The following day they were made aware that Mr B wasn't with Tavistock and about the fraud that had occurred.

Mr and Mrs M wrote a letter of complaint dated 10 September 2018. In brief they said that:

- Mr B had been their financial advisor for nearly six years and had gained their trust during this period.
- He advised them of various ways they could make the best use of monies available to them from a pension lump sum and ongoing savings. As a result they had invested a total of £165,000 in various investments.
- They had made cheques payable to Abacus Associates which had without their knowledge been redirected to Mr B's personal account.
- They were led to believe that they were taking out products and services that were appropriate for their needs. However, they have now discovered all their funds were stolen.
- They explained Mrs M had been diagnosed with Parkinson's disease in 2015 and this matter had caused significant trouble and upset.
- They held Tavistock responsible for their losses.

Tavistock didn't uphold Mr and Mrs M's complaint. On 21 February 2019, they provided their final response to the complaint. In summary, it said:

- Their records showed since 21 November 2012 Mr and Mrs M had been clients of Abacus and subsequently Tavistock.
- *There was no regulated activity*- what had happened was fraud/theft and not a legitimate investment and Mr and Mrs M had been persuaded to hand over cheques to Mr B. Abacus and Mr B weren't permitted to handle client money. Misappropriation of money is not a

regulated activity. The complaint doesn't relate to an activity regulated by the FCA.

- *Mr B didn't have Abacus' actual authority*- he wasn't authorised to misappropriate client's money and Abacus had no knowledge of what he was doing.
- *There wasn't ostensible authority*- Mr and Mr M didn't rely on Mr B acting on behalf of Abacus and it wasn't reasonable for them to think so. The advice to streamline investments in 2016 should have been perceived as lacking in credibility.
- Tavistock referred to the client agreement dated 21 November 2012 which stated that: *"Abacus Associates Financial Services Limited does not handle clients' money. We never accept a cheque made payable to us or handle cash (unless it is payment in settlement of adviser charges or disbursements for which we have sent you an invoice)."* As a recent Court case had shown, this meant that Mr and Mrs M should have known that writing cheques to Abacus could not be right.
- They did not receive any documentation and in-depth advice as they had done for legitimate investments made before 2016.
- The letter they received from Mr B in 2017 relating to the cash account listed the FSA - not the FCA. This discrepancy ought to raised suspiciouns.
- *There isn't vicarious liability*- the fraud that took place was not an integral part of Abacus business and Abacus had no knowledge of it.
- *Their systems and controls were adequate*- no reasonable system of monitoring would have resulted in the fraud being discovered.

Mr and Mrs M responded to the final response letter. In brief they said that

- They were inexperienced clients who sought out a financial adviser to help with their financial planning for their retirement.
- They hadn't complained about Mr B's action. Their complaint was the duty owed by Tavistock to them.
- They weren't "persuaded" to pay Mr B nearly £159,000. The cheques were made payable to Abacus Associates and not to Mr B direct. They weren't aware he had opened a personal bank account in the name of Abacus Associates.

The investigator's opinion

The complaint was considered by one of our investigators. He thought we could consider the complaint. His findings were that:

- The matter of the "investment" of £104,488 in 2016 and ongoing monthly contributions was separate to the two £15,000 investments in the cash account in 2017. They were separate acts. He dealt with the 2016 investment in this complaint reference and the 2017 investments under a separate reference.

- Mr and Mrs M's complaint was about the failure of Mr B (and consequently Tavistock) to provide professional investment services.

- Mr B advised Mr and Mrs M to invest in the Abacus Medium Portfolio in the Standard Life wrap. These portfolios were genuine products available on the open market and which were specified investments in The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO).
- Therefore Mr B undertook a regulated activity under Article 53 of the RAO. This is notwithstanding that Mr B misappropriated the monies paid by Mr and Mrs M for the investment. Mr B's fraud was carried out in connection with that regulated advice.

- Mr B had signed a representative agreement with Tavistock. Under that agreement Tavistock appointed Mr B as its representative. He was given authority to give investment advice. But Mr B had not acted in Tavistock's best interests when misappropriating money and it couldn't therefore be said that he'd acted with Tavistock's actual authority.

- However, Abacus had represented that Mr B had its authority to give investment advice about the Abacus Medium Portfolio. Mr and Mrs M had reasonably relied this representation. So Mr B had apparent authority/ostensible authority to give the advice he gave. Mr and Mrs M's complaint is therefore about business for which Tavistock had accepted responsibility.

- Abacus also accepted responsibility for the acts being complained about on the basis of vicarious liability. That was because there was a sufficient relationship between Mr B and Abacus and the act being complained about was within the field of activities assigned to Mr B and it had a sufficiently close connection with those activities.

- Furthermore, when Mr B advised Mr and Mrs M to invest and failed to arrange the investment, he was acting in his capacity as Abacus' approved person for the purpose of carrying on Abacus' regulated business. Mr and Mrs M was Abacus' "client" for the purposes of the client's best interests rule in COBS. If Mr B failed to act honestly and failed to arrange the recommended investment then (subject to the recognised defences) Abacus is responsible in damages to Mr and Mrs M under the statutory cause of action provided by section 138D(2) of FSMA. So the investigator said that 138D(2) of FSMA provides an alternative route by which Abacus is responsible for the acts complained of.

- It is not in dispute that Mr B defrauded Mr and Mrs M of their money. It is fair and reasonable Tavistock should compensate Mr and Mrs M for their loss.

- Tavistock should therefore pay compensation to Mr and Mrs M for the £104,488 investment in 2016 and ongoing monthly contributions.

Tavistock disagrees with the investigator:

Tavistock did not agree with the investigator and lawyers responded on its behalf. They argued that the investigator had introduced or been influenced by the test of fairness and reasonableness into jurisdiction (where it has no part to play) by dealing with both jurisdiction and merits (where the test does apply) in one single assessment letter. The ombudsman service should resolve the issue of jurisdiction first and separately before it can consider merits. Tavistock would only comment on jurisdiction at this stage.

They made a number of points as *summarised* below:

No regulated activity

- The Financial Ombudsman Service does not have jurisdiction to consider this complaint, because the activity complained of was not a regulated activity or ancillary to a regulated activity. Mr and Mrs M provided Mr B with the cheque for £104,000 in 2016. However, there was no documentary evidence of any advice at that time.

