DRN-3503889

The complaint

Mr B says he received advice from a financial adviser in 2015. The adviser – I will call him Mr X - was an agent of Abacus Associates Financial Services Limited which is now Tavistock Partners (UK) Limited. The adviser recommended Mr B invest in an Abacus Low Plus portfolio to be held on a platform with Standard Life. Mr B thought he was making that investment but instead the money was paid into a bank account controlled by Mr X who stole the money. Mr B holds Tavistock responsible for his losses and claims 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.

Abacus and its agent:

Abacus Associates Financial Services (Abacus) has been a trading name of Tavistock since 4 January 2018 and Mr X's activity in relation to Mr B 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 X who joined Abacus in April 2012 and was registered with the regulator as a CF30 approved person of Abacus.

Mr X was a self-employed agent of Abacus/Tavistock until May 2018 when he resigned. This means Mr X worked under the terms of an agency agreement with Abacus rather than as its employee. Mr X 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 X 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 2015:

Mr B says that around November 2015 he was seeking financial advice and a friend recommended Mr X. They met shortly after where a risk assessment was carried out and discussions took place about investment strategies and a will drafting service.

A second meeting took place on 3 December 2015 where Mr B says he again discussed his finances with Mr X. Mr B says he was advised to make £15,000 investment in an Abacus fund. Tavistock disputes that what took place at this meeting constituted financial advice or, at least, advice that constituted a regulated activity. But it is not disputed that Mr B wrote a cheque made payable to Abacus Associates on 3 December 2015.

Mr B also says that discussions took place with Mr X about his pension arrangements. Mr B signed letters of authority to be sent to Prudential, Sun Life of Canada, and Britannia Life. We have copies of these letters. These said:

> *"I hereby appoint Abacus Associates Financial Services Limited, which is regulated by the Financial Services Authority, as my Independent Financial Adviser. To enable it to give me/us advice, I authorise you to:-*
>
> *Provide any information as requested by Abacus Associates Financial Services Ltd regarding the under mentioned contact(s); and Transfer the under mentioned contract(s) to the agency of Abacus Associates Financial Services Limited. FSA Number: 230342."*

Abacus wrote to the three pension providers in December 2015 to request information and responses were received shortly after. However, it appears no transfers subsequently took place.

Mr B, along with his wife Mrs B, completed a will writing questionnaire during the meeting on 3 December 2015, which was subsequently drawn up and witnessed on 22 December 2015. He wrote a cheque for £110 made payable to *"Abacus Associates"* from his and Mrs B's joint account for this service. Mr X received commission through Abacus for this transaction. It is not disputed that this was legitimate Abacus business.

Mr B says he received the following business card from Mr X during their meeting and has provided us with a copy. The business card says:

> *"Abacus Associates Financial Services Ltd*
> *[Mr X] DipPFS*
> *Independent Financial Adviser, Regional Sales Manager*
> *Tel. XXXXXXXXX Mob. XXXXXXXX*
> *Email: [Mr X]@abacusadvisers.co.uk*
> *104-106 Widemarsh Street, Hereford HR4 9HG*
> *Tel XXXXXXXXXX Fax XXXXXXXXX*
> *www.abacusadvisers.co.uk*
> *Registered Office 104-106 Widemarsh Street, Hereford HR4 9HG Authorised and regulated by the Financial Conduct Authority No 230342"*

Following the meeting on 3 December 2015, Mr X sent Mr B a recommendation letter dated 23 December 2015. This said 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."*

The letter goes on to say:

> *"During our meeting, we reviewed Mr B's pension arrangements and investments and also discussed the benefit of writing a Will. Having completed a financial review*

we agreed that these areas were the only ones to be reviewed at this time, with no concerns or needs identified in the other areas of financial planning. I took your instructions for your Will, arranged for this to the drawn up, and we signed and witnessed it at our meeting yesterday. Your Will is now a valid legal document and you should store it in a safe place. Mr B, during our initial meeting I advised you to consider moving some of the money held in your current account to achieve a better return. You felt comfortable moving an amount of £15,000 and [I] gave advice on how to invest this.

Tax efficiency is important and you would like to achieve a potentially higher level of growth than is available through bank and building society deposits.

With this in mind I therefore recommended that you open the following portfolio account:-

The Abacus Associates Private Client Account Wrap provided by Standard Life [original emphasis]

The "Wrap" is a 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. This allows you to have a multi fund portfolio managed by your advisor at a much lower cost than would be available if you invested direct with the individual companies.

