DRN-3749356

The complaint

Ms S complains about the acts of Mr J. She says she believed she was investing money through Mr J (on Mr J's advice) but it's now clear Mr J kept most of the money himself. She says Openwork Limited is responsible because Mr J was with a business that was an appointed representative of Openwork at the relevant time.

What happened

I can see from the Financial Conduct Authority (FCA) register that Mr J worked for a business between 1 December 2001 and 16 December 2010. That business has had several different names over the years but seems to have consistently used the trading name of Bespoke Financial Advice (Bespoke) when dealing with Ms S. This is therefore the name I've used throughout this decision. Bespoke was an appointed representative of Openwork between 31 May 2005 and 17 August 2016.

Ms S says her husband, Mr S, was diagnosed as terminally ill towards the end of 2008, so they met with Mr J to make sure their finances were in order and that provision had been made for their children.

Following Mr J's advice, Mr and Ms S invested £200,000 into a Sterling bond in March 2009. But Ms S says they also wanted to invest for each of their three children and she says Mr J recommended three separate Sterling bonds for this.

I've been provided with a recommendation letter from Mr J dated 16 October 2009 on Bespoke branded paper with an Openwork footer which read:

> *To meet your investment need I recommended the Sterling Investment Bond…*
>
> *As I have explained to you, I am a member of Openwork, which is a network of financial advisers. We are committed to ensuring that the financial advice provided is suitable for your current needs given the information you have provided. If this proves not to be the case, Openwork guarantees to put it right…*
>
> *I have sent your application to Sterling and you should hear from them shortly…*
>
> *A Sterling Bond provides you with the potential for the investment to grow in value, with the flexibility of accessing your investment at any time and the ability to take a regular income at any age.*
>
> *We discussed the different versions of the bond and based on what we agreed, I recommended the following to meet your objectives.*
>
> ***High Allocation version of the Sterling Investment Bond***
> *This version of the bond was suitable as you wanted to get the highest allocation rate and are confident you will not require access to a lump sum from the capital in the first five years.*

The investment amount was stated to be £135,000. And a bond illustration that was provided also related to £135,000. But Ms S says the plan was to set up three Sterling bonds with £135,000 in each – one for each child. She says they therefore wrote three cheques for £135,000 which all cleared in October 2009. But it seems only one of the cheques was paid into a Sterling bond and the other two were paid into an account Mr J had.

I'm sorry to hear that Mr S died in December 2009.

Ms S says she wrote a further six cheques to top up the three Sterling bonds she believed existed. All of these were for £15,000 each. Three cleared in March/April 2010. And the other three cleared in December 2010. Each time only one of the cheques was paid into a genuine Sterling bond.

This decision relates to the two £15,000 cheques that cleared in March/April 2010 that weren't invested in a Sterling bond.

The initial £270,000 that was misappropriated; the remaining two cheques referred to above that were misappropriated; as well as a cheque in February 2014 which Ms S says she believed was being invested in an ISA, aren't covered by this decision. And neither is Ms S's complaint about mismanagement of the genuine investments and the fact her ISA allowances weren't utilised. These are all the subject of separate complaints.

Ms S says she received a monthly income from Bespoke as bogus investment income on the money that'd been misappropriated. She says this came to a total of around £162,750 and she's provided statements showing this.

On 4 December 2019 Ms S was contacted by the police and told Mr J had been arrested the day before. Mr J was later convicted of fraud and given a prison sentence. Ms S has been able to recover some of the money he took from her and Mr S under the Proceeds of Crime Act 2002 but has still suffered a loss.

Ms S complained to Openwork. Openwork issued a final response letter saying it wasn't responsible. In summary, it said:

- Two Sterling bonds had been arranged through it – one of £200,000 in March 2009 and one of £135,000 in November 2009. The £135,000 bond had been topped up with an additional £15,000 twice – in April 2010 and January 2011.

- Any advice or arrangements Mr J gave or made in relation to the fraudulent March/April 2010 top ups wasn't in his capacity as an appointed representative of it and it has no records of the fraudulent top ups.