- In any event, in practice, Mr B did not provide investment advice. He persuaded his victims to pay money into his own personal bank account – he misappropriated their money. The definition of a regulated activity requires both a specified activity and a specified investment. The fraud carried out by Mr B was not in relation to a specified investment. The list of specified investments includes only real investments not purported investments. Fraud, however it is dressed up, is outside the regulatory framework and outside the ombudsman service's jurisdiction. It cannot be correct that whenever a fraudster mentions a legitimate investment product to persuade a victim to hand over money that it falls within the ombudsman service's jurisdiction.

- The investigator had said that there was a disinvestment of a legitimate investment and the purported reinvestment by Mr B was part of a single stream of advice. That was not correct and this case was not analogous to the case of *Tenetconnect Services Ltd v Financial Ombudsman and another [2018] EWHC 459*. This case did not involve regulated advice about a legitimate Standard Life product that can be linked to Mr B's fraudulent scheme. And there was no evidence of disinvestment or reinvestment advice.

Apparent authority

Tavistock's lawyers agreed with the investigator that there was no *actual* authority, but they argued that there was no apparent authority either.

- For apparent authority there must be a representation by the principal to the third party that the agent had authority which the third party relied upon to their detriment. In this case those

requirements would need to be met before Mr and Mrs M handed over the cheque to Mr B.

- Mr and Mrs M had received significant documentation on the occasions in 2012 and 2015 when they had received legitimate advice from Mr B about their Standard Life investments and pensions. No documentation was provided to them for the 2016 investment.

- Mr and Mrs M made payments to Standard Life for those direct investments. This is in contrast to paying money directly into Mr B's bank account in relation to the fraud (albeit the account was privately operated by Mr B in the name of Abacus Associates).

- Tavistock reiterated that Mr and Mrs M had signed a client agreement in 2012 that said that Abacus did not handle client money. In the recent case of *Anderson v Sense Network Limited* [2019] EWCA Civ 1395 ("Sense"), the first instance judge held that, for Claimants who had purchased legitimate investments via the Appointed Representative Midas and who had signed Midas' terms of business (which included a warning about Midas not being authorised to handle client money), in respect of their payments into Midas' fraudulent scheme, they:

  > *"were therefore aware of or signed documentation which expressly provided that [Midas] could not handle client money or accept cheques made out to [Midas]. In my view, this is in itself fatal to any case of ostensible authority".*

  So, the terms of the client agreement that Mr and Mrs M signed in this case was fatal to their complaint on apparent authority.

- So it was impossible in these circumstances for apparent authority to apply. There were no representations and no reliance by Mr and Mrs M.

Vicarious liability

Tavistock's lawyers also said that vicarious liability could not apply either:

- *Frederick v Positive Solutions* [2018] EWCA Civ 431 is the most recent and highest authority on vicarious liability in a financial advisory context – rather than general context. The Court of Appeal left open the proposition that cases of fraud by commercial agents are governed by a different set of rules, a proposition which gains support from *Winter v Hockley Mint* [2019] 1 WLR 1617.

- In *Frederick*, the Court of Appeal specifically considered an argument of vicarious liability and found that – despite (a) the agent used the principal's

online portal to transact the unauthorised business; (b) the latter business was substantively connected to the authorised business (proceeds of re-mortgage); and (c) the two were temporally proximate – the principal firm was **not** vicariously liable for the acts and omissions of the adviser. The Court of Appeal deemed that the fraudulent 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 *ratio* of the Court of Appeal in *Frederick* to this case, Mr B persuaded Mr and Mrs M to pay money into a bank account that he controlled. This was entirely separate from and unknown to Tavistock and could not have been known to Tavistock. It was a separate account opened and used for separate purposes. In no way could it be said that Mr B's fraud was an integral part of Tavistock's business.

- The application by the investigator of the general test for vicarious liability to a financial advisory context is a clear attempt to extend the current law. There is no evidence that the Courts have any inclination to take the law of vicarious liability in this direction in a financial advisory context, despite the Court of Appeal having had the opportunity to do so.

Section 138D FSMA

Tavistock's lawyers also said that the investigator's arguments regarding section 138D FSMA were unfounded:

- Section 138D FSMA does not create a cause of action in its own right. It is subject to defences as it provides that:

  "*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.*"

- Such defences include the defence that a principal is not responsible for the acts and/or omissions of the agent who committed the breach. Furthermore, in *Sense*, the High Court makes clear that the claimants who satisfied the definition of private persons had a potential cause of action under section 138D for breach of the COBS rules, but this was obviously subject to a defence that the Appointed Representative was not acting with the principal firm's authority and, on the facts, the judge (approved by the Court of Appeal) found the authority defence to be effective.

Other objections

Tavistock's lawyers also objected to the "splitting" of the complaint. They argued that this case involves one fraud perpetrated by one adviser on various occasions. It was a single fraudulent scheme: Mr B persuaded his victims to pay monies into his own personal bank account. He misappropriated their monies, on a number of occasions, using the same technique and/or device. The decision to "split" Mr and Mrs M's complaint into two is entirely arbitrary, and the Service has provided no reasons for it.

Separate complaints?

I have written to the parties to make them aware that I am of the view that it is right to treat the events relating to the 2016 investment of £104,488 and regular contributions as separate to the investments of £15,000 (twice) in 2017.

To reiterate to the parties, the definition of "complaint" is set out in the FCA Handbook. That says a complaint is:

> *"any oral or written expression of dissatisfaction, whether justified or not, from, or on behalf of, a person about the provision of, or failure to provide, a financial service or a redress determination, which:*
> *(a) alleges that the complainant has suffered (or may suffer) financial loss, material distress or material inconvenience; and*
> *(b) relates to an activity of that respondent, or of any other respondent with whom that respondent has some connection in marketing or providing financial services or products, which comes under the jurisdiction of the Financial Ombudsman Service."*

Cases can be "split" where we believe that the matter brought to us involves more than one activity of a respondent.

Here, the activity being complained of relates to events in 2016 when Mr and Mrs M say they were advised to disinvest their investments held in the Abacus Medium Portfolio within the Standard Life Wrap and reinvest the same and continue to make regular monthly contributions in order to streamline costs and charges.

This is clearly different to the acts that took place in 2017 when Mr and Mrs M say they were advised to invest separate sums of money in an Abacus Cash Account in the Standard Life Wrap.

So it is right that we deal with each activity separately and this decision relates only to the investment in 2016 of £104,488 and the ongoing contributions Mr and Mrs M made for that investment.

My findings – jurisdiction

I've considered all the evidence and arguments in order to decide whether the Financial Ombudsman Service can consider Mr and Mrs M's complaint.