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 100 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 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.

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 no surrender 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. We have also discussed the type of funds that you would feel happy to invest in and I recommend the Low Plus Portfolio.

The portfolio provides access to a range of asset classes which provides potential for growth in different areas and also spreads the risk of your investment.

There is no fixed timescale for this investment and money can be added or withdrawn at any time.

It is possible for some savings contracts to qualify for a 'Stakeholder' style savings standard which means that they have achieved certain minimum standards relating to the level of charges, accessibility and contract terms. In fact, very few savings contracts can qualify for this standard since, as I have stated, most are designed as medium to long term investments; accessibility is therefore not something which can be readily promoted.

The choice of funds within Stakeholder style products is therefore very limited and, in matching the fund and investment type to your requirements, it was apparent that a Stakeholder marked product was not suitable for your requirements.

You would also like the benefit of regular meetings with me to review your investments. At these meetings we will consider fund switching and re-balancing and over time this will prove to be very cost effective.

These portfolio's provide access to a range of asset classes which provides potential for growth in different areas and also spreads the risk of your investment.

The total annual charge for your portfolio amounts to 1.50%. This covers the costs of the individual funds and also for my services.

We agreed that there would be no initial adviser charge. The funds chosen are designed to provide tax efficient growth throughout the investment term.

We have discussed your attitude towards investment risk, and agreed that this could be best described as cautious which means that you will take low levels of risk in order to achieve a slightly higher return.

In order to ascertain the fund choice and asset classes appropriate to your attitude to risk I have used the stochastic modeller and the asset class based model portfolio which is most suited to the risk level you require.

Future Reviews and Service

We agreed to meet at least once annually to review your investments and make any necessary amendments. You can, of course, contact me at any time. The best way to do this is via my mobile phone which I have with me at all times. The number is [XXXXXXXX]. If I am unable to take your call immediately I will return the call as soon as I can. Should you require clarification on any point, please do not hesitate to contact me."

Normally, when a consumer first becomes a client of Abacus, they agree to and sign a client agreement. Abacus has said that there is no client agreement between them and Mr B from this time.

Further contact about the investment

Shortly after the recommendation letter dated 23 December 2015, Mr X provided a document to Mr B purportedly detailing the investment. Mr X provided three more such documents on August 2016, January 2017 and 19 March 2018 around the same time he had meetings with Mr B.

The front page of each of the documents state:

"Your Wrap Information
Account number WP2163231
Adviser [Mr X]
Report produced on …
As at date …"

The documents/statements showed increasing values of £15,000, £15,732, £16,986, £19,058 in the "Personal Portfolio" product wrapper respectively, spread across 18 to 19 funds with a small holding in cash.

Mr B met with Mr X again on 29 March 2018 to discuss further investments. During this meeting, Mr X advised Mr B to invest a further £100,000.

Complaint in 2018

On 20 August 2018, Mr B's wife's friend informed her about Mr X's fraudulent activity. On the same day, Mrs B called Tavistock to say that her husband had made payments to Mr X. I've not heard the call, but the call notes confirm that Mrs B was told that the account with Standard Life didn't exist and Mrs B said she would contact both the police and action fraud immediately.

Mr B engaged a solicitor to represent him. On 9 October 2018, they wrote to Tavistock to explain the complaint. In brief they said that:

- During the meeting in or around November 2015, Mr X informed Mr B he was an employee of Abacus.

- Mr B received correspondence on company letterhead and had no reason to doubt he had invested with Abacus.

- Mr X was conducting business with Abacus' approval and on behalf of Abacus.

- Abacus were responsible for overseeing and monitoring Mr X.

- Mr B seeks full reimbursement.

Tavistock didn't uphold Mr B's complaint. On 21 February 2019, it provided its final response to the complaint. In summary Tavistock said:

- Mr B didn't sign a client agreement.

- There was no regulated activity- what had happened was fraud/theft and not a legitimate investment. Abacus and Mr X 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 X 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 apparent authority- Mr B didn't rely on Mr X acting on behalf of Abacus and it wasn't reasonable for him to think so. Mr X should have known paying monies to an advisory firm was highly unusual. The documentation received was limited and the letter of 23 December 2015 listed FSA instead of FCA. There were no communications with the product provider.

- 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.

- Tavistock's systems and controls were adequate - no reasonable system of monitoring would have resulted in the fraud being discovered.

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 investments made by Mr B in 2018 were separate events to the investment in 2015. This complaint dealt only with the 2015 investment.