- Mr J had been restricted to advising on plans and services arranged through it.

- Mr J was prohibited from handling client money.

- Ms S ought to have realised that things were different with the fraudulent top ups – she didn't receive any paperwork for them; the cheques were payable to Bespoke rather than Sterling; and monthly income came from Bespoke rather than Sterling. Ms S also didn't query the fact she received a notification in September 2012 that the adviser on the Sterling bond was someone different to Mr J.

Openwork later added that it felt Ms S had raised the complaint too late.

An investigator was satisfied we could consider the complaint and that it should be upheld. In summary, he said:

- The complaint had been made within the time limits.

- He was satisfied there'd been a regulated activity. He was persuaded that Ms S believed there were identical Sterling bonds for each of her three children. And even though there wasn't a recommendation letter to top up either the genuine Sterling bond or the fictional ones, he was satisfied it was most likely Mr J had given advice. All three £15,000 cheques cleared within a reasonably short space of time, and he felt it was most likely there was one single piece of advice to top up three identical investments.

- Openwork was responsible because Mr J was acting as Bespoke when he gave the advice, and he was authorised by it to give advice on Sterling bonds.

- If everything had happened as it should have, Ms S would have topped up three identical Sterling bonds.

Openwork didn't agree. The issue has therefore been passed to me for a decision. I've read and considered everything Openwork has said. In summary, it says:

- There should be one complaint for the issues raised.

- A decision should be made on the jurisdiction issues first.

- Jurisdiction is a matter of law that requires legal analysis – it can't be decided on the balance of probability and doesn't involve consideration of what's fair and reasonable.

- The events complained about were over 10 years ago and it's unlikely Ms S's recollections are accurate. There's no evidence that Mr and Ms S intended to create three identical pots of money, and this is contrary to all the documentation from the time. And there's no evidence Ms S then intended to top up three identical investments. We should place weight on the fact only one set of paperwork was received (for an initial investment of £135,000 and then a top up of £15,000); only one investment cheque was made payable to Sterling in March/April 2010; and only one of the sets of monthly returns came from Sterling and none of this was questioned. The dates the cheques were cashed isn't relevant.

- There's no evidence of any advice being given. Unlike with the initial investment Mr and Ms S made into a genuine Sterling bond, there's no recommendation letter from March/April 2010. And even if advice was given by Mr J, this wasn't regulated advice. This was a fraud which arose from Mr J's unlawful activities. Handling client money isn't a regulated activity. And the money Ms S gave Mr J didn't come from a regulated activity so the circumstances can be distinguished from those in *R (TenetConnect Services Ltd) v Financial Ombudsman Service* [2018] EWHC 459 (Admin).

- The starting point is that principals aren't responsible for all acts and omissions of their appointed representatives, including cases where the appointed representative steals money.

- It didn't make any representations in relation to Mr J fraudulently taking the money.

- The test when deciding whether a complaint was made outside the time limits is an objective one – real or professed naivety isn't a defence. And Ms S didn't need to know for certain that she had cause for complaint, she just needed to know enough that she ought reasonably to have investigated further.

- Ms S ought to have had concerns when she didn't get policy documents or annual updates from Sterling for more than one bond, and she ought to have had concerns about the way the monthly returns were received. We need to make sure we know exactly how these returns would have appeared.

What I've decided – how many complaints have been made

In my decision about the £270,000 misappropriated in October 2009, I considered in detail how many complaints had been made. I won't repeat that here, but I confirm I'm still satisfied Ms S has complained about five financial services Mr J provided and so there should be five complaints:

- One for two payments Mr and Ms S made – of £135,000 each – in October 2009 that Ms S says they believed were to set up Sterling bonds.

- One for two payments Ms S made – of £15,000 each – in March/April 2010 that she says she believed were to top up Sterling bonds.

- One for two payments Ms S made – of £15,000 each – in December 2010 that she says she believed were to top up Sterling bonds.

- One for a payment of £24,000 Ms S made in February 2014 that she says she believed was being invested in an ISA.