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).

It follows that 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.

I would add that if there are any disputed issues of fact that I need to resolve to help me decide either jurisdiction or the merits, it falls to me to decide them

according to the balance of probabilities.

The compulsory jurisdiction

The Financial Ombudsman Service can consider a complaint under its compulsory jurisdiction if that complaint relates to an act or omission by a "firm" in the carrying on of one or more listed activities, including "regulated activities" (DISP2.3.1R). The compulsory jurisdiction also extends to complaints that relate to a firm's acts or omissions in carrying on "ancillary activities, including advice, carried on by the firm" in connection with regulated activities.

Abacus is a "firm" under our rules, and it does not dispute that. "Regulated activities" are defined by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the RAO) as discussed below.

As DISP 2.3.3G explains, "*complaints about acts or omissions include those in respect of activities for which the firm … is responsible (including business of any appointed representative or agent for which the firm … has accepted responsibility)*".

So there are two questions to be determined before I can decide whether this complaint can be considered under the compulsory jurisdiction of this service:

1. Were the acts about which Mr and Mrs M complains done in the carrying on of a regulated activity, or an ancillary activity?

2. Was the principal firm, Abacus, responsible for those acts?

Before I do that, I will set out some further relevant background matters.

The regulatory background:

I have taken into account the FSMA, the RAO, and the Conduct of Business Sourcebook section of the FCA Handbook (COBS).

Regulated activities

An activity is a regulated activity if it is an activity of a specified kind that is carried on by way of business and relates to an investment of a specified kind, unless otherwise specified (section 22, FSMA).

Regulated activities are specified in Part II of the RAO and include:

- advising on the merits of buying or selling a particular investment which is a security or a relevant investment (article 53 RAO),

- making arrangements for another person to buy or sell or subscribe for a security or relevant investment (article 25 RAO), and

- agreeing to carry on either of those activities (article 64 RAO).

The general prohibition

Section 19 of FSMA says that a person may not carry on a regulated activity in the UK, or purport to do so, unless they are either an authorised person or an exempt person. This is known as the "general prohibition".

At the time of the events complained about, Abacus an 'authorised person' (also referred to as a 'firm' in regulator's rules). That means it could carry out regulated activities without being in breach of the general prohibition.

Mr B was neither an authorised person nor exempt from authorisation. That means if Mr B had carried out a regulated activity on his own behalf by way of business, he would have been in breach of the general prohibition.

The approved persons regime

The 'approved persons' regime is set out in Part V of FSMA. Its aim is to protect consumers by ensuring that only 'fit and proper' individuals may lawfully carry out certain functions within the financial services industry.

At the relevant time, section 59(1) of FSMA said:

> *"(1) An authorised person ("A") must take reasonable care to ensure that no person performs a controlled function under an arrangement entered into by A in relation to the carrying on by A of a regulated activity, unless the Authority approves the performance by that person of the controlled function to which the arrangement relates."*

Abacus was an authorised person. The act of advising on investments was a controlled function.

Abacus arranged for Mr B to be approved by the FSA (later FCA) to perform the controlled function *"CF30 Customer"* from 17 April 2012 to 18 May 2018. CF30 was defined in terms that included "*advising on investments … and performing other functions related to this such as dealing and arranging*": see SUP 10A.10.7R.

The approved persons regime does not depend on an individual's employment status. Employees can be approved persons, as can non-employees like Mr B.

Breach of statutory duty

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 said:

> "*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 FSA under

FSMA.

One such rule in place at the time of the events Mr and Mrs M complains 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 Mr and Mrs M suffered a loss as a result of an actionable rule such as this being breached by Abacus, they would have a right of action against Abacus/Tavistock for breach of statutory duty as private person. But they would have no such right against Mr B because he was not himself a 'firm' or an 'authorised person'. His status as Abacus' CF 30 advisor only allowed him to perform particular functions (including advising on investments and arranging

deals) in relation to regulated activities that Abacus carried on and for which Abacus was answerable under the FCA rules.

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.

In *Full Circle Asset Management v Financial Ombudsman Service* [2017] EWHC 323 (Admin) Nicol J said:

> 1. *It was, in my view, a necessary part of [the ombudsman's] function to determine the nature of [the consumer's] complaint. After all, as the Court of Appeal said in R (Heather Moor and Edgecomb Ltd) v Financial Ombudsman Service [2008] EWCA Civ 642 at [80] the Ombudsman 'is dealing with complaints, and not legal causes of action' and, as Irwin J. said in R (Keith Williams) v Financial Ombudsman Service [2008] EWHC 2142 (Admin) at [26] 'His jurisdiction is inquisitorial not adversarial.'*
> 54. *…the Ombudsman was not confined to what appeared in this box on the [complaint] form in deciding the nature of [the consumer's] complaint. He was entitled, as he did, to look more widely at the correspondence which she and her adviser had written to the Claimant and to him.*

Mr and Mrs M wrote a detailed letter of complaint to Tavistock in September 2018. Relevant extracts of that letter are:

- *"No one [at Abacus] contacted us even when his misconduct had become apparent."*
- *"We believe that the company should have been aware of what he was doing."*
- *"We believe that Abacus Associates/ Tavistock Partners (UK) Ltd have a duty of care to clients to ensure your advisers are acting within the law and in the best interests of the clients."*

- *"We are of the opinion that Tavistock Partners (UK) Ltd. have failed in delivering the above values statement"* [a reference to Tavistock's website].

- *"[Mr B] has been able to set up a private bank account called Abacus Associates resulting in the loss for us of a large amount of money, in fact our life savings. The immediate and future impact of this is devastating…"*

- *"We suggest that your company has failed to adequately monitor and regulate this individual adviser and we believe that Tavistock Partners (UK) Ltd. should bear responsibility for this."*

- "*We request that Tavistock Partners (UK) Ltd offer compensation to the value of what we have invested (approx.£165,000) which would have stayed in our accounts had the adviser working for your company acted honestly and if Tavistock Partners (UK) Ltd. had demonstrated due diligence and duty of care in rigorously monitoring the activities of this particular adviser*.