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

- Mr X advised Mr B to invest in the Low Plus Portfolio/Personal 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 X undertook a regulated activity under Article 53 of the RAO. This is notwithstanding that Mr X misappropriated the monies paid by Mr B for the investment. Mr X's fraud was carried out in connection with that regulated advice.

- Mr X had signed a representative agreement with Tavistock. Under that agreement Tavistock appointed Mr X as its representative. He was given authority to give investment advice. But Mr X 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 X had its authority to give investment advice about the Abacus Low Plus Portfolio. Mr B had reasonably relied this representation. So Mr X had apparent authority/ostensible authority to give the advice he gave. Mr B'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 X and Abacus and the act being complained about was within the field of activities assigned to Mr X and it had a sufficiently close connection with those activities.

- Furthermore, when Mr X advised Mr B 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 B was Abacus' "client" for the purposes of the client's best interests rule in COBS. If Mr X failed to act honestly and failed to arrange the recommended investment then (subject to the recognised defences) Abacus is responsible in damages to Mr B 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 X defrauded Mr B of his money. It is fair and reasonable Tavistock should compensate Mr B for his loss.

- Tavistock should therefore pay compensation to Mr B.

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 B provided Mr X with the cheque for £15,000 at the meeting on 3 December 2015. However, there was no documentary evidence of any advice at that time. The letter dated 23 December 2015 (set out above) was provided after this time.

- In any event, in practice, Mr X 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 X 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.

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 B handed over the cheque to Mr X. All documents in this case were given to Mr B after he handed over the cheque so cannot be relevant.

- In *Anderson v Sense* business cards and business stationery did not establish apparent authority. There must be a representation that the agent has authority to advise on the products which he did.

- So it was impossible in these circumstances for apparent authority to apply.

Vicarious liability

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

- *Frederick v Positive Solutions* [2018] EWCA Civ 431 ("*Frederick*") 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 X persuaded Mr

B 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 X'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 made the following points:

- They objected to the "splitting" of the complaint about the investments in 2015 and 2018. This case involves one fraud perpetrated by one adviser on various occasions. It was a single fraudulent scheme: Mr X 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 B's complaint into two is entirely arbitrary, and the Service has provided no reasons for it.

- The "investment" made by Mr B was entirely fictitious. The "investment" was never logged with Abacus and no records of it were communicated to Abacus. Abacus earned no commission or remuneration from it. So, Mr X was not pursuing Abacus business as the investigator had concluded.

- Mr X was clearly acting as he did for his own purposes. The proposition that he was acting on behalf of Abacus when stealing client money is entirely untenable.

- The point that Abacus owed a duty to supervise Mr X adds nothing to the debate: if Abacus had failed in its duty in that respect, a claim would lie under the SUPP rules. If there was no such failure, the common law of vicarious liability does not impose a more stringent test (as evidenced by the existence of the SUPP rules and the actionable nature of such breaches);

- The argument that advising clients was the purpose of the appointment of Mr X as an agent adviser and the very business that Abacus wanted Mr X to carry on is unsound: it was specifically advanced in *Sense* and rejected.

My findings on jurisdiction

A preliminary procedural matter

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 2015 investment of £15,000 as separate to the investments of £100,000 in 2018.

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 us involves more than one activity of a respondent.

Here, the activity being complained of relate to events in 2015 when Mr B says he was advised to invest in the Abacus Low Plus Portfolio.

This is clearly different to the acts that took place much later in 2018 even if the conduct of Mr X was broadly similar on both occasions. There was a long passage of time between the two events and different monies invested. They were, in my view, separate activities.

So it is right that we deal with each activity separately and this decision relates only to the investment in 2015 of £15,000.

Jurisdiction

I've considered all the evidence and arguments in order to decide whether the Financial Ombudsman Service can consider Mr B'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 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 three questions to be determined before I can decide whether this complaint can be considered under the compulsory jurisdiction of this service:

1. What is the complaint brought by Mr B?
2. Were the acts about which Mr B complains done in the carrying on of a regulated activity, or an ancillary activity?
3. 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 X was neither an authorised person nor exempt from authorisation. That means if Mr X 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 X 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 X.