- One for mismanagement of the genuine investments and the fact Ms S's ISA allowances weren't utilised.

This decision therefore only considers the £30,000 paid in March/April 2010 that Ms S says was intended to be put into two Sterling bonds but was misappropriated.

What I've decided – jurisdiction

I agree with Openwork that I can't decide jurisdiction on the basis of what I consider to be fair and reasonable in all the circumstances. That's the basis on which the merits of the complaint will be determined if, but only if, we have jurisdiction to consider it.

I accept that jurisdiction involves considering the rules and law. But I'd add that if there are any disputed issues of fact that I need to resolve to help me decide either jurisdiction or the merits of the complaint, it falls to me to decide them according to the balance of probability.

I've considered all the evidence that's been provided. Having done so, I'm satisfied this complaint is in the Financial Ombudsman Service's jurisdiction.

Was the complaint made too late?

This service can't look at all complaints. Our ability to consider complaints is set out in Chapter 2 (DISP 2) of the FCA's Handbook of Rules and Guidance.

DISP 2.8.2R says:

> *The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service…*
>
> > *(2) more than:*
> >
> > > *(a) six years after the event complained of; or (if later)*
> > >
> > > *(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;*
> >
> > *unless the complainant referred the complaint to the respondent or the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;*
>
> *unless:*
>
> > *(3) in the view of the Ombudsman, the failure to comply with the time limits…was as a result of exceptional circumstances.*

The advice complained about here was in March 2010. Ms S complained to Openwork on 6 January 2020. So, the complaint is outside the first part of the time limit – i.e. it was made more than six years after the events complained about.

The issue for me to decide is therefore whether the complaint was also made outside the second part of the time limit – i.e. whether it was made more than three years after Ms S knew, or ought reasonably to have known, she had cause for complaint.

Ms S says she didn't know she had cause for complaint until 4 December 2019 – when the police contacted her and told her Mr J had been arrested. She's said she had some doubts about Mr J when she was called by a company representing Openwork in December 2018 and told he was no longer on the FCA register but she says when she challenged Mr J about this, he reassured her that there wasn't a problem. Because the December 2018 phone call was less than three years before Ms S's complaint, I haven't considered it further.

Openwork says Ms S ought reasonably to have been aware of cause for complaint earlier than this. I agree with Openwork that the test when considering the time limits is an objective one and this is the test I've used when considering each of the events Openwork says ought reasonably to have made Ms S aware of cause for complaint. I also agree that a consumer doesn't have to know for certain that something has gone wrong, or the full extent of what's gone wrong, for the purpose of the time limit rules.

The fact the monthly returns came from Bespoke rather than Sterling

Ms S accepts that she received monthly returns from Sterling for the genuine Sterling bond and from Bespoke for the money Mr J had stolen. I can see from Ms S's statements that these were clearly distinguishable.

The investigator asked Ms S why she never questioned this. She explained that Mr J had told her he'd amalgamate the payments from two of the bonds and send the money to her as a single payment. I'm satisfied Ms S has been consistent and plausible in her explanation that this was what she was told. The question I need to answer is therefore whether these differing payments ought reasonably to have made her aware of cause for complaint.

Ms S has given detailed recollections of her relationship with Mr J. He became the financial adviser for her and her husband at a very difficult time in their lives and it's clear he built up a relationship of trust and friendship with them. Ms S has said that whenever she had questions, he always answered them in a way that was completely plausible, saying, "*He showed me graphs of financial performance, questionnaires on my attitude to risk and reassured me that our finances were all set up*". It's clear to me that Ms S viewed Mr J as a financial expert who could be trusted.

Whilst Ms S now knows the fact the monthly returns were being transferred to her differently was a warning flag, I'm satisfied based on everything I've seen that she didn't know this at the time. And I'm also satisfied it was reasonable for her to not know this at the time and to rely on the explanation she was given by her registered financial adviser.