In response to Tavistock's final response letter Mr and Mrs M said that:

> *Quote '[Tavistock say] Your complaint is that [Mr B] persuaded you to pay £159,000 to him' . This is categorically not our complaint.*
>
> *We have not complained about [Mr B's] actions. Nothing would be achieved by this. ' Persuaded' is the wrong word and we did not pay him £159,000. Persuaded is a word that they have used on a number of occasions.*
> *More accurate wording would be advised or suggested. Any cheques that we signed were made to Abacus Associates not to [Mr B].*
>
> *Our complaint is, despite claims on their website regarding 'the supervision of advisers', Abacus/ Tavistock have been remiss in their duties with regard to the monitoring and appraisal of their advisers and therefore should bear responsibility for his actions.*

In my view Mr and Mrs M's complaint is that they consulted Mr B in order to get bona fide investment services from an authorised investment adviser. Their complaint is that Abacus is responsible for its adviser failing to provide the professional investment advice service and acting in their interests when he instead paid the money into the account he controlled and stole their money.

Were the acts Mr and Mrs M complains about done in the carrying on of a regulated activity?

At the time of these events Abacus carried on the regulated activities of advising on investments, arranging deals in investments and agreeing to advise and arrange deals. Mr and Mrs M's complaint relates to these activities.

Abacus' position is that the reality is Mr B was not advising on any kind of investment as no investment existed. There was never any investment so there was no investment advice. Mr B was simply, and only, stealing Mr and Mrs M's

money. It in effect says I should consider the reality not the fiction created by Mr B.

Tavistock says fraud is outside the regulatory framework and cannot be brought in just by the mention by the fraudster of a regulated investment.

However, and for the same reasons explained by the investigator, I don't agree with Tavistock's analysis.

The regulated activity of advising on investment is defined in Article 53 RAO as follows:

> *"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 (whether as principal or agent)—*
> *(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."*

"Security" means any investment of the kind specified by any of articles 76 to 82. (I will return to this point below.)

Therefore if an adviser advises a client to invest in a specified investment there is regulated investment advice even if the adviser intercepts the payment and steals the money. This is

because although buying an investment naturally follows investment advice the actual purchase is not part of the definition of the regulated activity of advising on investments.

The subsequent arranging of the deal is a separate regulated activity under Article 25 RAO – even if the two activities normally run one into the other without much thought being given to that process. Also as I have mentioned agreeing to advise on investments and agreeing to arrange deals in investments is a regulated activity under Article 64 RAO.

To satisfy the definition of the activity under Art 53 there must be advice – not just, say, the provision of information. And the advice must

- be to a person in their capacity as an investor or potential investor
- relate to an investment that is security or relevant investment
- relate to the merits of buying, selling etc the investment
- relate to a particular investment

There isn't a great deal of evidence relating to events in 2016 when the £104,488 was invested or the subsequent monthly contributions that Mr and Mrs M made. I do however have Mr and Mrs M's version of events in which they say they were advised by Mr B that undertaking these transactions would result in lower costs and streamlined services, the statement from Standard Life showing the money

disinvested, the cheque that they paid to Abacus Associates and the investment statement that was provided to Mrs M in 2017.

Based on the evidence that is available to me it is my finding that Mr B did likely advise Mr and Mrs M to disinvest £104,488 from the Abacus Medium portfolio with Standard Life in order to re-invest it into the same portfolio and continue to make regular contributions to the investment. I say this for the following reasons:

- Mr and Mrs M's account has been credible and consistent. There is no indication that they have been untruthful or unreliable at any point.

- I can't see how or why Mr and Mrs M would have disinvested their funds from the Standard Life wrap and wrote the cheque to Abacus Associates if they had not been advised that this was an appropriate and suitable course of action for them by an adviser they trusted – i.e. Mr B.

- Mr and Mrs M had agreed to meet with Mr B at least annually when they first took advice from Mr B in 2012. I think the acts here were likely to have been part of those regular meetings to discuss their investments and strategy.

- We know from other complaints that Mr B advised many people to invest in Abacus Portfolios in a Standard Life wrap and asked for the cheques for the investments to be made payable to Abacus Associates and then stole the money. So, what has happened here is consistent with what we know to be Mr B's modus operandi in operating his fraud.

- The statement sent to Mrs M in 2017 was a forgery but appears to be an attempt by Mr B to give a veneer of credibility to advice he'd previously provided and to cover his tracks. The statement shows £65,652 in Mrs M's wrap invested in a personal portfolio with a list of assets. I think this portfolio was purporting to be the Abacus Medium

  Portfolio that she'd been invested in previously. This was clearly a document that post-dated the investment of £104,488. But it is, in my view, evidence of what Mr and Mrs M was likely to have been advised in 2016 about how their funds would be used and also is relevant to the ongoing monthly contributions that Mr and Mrs M were making.

So there was advice – but was this in connection with a security or relevant investment?

Mr and Mrs M and Mr B were discussing – and Mr B was recommending - a disinvestment proposed re-investment in the same portfolio – a portfolio that was actually offered by Abacus. The Standard Life Wrap and the Abacus Medium Portfolio were not inventions of Mr B on a one-off basis to facilitate his fraud. The Abacus Associates Private Client Account was a "private label" of the Standard Life platform and I understand the Medium Portfolio was an actual portfolio used by Standard Life and Abacus at the time. Tavistock's advisers were and are authorised to recommend it to investors.

The Standard Life Wrap is an arrangement through which investments may be made into various funds. The funds are, as I understand it, collective investments. While I have not analysed their precise legal status, I anticipate they are likely to be either unit trusts or open- ended investment companies and therefore collective investment schemes under Article 81 RAO. Such investments come within the definition of the term security for the purposes of Article 53.

In this case, Mr B advised Mr and Mrs M to disinvest their funds and reinvest in the medium portfolios in Abacus Associates Private Client Account. So it is my view that there was advice on the merits of selling and buying the collection of collective investments schemes that made up the Abacus Medium Portfolio at the time notwithstanding the point that the funds may not have been identified or discussed individually.

Tavistock's position is that it was not investment advice because the substance of what Mr B did that must be reviewed: he never gave investment advice and never intended to do so. He only intended to persuade Mr and Mrs M to pay money into his personal bank account and that this was therefore a purported - and not real investment.

I don't agree with this analysis. First, Mr B did give Mr and Mrs M advice to disinvest from their existing holdings. That in itself is a regulated activity. And it is intrinsically linked to the reinvestment advice that Mr B gave about the use of those funds.

Further, when viewed from Mr and Mrs M's position, or from the position of an objective observer, they were clearly advised to disinvest their existing investment and *reinvest* the money to the same platform to make investments. And when looked at objectively or from Mr B's viewpoint, he advised them to do so – it was an essential part of his fraud. This is not a case where, say, the adviser persuades the investor to lend money to the adviser personally or join in a joint investment project with the adviser personally. And it's not a case where – as with some of the other money they later transferred to Mr B – they thought it was going to sit in cash. They always thought they were disinvesting reinvesting in the Abacus Medium Portfolio to be held in a Standard Life wrap.