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 B 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 B suffered a loss as a result of an actionable rule such as this being breached by Abacus, he would have a right of action against Abacus/Tavistock for breach of statutory duty as private person. But he would have no such right against Mr X 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.*

On 9 October 2019, Mr B's representative wrote a letter of complaint to Tavistock. In included the following:

> *As you will appreciate, my client is extremely distressed having invested everything he had through Mr [X] with Abacus Associates Financial Services Limited. At all times, our client was led to believe that Mr X was an employee of Abacus Associates Financial Services Limited. Our client also received correspondence on Company letterhead and therefore did not have any reason to doubt that they had invested with Abacus Associates Financial Services Ltd.*
>
> *Given Mr [X] was conducting business with your approval and on behalf of Abacus Associates Financial Services Limited, it is my client's position that you were responsible for overseeing and monitoring Mr [X] and his activities and your failure to*

do so has resulted in a significant loss to him. It is evident to my client that there has been a failure to properly supervise and monitor Mr [X] or that there was no proper system in place to monitor Mr [X]. My client has sustained a loss and he seeks reimbursement. Can you please advise what systems were in place to monitor Mr [X] and his activities?

In the referral of the complaint to our service, Mr B's representatives wrote:

In or around November 2015. Mr and Mrs B were seeking financial advice and friends recommended that they use the services of Mr X, an authorised agent of the Firm; a meeting took place between the parties shortly thereafter. At the outset of the meeting. Mr X informed my clients that he was a fully qualified financial adviser employed by the Firm and provided them with a copy of his business card. The card referred to Mr X as an 'Independent Financial Adviser, Regional Sales Manager" of the Firm, and contained its correct contact details and FCA authorisation. A copy of the business card is attached hereto marked "Appendix 1".

During this initial meeting, Mr X discussed my clients' financial needs, completed a risk assessment and discussed an investment strategy. At the same time, discussions took place in relation to will drafting services offered by the Firm.

A second meeting took place in December 2015 between my clients and Mr X. At this meeting Mr X produced wills for my clients to sign in accordance with the previous agreement. The wills were signed and a fee of £110 was paid. No further issues arise in relation to this work. At the same meeting Mr X advised my clients to invest £15,000 with the Firm. In reliance upon this advice my clients drew a cheque in the sum of £15,000.

…
On the basis that all advice provided by Mr X was provided at a time when he was an authorised representative and employee of the Firm and that at all material times, Mr X held himself out as acting for and on behalf of the Firm, by letter dated 9 October 2019, a formal complaint was raised with the Firm along with a request for a full reimbursement of the sums provided to Mr X.

In my view Mr B's complaint is that he consulted Mr X in order to get bona fide investment services from an authorised investment adviser. His complaint is that Abacus is responsible for its adviser failing to provide the professional investment advice service he was supposed to provide, and in particular that he failed to arrange the investment he had recommended to him as suitable when he instead paid the money into the account he controlled and stole his money.

Were the acts Mr B 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 B's complaint relates to these activities.

Abacus' position is that the reality is Mr X was not advising on any kind of investment as no investment existed. There was never any investment so there was no investment advice. Mr X was simply, and only, stealing Mr B's money. It in effect says I should consider the reality not the fiction created by Mr X.

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.

In 2015 the regulated activity of advising on investment was 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 specific 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– 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.

To satisfy the definition of the activity under Article 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 December 2015. Mr X was a fraudster and he did not use Abacus's usual record keeping systems. I do however have Mr B's version of events and Mr X's letter of 23 December 2015. Though Mr X is known to be a dishonest person the letter of 23 December is still an indication of what was discussed at the time.

Based on the evidence that is available to me it is my finding that Mr X did advise Mr B to invest £15,000 in a wrap account with Standard Life. Or more specifically Mr X advised Mr B to invest in the Abacus Low Plus Portfolio within the Standard Life wrap. He recommended that he make that investment, he advised him it was suitable for his investment needs. This is advice to Mr B in his capacity as an investor or potential investor on the merits of buying that investment.

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

Mr B and Mr X were discussing – and Mr X was recommending - a proposed investment in a portfolio actually offered by Abacus at the time. The Standard Life Wrap and the Abacus Low Plus Portfolio were not inventions of Mr X on a one-off basis to facilitate his fraud. Abacus Associates Private Client Account was a "private label" of the Standard Life platform and the Low Plus 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 within the Low plus Portfolio 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 (as alluded to in Mr X's letter of 23 December 2015) 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.

It is my view that there is advice on the merits of buying the collection of collective investments schemes that made up the portfolio at the time notwithstanding the point that the funds were not identified or discussed individually.