The fact she was only given one set of paperwork – for the legitimate investment

Ms S says she met with Mr J approximately every six months and he always presented the legitimate Sterling bond valuation as representative of all three. It seems to be these meetings that Ms S relied on for information rather than anything sent to her direct by Sterling. I think this was reasonable in the circumstances and I don't think the fact Mr J only ever presented one set of documentation is something that ought to have caused Ms S concern. Ms S has explained that she and Mr S had a lot of different paperwork for their affairs at the time of the initial investments and that everything was quite overwhelming. The fact that their financial adviser seemed to be taking steps to help by reducing the paperwork was probably something they were grateful for. Ms S has consistently said that she believed there were three identical Sterling bonds – to only have to deal with one set of paperwork rather than three identical sets would seem to many to be logical. And again, I note that this was all to the backdrop of Mr J having built a relationship of trust with Ms S.

The fact she knew by 2014 that Mr J was no longer her financial adviser

Openwork says in September 2012 Ms S was notified that the authorised financial adviser on her Sterling bond was no longer Mr J. And it says by 2014 Ms S was aware that Mr J was no longer her financial adviser. To be clear, the money Ms S says she lost in 2014 is the subject of a separate complaint and isn't considered in this decision. I refer to the events of 2014 here only for the purpose of addressing Openwork's argument that they ought reasonably to have made Ms S aware of cause for complaint in relation to the money she paid in March/April 2010.

Openwork has pointed to Sterling bond documents from September 2012 and ISA documents from January 2014 that list a different adviser of Bespoke as Ms S's adviser. And it's also referred to a recommendation letter Ms S was sent by that adviser dated 20 August 2014 despite the fact Ms S says it was Mr J she'd met and who'd advised her rather than the new adviser.

Ms S accepts knowing that Mr J was no longer her financial adviser by that time. She says Mr J told her he'd become a will and estate planning specialist but had retained a number of his old clients. She says he told her that it didn't matter he was no longer a registered financial adviser because all the investments had already been made and as there was no more money to be received, a regulated adviser wasn't necessary. She said that given their history and the fact he knew her needs, it made sense to stay with him.

In relation to the 20 August 2014 letter, Ms S said:

> *I accept that I should have read the letter date 20th August 2014 more carefully at the time and raised the discrepancies. However, a) I was not aware at that time that the investment figures were inaccurate and masked the fact that* [Mr J] *had stolen from us, and b) I did not challenge the letter coming from* [the new adviser] *at that time because* [Mr J] *told me that he was using* [the new adviser] *as his contact to authorise financial transactions/changes as he* [(Mr J)] *was no longer registered to do so. All my challenges to* [Mr J] *were responded to with plausible responses and I did not question this at the time as* [Mr J] *had spent several years building up my trust*.

I'm not persuaded that knowing Mr J was no longer a registered financial adviser ought reasonably to have made Ms S aware of cause for complaint. I note that Mr J's contract was terminated in December 2010. But Ms S says she wasn't made aware of his misconduct, and I've seen no evidence that she was. Mr J's explanation that he'd simply changed the type of work he was doing seems reasonable. And although, as Ms S accepts, the fact Mr J gave advice in August 2014 which was then followed up by a recommendation letter from a different adviser should have stood out, I don't think this was enough that it ought reasonably to have concerned Ms S. Again, Mr J had provided her an explanation for the involvement of a different adviser which was plausible. And as Ms S hadn't been told – by Openwork or anyone else – the reason why Mr J was no longer a financial adviser, there was nothing to contradict the explanations she was getting from Mr J.

Like the investigator, I also note that Mr J managed to defraud a number of customers across a number of years before his fraud was discovered. It's clear that he was very plausible and persuasive in how he carried out the fraud.

Taking everything into account, I've not seen anything that satisfies me Ms S ought reasonably to have known of cause for complaint more than three years before she complained. I'm therefore satisfied she made her complaint within the time limits.

Responsibility

To carry out regulated activities a business needs to be authorised (Section 19 of the Financial Services and Markets Act 2000 (FSMA)). Bespoke (and therefore Mr J) wasn't directly authorised. Instead, it was an appointed representative of Openwork. Openwork is an authorised firm. It's authorised by the FCA to carry out a range of regulated activities including advising on investments and arranging deals in investments. We can therefore consider complaints about Openwork. And this includes some complaints about its appointed representatives.