I do not agree that Mr B's fraudulent intention not to arrange the recommended investment means that he did not advise Mr and Mrs M to disinvest their investment or that no reinvestment was in fact recommended.

So it is my view Mr B recommended the disinvestment and reinvestment. It is also my view that he then agreed to arrange that investment by words or conduct as part of the process.

That is how he persuaded Mr and Mrs M to make the recommended investment and give him a cheque in payment for the investment.

Therefore, my conclusion is that this complaint does relate to the regulated activity of advising on investments, and or/ of arranging deals in investments and/or of agreeing to do one or other or both of those activities.

Also, although I think the complaint relates squarely to those regulated activities, if it could be said that any part of Mr B's conduct didn't fall within those activities, the conduct was in my view at least "ancillary" to one or more of them. For example, the steps Mr B took to cover his tracks, by suggesting to Mr and Mrs M in the

2017 statement (we only have the statement for Mrs M) that their money had been profitably invested by Abacus seem to me to be at least ancillary to the regulated activities I have identified.

Was Tavistock responsible for the acts Mr and 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 B.

It isn't in dispute that Mr B did not have Abacus' actual authority to carry out the acts here. He did not act in accordance with the agency agreement. He was authorised to give investment advice to clients such as Mr and Mrs M on behalf of Tavistock, including recommending disinvesting and investing in the Standard Life wrap and the Abacus Medium Portfolio. He was also authorised to arrange such investments. However, he was not authorised to commit the fraud. He had no authority to hold client's money. He failed to follow its usual processes and procedures in relation to Mr and Mrs M and Tavistock received no payments or commissions etc.

There is also a general point that an agent (Mr B) is required to try to act in the principal's (Abacus') best interests. Here, all Mr B's conduct was motivated by his intention of stealing Mr and Mrs M's money and preventing him from discovering the theft. And stealing money from Tavistock's client that was supposed to be invested through Tavistock was clearly not trying to act in Tavistock's best interest.

I therefore accept that Mr B was not acting with Tavistock's actual authority in relation to the matters about which Mr and Mrs M complains.

Apparent (or ostensible) authority

However, that is not the end of the matter. In an agency relationship, a principal may limit the actual authority of his agent. But if the agent acts outside 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 Mr and 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 *Anderson* case was the subject of an appeal. The Court of Appeal has now issued its decision agreeing with the earlier decision of Jacobs J. I merely wish to acknowledge the fact of the appeal but it should be noted that Jacobs J's conclusion on apparent authority was not appealed by the parties involved in that case.

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 Mr and 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'.*"

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.

So, in determining whether there was apparent authority, I must consider whether, on the facts of this individual case:

- Abacus made a representation to Mr and Mrs M that Mr B had Abacus' authority to act on its behalf in carrying out the activities they now complain about, and

- Mr and Mrs M relied on that representation in entering into the transactions they now complain 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 Abacus placed Mr B in a position which would objectively generally be regarded as carrying its authority to enter into transactions such as recommending the Abacus Medium Portfolio and arranging and reporting on the recommended investments.

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

Did Abacus represent to Mr and Mrs M that Mr B had the relevant authority?

To answer this question, it is right for me to consider whether Abacus placed Mr B in a position which would objectively carry Abacus' authority for Mr B to conduct business of the *type* he purported to conduct.

My view is that Mr B was acting as an independent financial adviser able to independent financial advice through Abacus. And he was able to do this

because at the time of events in this complaint, *Abacus* held itself out generally as an authorised independent financial adviser firm that gave advice and offered investment products and services from the whole of the market through its financial advisers, including Mr B.

This is illustrated in the marketing material relating to Abacus that I have seen that was given to other customers at around the same time. There is no direct evidence that the marketing material was given to Mr and Mrs M, but given that they were longstanding clients of Abacus it is probable that they were provided with this or similar material. Even if they were not provided with such material, the extract below sets out at least broadly the way in which Abacus was generally holding itself (and its advisers) out at the time. The marketing information included:

> *"**abacus associates financial services ltd***
>
> *Abacus Associates Financial Services Limited is a well established firm of Independent Financial Advisers who specialise in personal financial planning. We have advisers based throughout the UK who are ready to help you with a personal financial planning meeting in your home, or at our offices, whichever you prefer.*
>
> *With over 30,000 products available form the whole of the financial market place, our advisers can ensure you gain unbiased access to not only the best value but also the highest quality products available. Our advisers can help you build your very own personal strategic financial plan, to ensure your vision for the future becomes a reality."*
>
> ***who we are***
> *Abacus Associate Financial Services one of the country's leading Independent Financial advisers, (with funds under management of circa £400,000,000).*
>
> *We are a genuinely independent practice with no ties to any Insurance Company, Bank or other financial institution.*
>
> *This independence enables us to advise our clients on products and services from across the whole of the market place.*
>
> *We tailor our service to the diverse need of our clients, offering each one the best possible choice.*
> *Our advisers strive to build a trusted client relationship which will last a lifetime.*
>
> ***what we do***
> *we offer a professional, friendly service with solid, down to earth advice that our clients will understand.*
>
> *We focus on providing out clients with independent wealth management services and, through our wealth management services and, through our investment in technology and the training of our support team, pride ourselves on delivering a highly streamlined service to all our clients.*
>
> ***what we stand for***

As Independent Financial Advisers we pride ourselves in offering "truly independent advice". We have the best interests of our client at heart and act solely on their behalf at all times.
However professional financial advice does come at a cost much the same as legal or accountancy advice.

we specialise in:

- *Creating tax savings*
- *Protecting families from financial disaster*
- *Retirement and pension planning*
- *Wills and estate planning*
- *Creating cash flow for business and raising finance via mortgages and loans*
- *Wealth management*

We offer a friendly service with good, down to earth advice that you will understand. For truly independent advice contact us

what you can expect as a client

- *Truly independent advice from a fully qualified Independent Financial adviser*
- *Support from one of the UK's leading national independent IFA firms which is regulated by the Financial Services Authority*
- *A commitment to ensure all cost and charges are transparent in line with the Retail Distribution Review*
- *To feel safe and secure in the knowledge that we are committed to the highest of professional and regulatory standards."*

Mr B was authorised to give investment advice by Abacus. He was held out by Abacus as one if its advisers. He was registered, by Abacus, as one of its CF30 financial advisers on the FCA Register which is a register which is freely available to the general public.