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

However when viewed from Mr B's position, or from the position of an objective observer, he was clearly advised to make that investment. And when looked at objectively or from Mr X'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. Mr B did not know he was paying the money to Mr X personally. He always thought he was paying it to Abacus Associates for the purpose of investing in the Abacus Low Plus Portfolio to be held in a Standard Life wrap.

I do not agree that Mr X's fraudulent intention not to arrange the recommended investment means that no investment was in fact recommended.

In my view Mr X recommended an investment and then agreed to arrange that investment by words or conduct as part of the process. That is how he persuaded Mr B to make the recommended investment and give him a cheque in payment for the investment. This was similar to Mr X's agreement to arrange the will as part of the process by which Mr B agreed to go ahead with the will and pay him the cheque for that service.

It is my view 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 X'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 X took to cover his tracks, by suggesting to Mr B his 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 B 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 X.

It isn't in dispute that Mr X 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 B on behalf of Tavistock, including recommending the Standard Life wrap and the Abacus Low Plus 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 B and Tavistock received no payments or commissions etc. (That is except in relation to the will which was carried under the Abacus process and it was paid for that service which it provided.)

There is also a general point that an agent (Mr X) is required to try to act in the principal's (Abacus') best interests. Here, all Mr X's conduct was motivated by his intention of stealing Mr B'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 X was not acting with Tavistock's actual authority in relation to the matters about which Mr B 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 B.

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 B) 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 B that Mr X had Abacus' authority to act on its behalf in carrying out the activities he now complains about, and

- Mr B relied on that representation in entering into the transactions he now complains 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 X in a position which would objectively generally be regarded as carrying its authority to enter into transactions such as recommending the Abacus Low Plus Portfolio and arranging and reporting on the recommended investments.

I also need to decide whether Mr B relied on any representation Abacus made. Having considered Parker J's comments in *Martin*, if Mr B proceeded throughout on the footing that in giving advice Mr X 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 B relied on Abacus' representation.

Did Abacus represent to Mr B that Mr X had the relevant authority?

The first question is whether there was apparent authority in relation to the advice and acts of Mr X - in this case at the meetings before and on 3 December 2015. To answer that question, it is right for me to consider whether Abacus placed Mr X in a position which would objectively carry Abacus' authority for Mr X to conduct business of the *type* he purported to conduct.

As a reminder, Mr B says he consulted Mr X in November after a recommendation from a friend that Mr X was an independent financial adviser at Abacus. They met in around November and a financial risk assessment was carried out and investment strategies were discussed as well as discussions about will drafting services. Mr B says, and I accept, that Mr X gave his Abacus business card at that meeting and no other documents relating to Abacus.

As quoted above, the business card gave Abacus' name and Mr X's name and referred to him as "Independent Financial Adviser, Regional Sales Manager." It also gave Abacus' address and website details and Mr X's contact details including his Abacus email address.

Mr B says that the meeting at which he was advised about investing the £15,000 took place on or around 3 December 2015. It isn't in dispute that this is when Mr B handed the cheque to Mr X for to be placed in the Low Plus Portfolio. The wills discussed previously were produced and fees paid for by Mr B – again by cheque. Letters were also produced by Mr X and signed by Mr B on Abacus letterhead about his appointment of Abacus as his IFA enabling Abacus to obtain information about his pensions.

There then followed a letter from Mr X to Mr B on 23 December 2015 setting out what had been agreed regarding the £15,000 investment.

I am satisfied that Mr X was at all times set out above acting as an independent financial adviser able to provide independent financial advice though 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 X.

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 evidence that the marketing material was given to Mr B and so I *do not say* that the material was itself a representation made by Abacus to Mr B in December 2015, but it indicates 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 X 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 X was given business cards and stationery and access to Abacus' email account and computerised records system.

So, Abacus placed Mr X in a position which would, in the outside world, generally be regarded as having authority to carry out the acts Mr B 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 Low Plus Portfolio specifically.

It was in Abacus' interest for the general public, including Mr B, to understand that it was taking responsibility for the advice given by its financial advisers. I am satisfied that Abacus intended Mr B to act on its representation that Mr X 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 X as having authority to give investment advice on behalf of Abacus.