But this service can't look at all complaints. Before we can consider a complaint, we need to check, by reference to the DISP rules and the legislation from which those rules are derived, whether it's one we have the power to look at.

DISP 2.3.1R says we can:

> *consider a complaint under the Compulsory Jurisdiction if it relates to an act or omission by a firm in carrying on…regulated activities…or any ancillary activities, including advice, carried on by the firm in connection with them*.

Guidance for this rule at DISP 2.3.3G says that:

> *complaints about acts or omissions include those in respect of activities for which the firm…is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility*.

And Section 39(3) FSMA says:

> *The principal of an appointed representative is responsible, to the same extent as if he had expressly permitted it, for anything done or omitted by the representative in carrying on the business for which he has accepted responsibility*.

Openwork queried why the investigator didn't consider Section 39(4) and (6) FSMA in his view. But as the investigator explained in response, these are relevant when "*determining whether the principal has committed an offence*" – which isn't appropriate here.

The responsibility of a principal was considered by the judge in the case of *Anderson v Sense Network* [2018] EWHC 2834 (this case was the subject of an appeal, but the Court of Appeal issued a decision agreeing with the earlier decision). In the High Court, Mr Justice Jacobs said, at paragraph 33:

> *There is no indication in the wording of section 39, or in the case-law, that indicates that the business for which responsibility is accepted is to be determined not by reference to the contract, but by reference to the authorisations granted to the principal which are to be found in the Financial Services register*.

So, I agree with Openwork that a principal isn't automatically responsible for the actions of its appointed representatives and it's necessary to go beyond looking at the activities Openwork was authorised to do. The starting point for deciding whether Openwork is responsible for the actions of Mr J here is to consider the terms of the contract between Openwork and Bespoke.

To decide whether Openwork is responsible here, there are three issues I need to consider:

- What are the specific acts Ms S has complained about?
- Are those acts regulated activities or ancillary to regulated activities?
- Did Openwork accept responsibility for those acts?

What are the specific acts Ms S has complained about?

Ms S complains Mr J advised her to invest money through him in a genuine investment but it's now clear he kept the money himself.

Are those acts regulated activities or ancillary to regulated activities?

Section 22 FSMA defines "*regulated activities*" as follows:

> *(1) An activity is a regulated activity for the purposes of this Act if it is an activity of a specified kind which is carried on by way of business and –*
>
> *(a) relates to an investment of a specified kind;…*
>
> *(4) "Investment" includes any asset, right or interest.*
>
> *(5) "Specified" means specified in an order made by the Treasury*.

The relevant Order is the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO). Advising on investments is a specified activity under Article 53 RAO. And

agreeing to advise on investments and agreeing to arrange deals in investments is a regulated activity under Article 64 RAO.

To satisfy the definition of the activity under Article 53 RAO there must be advice and, as the investigator explained, the advice must:

- Be to a person in their capacity as an investor or potential investor.
- Relate to an investment that's a security or relevant investment.
- Relate to the merits of buying, selling etc the investment.
- Relate to a particular investment.

Openwork says it's not clear that the intention was to invest in three identical Sterling bonds and any finding otherwise is contrary to the documentation from the time. It also says there's no evidence Mr J gave any advice in relation to either the top up that was genuinely made in March/April 2010 or the money that was misappropriated around that time. And it says that even if Mr J did give advice to top up Sterling bonds, the reality is that he wasn't advising on any kind of investment for the £30,000 that was misappropriated as it was never put into an investment so there was no investment advice. Instead, it says Mr J was simply stealing Ms S's money and it's this reality that should be considered.

I've carefully considered everything Openwork has said. Unfortunately, there isn't much evidence available here. We know that Mr J did advise Mr and Ms S to invest £135,000 in a Sterling bond in October 2009 because there's a recommendation letter for it dated 16 October 2009. But we don't have any recommendation letters for the other £270,000 that was misappropriated at that time or for the £45,000 that Ms S says she paid to top up the three Sterling bonds she believed she had.