In his role as a financial adviser with Abacus, Mr B was given business cards and stationery and access to Abacus' email account and computerised records system.

Abacus placed Mr B in a position which would, in the outside world, generally be regarded as having authority to carry out the acts Mr and Mrs M complains about – that is the giving of investment advice and arranging the investment recommended. This is the case both generally and in relation to recommending and arranging investments in the Abacus Medium Portfolio specifically.

It was in Abacus' interest for the general public, including Mr and Mrs M, to understand that it was taking responsibility for the advice given by its financial advisers. I am satisfied that Abacus intended Mr and Mrs M to act on its representation that Mr B was its financial adviser.

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

Tavistock says that no documents were provided to Mr and Mrs M in 2016 and therefore there could be no relevant representation. However, Mr and Mrs M would very likely have been provided with some documentation about Abacus and its advisers before 2016 as they were longstanding clients. And in any event the Court cases I've highlighted set out that representations may be *general in nature and by conduct*. The case law does not say that apparent authority operates only when a principal has represented in documents that an agent has authority to carry out a specific act. Apparent authority operates where a principal has represented that its agent has its authority to carry out a more general class of acts.

For example, Diplock LJ in *Freeman & Lockyer* referred to a representation 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*". And in *Armagas*, Lord Keith said that in the commonly encountered case ostensible authority "*is general in character*" arising when the agent is placed in a position generally regarded as carrying "*authority to enter into transactions of the kind in question*".

Bearing all this in mind, it is my view that Abacus did represent that Mr B was authorised to recommend the Abacus Medium Portfolio to persons, such as Mr and Mrs M, who sought Abacus' advice and to help such persons then implement the recommendation by making the necessary arrangements.

Did Mr and Mrs M reasonably rely on Abacus' representation?

This is a key area of dispute. There are two points here – did Mr and Mrs M rely on the representation of authority I refer to above? And if they did was that reasonable in the circumstances?

I don't think there's any reason to doubt that Mr and Mrs M believed that Mr B was acting at all times as an Abacus adviser and authorised to give investment advice of the type given here. That was an essential part of the overall fraud perpetrated by Mr B.

Tavistock's argument is essentially that it wasn't reasonable for Mr and Mrs M to rely on any representations because (in summary):

- In contrast to the advice they had received in 2012 and on other occasions before 2016, they were not provided with any paperwork about the events in 2016.

- Again, in contrast to their previous legitimate investments they made the cheque for the investment payable directly to Abacus Associates.

- They had signed the Abacus' client agreement acknowledging that Abacus did not handle client money. So, this situation was similar to *Sense* where the fact that clients had paid money to the advice firm in contradiction to the terms and conditions was held to be fatal to apparent authority.

I acknowledge these points and have thought about them carefully. However I think it was reasonable for Mr and Mrs M to rely on the representations

because:

- I don't think consumers necessarily understand the processes and documents involved in getting financial advice – for example who should be providing documentation and what that documentation should consist of. And I don't think it is the case that consumers should know from previous dealings what the process should look like going forward.

- I think the circumstances here are important. Mr and Mrs B had an existing client relationship with Mr B as an Abacus adviser over a number of years and he was meeting them regularly to discuss their investments. They may not have been given documentation in 2016 as was the case previously, but they were, in my view, entitled to believe that Mr B was acting in their best interests at all times as he had done on other occasions previously.

- The cheque was made payable to Abacus Associates and they believed that the investment was effectively an Abacus styled product within the Standard Life wrapper. I don't expect them to have remembered or questioned that this was not how previous transactions were concluded. And of course the advice from Mr B - their trusted Abacus adviser - was that this arrangement was different and "streamlined" version of what they'd done before.

- I do not think that Mr and Mrs M could reasonably be obliged to understand that Abacus is not authorised to hold client money or to even understand what that concept means. They received the client agreement four years previously in 2012 and I would not expect them to remember the terms it contained.

This case is also very different to the situation in *Sense.* In *Sense,* the advice firm was operating a deposit scheme and it was said in the High Court*:*

> *"It is beyond serious argument that the activities of MFSS and Mr. Greig in relation to the scheme, both in terms of operating it and advising upon it, were wholly unauthorised. It is no part of the ordinary business of a financial adviser to operate a scheme for taking deposits from clients. As the Claimants' expert, Mr. Morrey, said: "operating the scheme, so having the monies under your control, clearly is not the work of a financial adviser".*

This case does not involve such a scheme. What was being advised on was an investment – the Abacus Medium Portfolio – that was entirely within what the scope of what Abacus was authorised to give advice on. Mr and Mrs M did not believe that their money was being held by Abacus on deposit at all – but proceeded on the basis that it would be re-invested in the Abacus Medium Portfolio in the Standard Life Wrap.

Furthermore, in *Sense,* the majority of the claimants had never heard of the defendant, Sense Network, and those who had heard of it made their decision to invest before they saw the stationery which they later said contained the representation on which they relied. Here, Mr and Mrs M had clearly heard of

Abacus (having been existing clients for some years) and, in my view, proceeded (correctly) on the basis that Mr B was authorised to provide the financial advice services he gave in connection with the Abacus Medium Portfolio.

Overall, on balance, the evidence does indicate that Mr and Mrs M reasonably proceeded on the basis that Mr B was acting in every respect as the agent of Abacus with authority from Abacus so to act.

My conclusion on agency

It is my conclusion that Abacus is responsible for the acts and omission of Mr B from 2016 in respect of the advice to invest in the Abacus Medium Portfolio until the discovery of the fraud on the basis of apparent or ostensible authority for the reasons set out above. As such, we have jurisdiction to consider the merits of this complaint.

Vicarious liability

I think it is also appropriate for me to consider whether Abacus is vicariously liable for the advice and actions of Mr B – independently of whether apparent authority also operated such as to fix Abacus with liability for the actions of its agents.

What is 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 B was not an employee of Abacus. 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 recent 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 his 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.

Tavistock says that the investigator has unjustifiably sought to extend vicarious liability to a financial advice context when there has been a reluctance by the courts do so this. I don't think that actually reflects the issue in the courts cases have debated. The debate is whether the general tests I mentioned above apply in cases involving vicarious liability, agency and fraudulent misrepresentation or "deceit".