In his letter of 23 December 2015 to Mr B, Mr X said:

> *"…You would also like the benefit of regular meetings with me to review your investments. At these meetings we will consider fund switching and re-balancing and over time this will prove to be very cost effective."*

And under the heading *"Future Reviews and Service"*

"We agreed to meet at least annually to review your investments and to make any necessary amendments…"

I am of course aware that the letter was sent after the meeting on 3 December (and after Mr B handed over the cheque for the investment) and I do not say the letter was itself a representation that was made before the act being complained of. But it records the advice and review arrangements agreed at the earlier meeting. And the arrangements for reviews of investments is a normal service for an IFA to offer. It's consistent with the recommendation of an investment portfolio. It's also consistent with the type of service Abacus held itself out as providing - a full service to clients over a lasting relationship – with comments such as the following in its marketing material that said:

- it *"specialise[s] in personal financial planning…"*
- it *"Focus[es] on providing our clients with independent wealth management services"*
- its *"advisers strive to build a trusted client relationship which will last a lifetime."*

It is my view that Abacus represented that Mr X was authorised to offer, and agree to provide, an ongoing service of reviewing the recommended investment periodically with the client as this is a normal part of the service of an IFA and a natural part of the investment advice and arranging service.

Tavistock has said that there is no documentary evidence of representations before Mr B handed over his cheque for the investment on 3 December 2015. That is not correct because some documents such as the business card and letters regarding Mr B's pension were provided on or before 3 December 2015. But it is also important to make clear that representations do not need to be specifically set out in any documents.

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 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*".

The other argument that Tavistock makes is that the Court in *Sense* decided that "status disclosure" wording on business cards and letter headings could not amount to a representation for the purposes of ostensible authority.

But I've already set out above that the representations in this case were of a general nature and I do not simply rely on the business card and letterhead. Furthermore, this case is different to *Sense* on a factual basis. As the Judge in the High Court in *Sense* said, *it is no part of the ordinary business of a financial adviser to operate a scheme for taking deposits from clients.* The advice given here was exactly of the type that financial adviser may give and specifically of the type that Mr X could give as an Abacus adviser.

So, it is my view that Abacus did represent that Mr X was authorised to recommend the Abacus Low Plus Portfolio to persons, such as Mr B, who sought Abacus' advice and to help such persons then implement the recommendation by making the necessary arrangements.

Did Mr B reasonably rely on Abacus' representation?

There are two points here – did Mr B rely on the representation of authority I refer to above? And if he did was that reasonable in the circumstances?

I don't think there's any reason to doubt that Mr B believed that Mr X 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 X.

But was it reasonable for him to do so?

Mr B has said (and I accept) that Mr X informed him that he was a "fully qualified financial adviser" employed by the Abacus and provided him with a copy of his business card. Mr X also provided genuine Abacus services relating to a will and obtaining pension information at the same time and used Abacus stationary when doing so. I think these factors support a finding that Mr B acted reasonably in his belief that Mr X was acting on behalf of Abacus in all his dealings with him.

I don't think the lack of documentation about the investment at the 3 December 2015 meeting means that Mr B acted unreasonably in his belief that Mr X was carrying on genuine Abacus business. 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. I think it was reasonable for Mr B to trust that Mr X, a regional sales manager of Abacus, a regulated firm, would invest his funds in the way he'd advised and that was acting in Mr B's interests. I don't expect Mr B to have undertaken enquiries and corroborate what he was being told.

Tavistock has said that it was not reasonable for Mr B to have believed Mr X was genuinely conducting Abacus investment business as the cheques for the investment were made payable to "Abacus Associates" (but in reality this was an account controlled by Mr X) and that this was in breach of Abacus' regulatory authorisations and terms of business about holding client money. Having considered the point, I do not think that Mr B could reasonably be obliged to understand that Abacus is not authorised to hold client money or to even understand what that concept means. And of course Mr B made a cheque payable to "Abacus Associates" at the same time for the will service that was genuinely provided by Mr X. So, in my view, Mr B wouldn't have thought it unusual to have made the cheque for the investment to Abacus too.

Tavistock has pointed to the *Sense* case and said that here, just as with the claimants in that case, it could not be said that Mr B relied any representation made by Abacus. But this case is very different to the situation in *Sense*. An important consideration in that case was that the majority of the claimants had never heard of the defendant, Sense Network, and that those who had heard of it made their decision to invest before they saw the stationery which they later said contained the representation on which they relied. Here, Mr B had clearly heard of Abacus and, in my view, proceeded (correctly) on the basis that Mr X was authorised to provide the financial advice services he gave in connection with the Abacus Low Plus Portfolio.