In my decision about the £270,000 that was misappropriated in October 2009, I said I was satisfied Mr and Ms S's intention had been to make an identical investment for each of their three children. And I was satisfied it was most likely Mr J advised Mr and Ms S to invest into three separate Sterling bonds. I haven't changed my opinion on this.

In her initial complaint, Ms S said Mr J had advised her in both March/April 2010 and December 2010 to top up the Sterling bonds. And when the investigator probed this further, she said that on both occasions she'd received additional money and wasn't sure what to do with it and so sought Mr J's advice.

Given the top up that was actually made was to an investment Mr J had previously recommended, I don't think the absence of a new recommendation letter means advice wasn't given. I've therefore considered what I think is most likely. I accept there are notes on Openwork's system saying the March/April 2010 top up was execution-only and that's what Mr J told Openwork. But Ms S has been consistent and plausible in her recollections. And given there was such a relationship of trust between her and Mr J, I think it's most likely her recollections are an accurate reflection of how their relationship operated and what actions she took when more money became available. I also note that Mr J's explanation that she "*executed this direct with Sterling*" doesn't account for the fact two of the cheques were made payable to Bespoke rather than Sterling and that suggests he was involved much earlier.

I accept Ms S didn't question the lack of documentation for the £30,000 of top ups or the cheques being made out to different businesses. But I'm satisfied this is simply reflective of her state of mind at the time and the level of trust Mr J had built.

Taking everything into account, I'm satisfied it's most likely Mr J advised Ms S to top up three separate Sterling bonds with £15,000 each in March 2010. It's also my view that Mr J agreed to arrange those top ups.

I accept that handling client money isn't a regulated activity. But I'm satisfied that if an adviser advises a client to invest in or top up a specified investment, there's regulated investment advice even if the adviser then intercepts the payment and steals the money. This is because, as the investigator explained, although buying or topping up an investment naturally follows investment advice, the actual purchase isn't part of the definition of the regulated activity of advising on investments. The subsequent arranging of the deal is a separate regulated activity under Article 25 RAO – even if the two activities normally run one into the other without much thought being given to that process.

I therefore don't agree that Mr J's fraudulent intention not to arrange the recommended top ups (for £30,000 of the money) means that he didn't advise Ms S. Openwork has referred to *Emmanuel v DBS Management Plc* (1999) and judicial comments about a property in Goa in *R (TenetConnect Services Ltd) v Financial Ombudsman Service* [2018] EWHC 459 (Admin). But I'm satisfied the circumstances here can be distinguished because Mr J advised Ms S and he carried out a regulated activity when he did so. I therefore also haven't needed to consider where the money came from and so I agree this case can be distinguished from *R (TenetConnect Services Ltd) v Financial Ombudsman Service* [2018] EWHC 459 (Admin).

Did Openwork accept responsibility for those acts?

Which business was Mr J acting for?

To answer whether Openwork accepted responsibility for the acts complained of, the first question I need to satisfy myself of is whether Mr J was acting for Openwork when carrying out any of the acts.

Taking everything into account, I'm satisfied he was. I say this because the recommendation letter dated 16 October 2009 was on Bespoke headed paper with an Openwork footer and included a paragraph explaining the relationship with Openwork:

> *As I have explained to you, I am a member of Openwork, which is a network of financial advisers. We are committed to ensuring that the financial advice provided is suitable for your current needs given the information you have provided. If this proves not to be the case, Openwork guarantees to put it right.*

He also requested that the cheques that were misappropriated were made payable to Bespoke. And when he paid the fictitious monthly returns to Ms S they appeared on her statements as being from Bespoke.

I haven't seen any evidence that he held himself out as representing any other businesses for these events. I've therefore gone on to consider whether Openwork accepted responsibility for the acts complained about under the agreement it had with Bespoke.

The agreement with Bespoke

Openwork has accepted that Mr J was allowed to give advice on Sterling bonds under the appointed representative agreement. And this matches what I've seen – both in the agreement and with Openwork having received commission in April 2010.