Tavistock have highlighted the case of *Frederick v Positive Solutions* [2018] EWCA Civ 431. This 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 as the Christian Brothers case, Cox or Mohamud, so that the principal cannot be vicariously liable unless the agent had actual or ostensible authority…"*

In 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. It was said there that:

> *"48. Armagas [v Mundagas [1986] 1AC 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 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 *Sense,* a case that I've referred to above in other sections of this decision. 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 B's conduct in advising Mr and Mrs M to invest in the Abacus Medium Portfolio, agreeing to arrange that investment, and purporting to make those arrangements and report on the performance of the investment was conduct that was within his apparent authority. Accordingly, I consider that Abacus 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. First, 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).

Second, Mr and Mrs M have 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.

Third, 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.

These 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 B's handling of the cheque and to the question of Abacus' responsibility for all his statements and conduct under s.138D FSMA. I am not extending the law, but simply applying it. As such 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 B was not an employee. He was a self-employed agent of Abacus. 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 *Sense* case. He was carrying out work for Abacus. He was throughout purporting to be an adviser acting for Abacus. He gave advice on its behalf and he recommended and arranged investments such as the Abacus Medium Portfolio. He was part and parcel of Abacus' business of giving financial advice and providing related services to its clients such as will drafting. And I am satisfied their relationship was akin to employment.

In these circumstances, I have no doubt that a relationship existed between Mr B and Abacus such that Abacus may be held vicariously liable for their 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:

- Abacus is considerably more likely to have the means to

compensate Mr and Mrs M than Mr B. Abacus 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.

- Abacus had assigned to Mr B the activity of giving investment advice and arranging investments on its behalf. The acts Mr and Mrs M complains of – the failure to recommend *and* arrange a suitable investment as agreed – was therefore carried out as a result of activity Mr B undertook on Abacus' behalf.

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

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

- Mr B was to a very large degree under the control of Abacus. The Regulator's rules required Abacus to properly supervise all of its approved persons, including Mr B.

However, the fact that the relationships in question are capable of giving rise to vicarious liability does not mean that Abacus is automatically liable for everything Mr B did. To decide whether Abacus 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 B's duties on behalf of Abacus – the stage two test.

The stage two test

Under this test there are two important questions:

- What was the field of activities Abacus had assigned to Mr B?

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

Investment advice is regulated and investment advice may only be given by those authorised to give it – regulated firms – and the approved persons who give advice on the firm's behalf. Accordingly Mr B appeared on the Financial Conduct Authority's Register as an 'approved person' able to give such advice on Abacus' behalf. For the purposes of the application of the stage two test to Mr and Mrs M's complaint, I consider that the field of activities assigned to Mr B by Abacus 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 B gave and his failure to arrange the investment he recommended.

- The advice given was of a type authorised by Abacus and Mr B was authorised to arrange investments of the type he recommended - the Abacus Medium portfolio.

- Mr B was outwardly purporting to act on behalf of Abacus and Mr and Mrs M handed over the cheque made payable to Abacus Associates for investment in the Abacus Medium portfolio.

- Mr B had agreed with Abacus that he would follow certain processes when giving investment advice and arranging the investment he recommended and he did not do so.

- I would not expect an ordinary consumer in Mr and Mrs M's position to have noticed the deficiencies in the advice process.

- I do not consider that Mr and Mrs M, or an ordinary consumer in the position of Mr and Mrs M, could reasonably have known that Mr B had no intention of arranging the investment he was recommending seemingly on behalf of and connected to Abacus – the Abacus Medium Portfolio.

- 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 B was motivated by personal greed to act dishonestly but rather whether he was acting dishonestly when going about his employer's business or whether the was pursuing private ends. In this case Mr B was pursuing Abacus' business. He arranged the drafting of the will for example. He did wrongfully perform his duties in relation to the investment. But he wasn't, for example, moonlighting or pursuing a personal vendetta against either Mr and Mrs M or Abacus. He was just dishonestly performing his duties as an Abacus investment adviser.

I consider that the field of activities Abacus had assigned to Mr B was the giving of investment advice and the arranging or 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 - were indeed so closely connected with the acts Mr B was authorised to do such that, for the purposes of Abacus' liability to Mr and Mrs M, that advice and failure to arrange as agreed may fairly and properly be regarded as having been done by Mr B while acting in the ordinary course of his duties for Abacus.

For the reasons given above, I am therefore satisfied that Abacus is vicariously liable for the advice to Mr and Mrs M to invest in the Abacus Medium portfolio and failure to arrange that recommended investment, as agreed, by Mr B.

Statutory responsibility under section 138D(2) of FSMA

For the reasons I've given above, I am satisfied that when Mr B advised Mr and Mrs M to disinvest and reinvest in the Abacus Medium Portfolio and failed to arrange that recommended investment, he was acting in his capacity as Abacus' approved person for the purpose of carrying on Abacus' regulated business. He was not carrying on a business of his own notwithstanding the fact that he stole Mr and Mrs M's money.

Mr and Mrs M was Abacus' "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 Abacus, through Mr B, undertook regulated activities for Mr and Mrs M means they were its client.

That means Abacus is subject to the client's best interests rule in respect of Mr B's actions. If Mr B failed to act honestly and failed to arrange the recommended investment then (subject to recognised defences) Abacus is responsible in damages to Mr and 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 Abacus 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:

- Abacus is responsible for the acts complained about through apparent (or ostensible) authority.
- Abacus is vicariously liable for the acts Mr and Mrs M complain about.
- Abacus 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 Abacus is responsible for the acts Mr and Mrs M have complained about.

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.

Tavistock has argued that the merits of Mr and Mrs M's complaint should not be considered until the issue of jurisdiction is resolved. In particular it thought that the approach to merits issues – that they are decided on the basis of what is fair and reasonable in all the circumstances – had influenced the investigator's approach on jurisdiction matters.

I have set out above my view on jurisdiction. I have made it clear how I have approached the issue and that I have not based any part of my view on a consideration of what is fair and reasonable in all the circumstances.

As it is my view that I have jurisdiction and as both parties have been given the opportunity to comment on both jurisdiction and merits and, given the requirement to resolve complaints which are within our jurisdiction speedily and with minimal formality, I now set out my conclusions on the merits of Mr and Mrs M's complaint also.

Mr and Mrs M were in contact with Mr B about their investments. They were happy with their Abacus Medium Portfolio that they were invested in. But they were advised that it would be in their interests to disinvest and reinvest in the same investment as to do so via Abacus at that time would be more cost effective. They were also directed to make ongoing monthly contributions as part of the new arrangement.

It was in fact not cheaper for Mr and Mrs M to undertake this course of action and there is no basis to say this was a suitable course of action.