I'm aware that the later letter dated 23 December 2015 made reference to the "Financial Services Authority" in the footer rather than the Financial Conduct Authority – which was the regulator at the time. As explained, I'm not proceeding on the basis that the letter itself

formed part of the representations at the time of the investment. But, even taking this into account, I don't think it would be reasonable for to expect Mr B to have spotted this inaccuracy and investigated it and concluded that Mr B can't have been operating with Abacus' authority when giving the advice he had had given earlier.

Overall, on balance, the evidence does indicate that Mr B reasonably proceeded on the basis that Mr X 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 X from their first contact 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 X – 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 X 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". But I've considered the issues in full in any event/

Tavistock has 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 November 2018 the Court of Appeal considered another vicarious liability case involving fraud and agency. The case was *James Scott Winter v Hockley Mint Limited* [2018] EWCA Civ 2480. 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 July 2019 the Court of Appeal made a decision in another case involving vicarious liability, fraud and financial services. That case involved appointed representatives rather than common law agency – though some of the issues involved are similar. That case was *Anderson v Sense Network*. Both the *Frederick* and the *James Winter* cases were referred to in argument in that case but the *James Winter* case is not referred to in the judgment. The court said:

> *"64. In my judgment, there is no substance in the appeal on vicarious liability. The judge made clear findings that Midas was carrying on its own business and it is not open to the appellants to go behind those findings. Sense also carried on its own business which comprised providing the regulatory umbrella for independent financial services firms. When Midas and its advisers provided financial advice, they were doing so as part of Midas's own recognisably independent business. In no sense could it be said that they were carrying out activities assigned to them by Sense as part of Sense's business and for Sense's benefit.*
>
> *65. It is unnecessary to express any view on further submissions made on behalf of Sense that these principles of vicarious liability are not applicable in the case of*

commercial agents, particularly as regards the issue left open by this court in Frederick v Positive Solutions (Financial Services) Ltd [2018] EWCA Civ 431 at [77], and I do not do so."

It would not seem to be right to speculate about what, if anything, the Supreme Court would have said about vicarious liability and fraudulent misrepresentation if it had heard the *Frederick* 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 X's conduct in advising Mr B to invest in the Abacus Low Plus 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 B has 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 X'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 X 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 *Anderson v Sense Network* 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 Low Plus 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 X 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 B than Mr X. 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 X the activity of giving investment advice and arranging investments on its behalf. The acts Mr B complains of – the failure to recommend *and* arrange a suitable investment for him as agreed – was therefore carried out as a result of activity Mr X undertook on Abacus' behalf.

- Mr X'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 X, who was registered with the regulator as Abacus' CF30 approved persons.

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

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 X 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 X'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 X?

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

Mr B contacted Mr X to give him investment advice. At that point he did not know about Abacus. But the position is that 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 X 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 B's complaint, I consider that the field of activities assigned to Mr X 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 X gave and his failure to arrange the investment he recommended.

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

- Mr X was outwardly purporting to act on behalf of Abacus and Mr B handed over his cheque made payable to Abacus Associates for investment in the Abacus Low Plus portfolio.

- Mr X 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 B's position to have noticed the deficiencies in the advice process. He knew of Mr B as a result of the recommendation from a friend.

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

Low Plus 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 X 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 X 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 B 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 X 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 X was authorised to do such that, for the purposes of Abacus' liability to Mr B, that advice and failure to arrange as agreed may fairly and properly be regarded as having been done by Mr X 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 B to invest in the Abacus Low Plus portfolio and failure to arrange that recommended investment, as agreed, by Mr X.

Statutory responsibility under section 138D(2) of FSMA

For the reasons I've given above, I am satisfied that when Mr X advised Mr B to invest in the Abacus Low Plus 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 B's money.

Mr B 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 X, undertook regulated activities for Mr B means he was its client.

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

Mr B contacted Mr X in 2015 in order to get advice about how to invest money. He seems to have been happy to invest £15,000 and had no particular investment objective or time frame in mind. He wanted to achieve a better return than a savings account but with low risk. These points as noted in Mr X's letter all seem plausible and reasonable.

Mr X recommended investing in the Abacus Low Plus portfolio in a Standard Life wrap.

As I understand it, what should have happened is that Mr X should have confirmed his recommendation in writing and had that advice checked (or reviewed) before confirming it to Mr B. On the assumption the advice was checked/reviewed and approved and then accepted by Mr B, an application for the Wrap account with Standard Life should have been completed and payment made to Standard Life. So if payment was to be made by cheque rather than bank transfer the cheque would have been made payable to Standard Life.