The "*Franchise Contract*" I've been given as what was in place at the time said:

> [The Franchisor] *agrees to accept responsibility for the Franchisee's activities only to the extent required by Section 39 of* [FSMA] *and to the extent that the Franchisee is expressly authorised to carry on such activities pursuant to this Contract. The Franchisee has no authority from the Franchisor to sell any financial services or plans other than the Services or the Plans or to carry on any other Regulated Activity.*

And the "Compliance Manual" of the same date went on to say:

> *Your appointment is restricted to obtaining applications for the Plans and Services arranged through Openwork…*
>
> *You have no authority from Openwork to sell any other financial services or products or to carry on any other investment business other than those offered through Openwork…*
>
> *If you carry on any kind of business other than your Openwork permitted activities, you must notify Openwork and run it as a separate business, in separate premises and clearly distinct from Openwork unless you have obtained consent in writing from Openwork.*

"*Plans*" was defined as:

> *any policy or investment contract offered by our Product Providers via Openwork (or, where the context permits, its competitors).*

And "*Services*" was defined as:

> *Any services offered or arranged via Openwork (or where the context permits, its competitors).*

There was a list of prohibited activities in the "*Compliance Manual*", but none of those seem to be relevant in the circumstances here. And Sterling bonds were on the product wheel I've been given dated June 2009 which shows products that were allowed.

Openwork has pointed to the fact that it wasn't allowed to handle client money and that the agreement it had with Bespoke specifically forbid Bespoke from doing so too. As the investigator explained, there's no doubt that Mr J breached the agreement with Openwork when he misappropriated Ms S's money. But that doesn't mean Openwork isn't responsible for his actions.

It's clear from a number of recent court cases that breaches of some terms of appointed representative agreements will work to exclude responsibility for a principal, and others won't.

In *Ovcharenko v Investuk* [2017] EWHC 2114, HHJ Waksman said the following:

> *the whole point of section 39(3) is to ensure a safeguard for clients who deal with authorised representatives but who would not otherwise be permitted to carry out regulated activities, so that they have a long stop liability target which is the party*

> *which granted permission to the authorised representative in the first place. In my judgment, section 39(3) is a clear and separate statutory route to liability. It does no more and no less than enable the claimant, without law, to render the second defendant liable where there have been defaults on the part of the authorised representative in the carrying out of the business and which responsibility had been accepted…*
>
> [Counsel for the principal] *has relied upon certain other provisions within the authorised representative agreement…He relies on paragraph 4.3 which is simply a promise by [the appointed representative] to* [the principal] *that it will not do anything outside clause 3…*
>
> *All that does is regulate the position* inter se *between* [the appointed representative] *and* [the principal]*. It says nothing about the scope of the liability of* [the principal] *to the claimants under section 39(3). The same point can be made in respect of clause 4.7 which says, "The representative will not carry out any activity in breach of section 19 of FSMA* [sic – this should be s.39 as per the quote from clause 4.7 in paragraph 9 of the judgment and the following description of the clause] *which limits the activities that can be undertaken or of any other applicable law or regulation". Again, that is a promise made* inter se*.*
>
> *The reason for those promises is obvious.* [The principal] *will be, as it were, on the hook to the claimants as in respect of the defaults of* [the appointed representative] *and if those defaults have arisen because* [the appointed representative] *has exceeded what it was entitled to do or has broken the law in any way, then that gives a right of recourse which sounds in damages on the part of* [the principal] *against* [the appointed representative]*. If* [counsel for the principal] *was correct, it would follow that any time there was any default on the part of an authorised representative, for example, by being in breach of COBS, that very default will automatically take the authorised representative not only outside the scope of the authorised representative agreement but will take* [the principal] *outside the scope of section 39(3), in which case its purpose as a failsafe protection for the client will be rendered nugatory; that is an impossible construction and I reject it.*

The judge in *TenetConnect Services Ltd v Financial Ombudsman Service* [2018] EWHC 459 (Admin) agreed with the above. In that case the network principal had argued it wasn't responsible for advice to invest in an investment in which it didn't authorise the appointed representative to deal. Mr Justice Ouseley said:

> *the decisions in Martin v Britannia and in Ovcharenko are clearly against* [counsel for the principal]*. The fact that* [the appointed representative] *had no actual authority, express or implied, to act as he did on* [the principal's] *behalf, nor was he held out by* [the principal] *as having such authority, does not answer the s.39(3) issue.*

So, it's clear the courts think at least some conditions on the authority given to an appointed representative in the agreement only apply as between the parties and don't affect the principal's responsibility under Section 39 FSMA.