Mr B then failed to arrange the investment. He failed to do so because he was acting dishonestly. He was when carrying out his duties as an Abacus adviser towards Mr and Mrs M, failing to act honestly, fairly and professionally in accordance with the best interests of his clients, Mr and Mrs M.

Mr B had agreed to arrange the investment but instead stole Mr and Mrs M's money and continued to pocket the monthly contributions. He paid Mr and Mrs M's money into his account and used it for his own purposes. In order to maintain the concealment of his theft he provided them with false portfolio valuations on at least one occasion.

Mr B's conduct in not arranging the recommended investment and the monthly contributions as he had agreed to do but instead stealing the money has caused Mr and Mrs M to lose money. They have also lost the investment return they could have earned on their money.

And they have suffered considerable trouble and upset in being the subject of Mr B's conduct.

Is it fair and reasonable that Tavistock compensate Mr and Mrs M?

I have said above that Tavistock is responsible for Mr B's conduct. That point needs to be emphasised – Mr B's conduct. My decision is not about Abacus's conduct, about for example whether it did enough to supervise Mr B. That is not the test.

Clearly Abacus did not actually authorise Mr B to steal Mr and Mrs M's money. And it did not receive it. So is it fair to require Abacus to compensate Mr and Mrs M for his losses?

I have found that Abacus is responsible for Mr B's conduct in relation to Mr and Mrs M, because I consider the law would impose liability on Abacus for his actions. So it is not necessarily unfair to require Abacus to pay compensation for the losses caused by Mr B'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 Abacus to compensate
Mr and Mrs M for the effect of Mr B's actions unless there is good reason why it shouldn't do so.

Tavistock made points, which I referred to above, when arguing that Mr and Mrs M should not be considered to have reasonably relied on any representation of authority by Abacus. I have considered these same points again in order to decide whether it is fair and reasonable to require Tavistock to compensate Mr and Mrs M. For the same reasons set out previously, I don't think Mr and Mrs M acted unreasonably in their belief that Mr B was conducting genuine Abacus business and was acting in their interests. They were not careless. They were the innocent victims of a dishonest financial adviser who was an agent of Abacus acting within his apparent authority in recommending they invest in the Abacus Medium Portfolio.

In my view it is fair and reasonable in all the circumstances to require Abacus to compensate Mr and Mrs M.

Putting things right

In assessing what would be fair compensation, I consider that my aim should be to put Mr and Mrs M as close to the position they would probably now be in if they'd had not entrusted Mr B with advising them on their investments and ongoing contributions.

In the particular circumstances of this case, it seems reasonable to say Mr and Mrs M would have remained invested in their respective Abacus Medium Portfolios within the Standard Life wrap. They were happy with the arrangements and it appears to have been in line with their risk profile. Their understanding was that the monies would be re- invested as per previously and this action was being undertaken as Abacus/Standard Life were streamlining their business model which meant less fees for them to pay.

So, if Mr B hadn't disinvested their monies or asked them to make the monthly contributions to Abacus, I am satisfied Mr and Mrs M would have continued to have remained invested as they were.

I also understand that the previous portfolios are still active and so Tavistock should be able to calculate what the financial position Mr and Mrs M would have been in if they hadn't surrendered their investments in 2016 and if the monthly payments continued to be invested as per their original instructions.

I've noted that the portfolios were split across ISAs held by Mr and Mrs M and a joint unit trust – with the intention that the fund in the joint unit trust would be invested in the ISAs in subsequent years. However, Mr and Mrs M have confirmed that they don't intend to now reinvest in ISAs. So I've made the parties aware that, unlike the investigator before me, I make no allowance in the compensation for the loss of the ISA allowance and will ask Tavistock to compensate Mr and Mrs M in cash.

I am satisfied that what I have set out below is fair and reasonable given Mr and Mrs M's circumstances and objectives when they invested.

What should Tavistock do?

To compensate Mr and Mrs M fairly, Tavistock must:

- Compare the actual value of their investment of £104,488 against the value of their investments if they had remained invested in their existing Abacus portfolios (the benchmark) from the start date to the end date as summarised below in the table below.

- Compare the position of their monthly contributions if these had continued to be invested in line with the original instruction from the start date to the end date as summarised in the table below.

- Pay Mr and Mrs M the difference between benchmark and actual value (the compensation).

- Pay Mr and Mrs M a sum of £1,000 for the considerable upset they have suffered as a result of losing their money because of Abacus' adviser's dishonesty. This has clearly been the cause of much stress and worry for them, especially at a time when Mrs M has been in ill health. I've taken that into account in this award.

- Income tax may also be payable on any interest awarded.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
The sum disinvested in 2016	The surrender proceeds were not reinvested and the investment money (£104,488) was stolen	If they had remained invested in the portfolios within the Standard Life Wrap: Abacus Medium Minus, Abacus Medium Plus and Abacus Medium	Date of surrender	Date of this decision	8% simple per year from date of this decision to date of settlement (if compensation is not paid within 28 days of the business being notified of acceptance)
The monthly contributions made by Mr and Mrs M made between June 2016 and August 2017	The 15 x monthly contributions of £1,000 x 2 were not invested and were stolen	If they had invested in the portfolios within the Standard Life Wrap as per previous contributions	Dates each monthly payments were made	date of this decision	8% simple per year from date of this decision to date of settlement (if compensation is not paid within 28 days of the business being notified of acceptance)

Actual value

This should be taken to zero. This is because the monies were stolen and haven't been recovered.

My final decision

Where I uphold a complaint, I can award fair compensation to be paid by a financial business of up to £150,000, plus any interest and/or costs/ interest on costs that I think are appropriate. If I think that fair compensation is more than £150,000, I may recommend that the business pays the balance.

Decision and award: I uphold the complaint. I think that fair compensation should be calculated as above. My decision is that Tavistock Partners (UK) Limited should pay Mr and Mrs M the amount produced by that calculation – up to a maximum of £150,000 plus interest.

Recommendation: If the amount produced by the calculation of fair compensation is more than £150,000, I recommend that Tavistock Partners (UK) Limited pays Mr and Mrs M the balance.

This recommendation is not part of my determination or award. Tavistock Partners (UK) Limited doesn't have to do what I recommend. It's unlikely that Mr and Mrs M can accept my decision and go to court to ask for the balance. Mr and Mrs M may want to get independent legal advice before deciding whether to accept this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M and Mr M to accept or reject my decision before 28 October 2022.

Abdul Hafez
Ombudsman