Instead of operating in that way Mr X requested payment by cheque to "Abacus Associates". He was not authorised by Abacus to hold client money in that way (or all all) and nor was Abacus itself.

Mr X should have arranged the investment he recommended in the way (or in broadly the way) I have described. He did not do so because he was acting dishonestly. He was when carrying out his duties as an Abacus adviser towards Mr B, failing to act honestly, fairly and professionally in accordance with the best interests of his client, Mr B.

Mr X had agreed to arrange the investment but instead stole Mr B's money. He paid Mr B's money into his account and used it for his own purposes. In order to maintain the concealment of his theft he provided him with false portfolio valuations.

Mr X's conduct in not arranging the recommended investment as he had agreed to do but instead stealing the money has caused Mr B to lose his money. He has also lost the investment return he could have earned on his money. And he has suffered considerable trouble and upset in losing a considerable sum of money.

For the sake of completeness, I would add that those losses would also probably not have occurred but for Mr X's active concealment of the theft which began almost immediately after receiving the cheque, when he gave Mr B "portfolio" information and valuations. But for those deceptions, all of which were carried out in Abacus' name and with apparent authority, Mr B would doubtless have demanded his money back almost as soon as he handed it over and at a time when Mr X is most likely to have had the ability to repay him.

Is it fair and reasonable that Tavistock compensate Mr B?

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

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

I have found that Abacus is responsible for Mr X's conduct in relation to Mr B, 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 X'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 B for the effect of Mr X'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 B 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 B. For the same reasons set out previously, I don't think Mr B acted unreasonably in his belief that Mr X was conducting genuine Abacus business and was acting in his interests. He was not careless. He was the innocent victim of a dishonest financial adviser who was an agent of Abacus acting within his apparent authority in recommending he invest in the Abacus Low Plus Portfolio.

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

Putting things right

In assessing what would be fair compensation, I consider that my aim should be to put Mr B as close to the position he would probably now be in if he had not entrusted Mr X with advising him and arranging his investments.

It seems reasonable to say Mr B would have invested the same sum. It is the case that Mr X's advice was tainted by his concealed dishonest motive. It is not possible to say if he would have recommended the same investment, or something quite different, if he had been acting in Mr B's best interests. But I am satisfied that what I have set out below is fair and reasonable given Mr B's circumstances and objectives when he invested.

What should Tavistock do?

To compensate Mr B fairly, Tavistock must:

- Compare the performance of Mr B's £15,000 investment with that of the benchmark shown below and pay the difference between the *fair value* and the *actual value* of the investment.

- Tavistock should also pay interest as set out below.

- Pay Mr B £300 for the considerable upset Mr B has suffered as a result of losing his investment because of Abacus' adviser's actions.

Income tax may be payable on any interest awarded.

investment name	status	benchmark	from ("start date")	to ("end date")	additional interest
not applicable	the investment was not arranged, and the investment money (£15,000) was stolen	for half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	3 December 2015	date of my decision	8% simple per year from date of 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.

Fair value

This is what the investment of £15,000 would have been worth at the end date had it produced a return using the benchmark.

To arrive at the *fair value* when using the fixed rate bonds as the benchmark, Tavistock should use the monthly average rate for one-year fixed-rate bonds as published by the Bank of England. The rate for each month is that shown as at the end of the previous month. Those rates should be applied to the investment on an annually compounded basis.

Why is this remedy suitable?

I have chosen this method of compensation because:

- Mr B wanted capital growth with a small risk to his capital.

- The average rate for the fixed rate bonds would be a fair measure for someone who wanted to achieve a reasonable return without risk to his capital.

- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is a mix of diversified indices representing different asset classes, mainly UK equities and government bonds. It would be a fair measure for someone who was prepared to take some risk to get a higher return.

- I consider that Mr B's risk profile doesn't correspond exactly to either one of those benchmarks but fell between them, in the sense that he was prepared to take a small level of risk to attain his investment objectives. So, the 50/50 combination would reasonably put Mr B into that position. It does not mean that Mr B would have invested 50% of his money in a fixed rate bond and 50% in some kind of index tracker fund. Rather, I consider this a reasonable compromise that broadly reflects the sort of return Mr B could have obtained from investments suited to his objective and risk attitude.

My final decision

I consider that the Financial Ombudsman Service may consider Mr B's complaint and that it should be upheld. My decision is that Tavistock Partners (UK) Limited should pay fair compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 12 October 2022.

Abdul Hafez
Ombudsman