In the *Anderson v Sense Network* case I referred to above, Mr Justice Jacobs also said:

> *I agree with the Claimants that liability under section 39 (and its predecessor) cannot simply be answered by asking whether a particular transaction was within the scope of the AR's actual authority…*

In Ovcharenko, HHJ Waksman QC considered the scope of Clause 3.2 of the AR agreement in that case, and went on to hold that the relevant investment advice was "firmly encompassed by the permitted services in the authorised representative agreement"…He said that the "business for which responsibility had been accepted encompasses the services set out in Clause 3 of the authorised representative agreement". Thus, section 39 was engaged notwithstanding other provisions of the AR agreement which imposed obligations or restrictions upon the AR; specifically, not to offer inducements, and an obligation not to do anything outside clause 3. The judge considered that these restrictions were matters which applied between the principal and the AR inter se, and did not affect liability under s.39.

Most recently, in TenetConnect, Ouseley J applied the decisions in both Martin and Ovcharenko in circumstances where it was common ground that liability under s.39 "was not to be determined as a matter of the contractual law of agency"…The basis of the decision in TenetConnect was that the relevant advice on "unregulated" investments was sufficiently closely linked to the advice on regulated investments, which the AR was authorised to give. The case therefore again supports the proposition that in ascertaining the scope of section 39, and the question of the business for which the principal has accepted responsibility, it is relevant to consider the terms of agreement between the principal and the AR. It is implicit in the decision that if the advice on the unregulated investments had not been sufficiently closely linked to advice which the AR was authorised to give, then there would have been no liability under section 39.

I also agree with the Claimants that the authorities indicate that it is appropriate to take a broad approach when seeking to identify the "business for which he has accepted responsibility". The fact that there may not be actual authority for a particular transaction, for example because of breach of an obligation not to offer an inducement (Ovcharenko), or because there was no authority to advise on a related transaction (TenetConnect), or because certain duties needed to be fulfilled before a product was offered, does not mean that the transaction in question falls outside the scope of the relevant "business" for which responsibility is taken. Equally, the approach must not be so broad that it becomes divorced from the terms of the very AR agreement relied upon in support of the case that the principal has accepted responsibility for the business in question.

In the present case, I agree with [the principal] *that the scheme, and advice in connection with that scheme, were well beyond the scope of the "business" for which [the principal] accepted responsibility pursuant to the AR agreement. It is beyond serious argument that the activities of* [the appointed representative]*…in relation to the scheme, both in terms of operating it and advising upon it, were wholly unauthorised. It is no part of the ordinary business of a financial adviser to operate a scheme for taking deposits from clients*.

And in the Court of Appeal, Lord Justice Richards said:

I do not agree with Mr Sims' next submission that it is impossible to distinguish between "what" and "how", so that the only sensible answer is to define the authorised person's responsibility by reference to its authority to conduct business of a prescribed, generic description. In my view, it will be a rare case which presents any difficulty in distinguishing between what activity may be carried on and how a permitted activity is carried on.

All this means a principal is responsible for the acts and omissions of an appointed representative acting within their actual authority. It also means that sometimes a principal is

responsible when the appointed representative acts beyond their actual authority. And sometimes a principal isn't responsible when the appointed representative acts beyond their actual authority. And the caselaw indicates that some clauses are akin to "*what*" the appointed representative can do which means a principal isn't responsible if they're breached; whereas some are akin to "*certain duties* [that need] *to be fulfilled*" or "*how*" they can do it and a breach of those means a principal is responsible.

Here, I'm satisfied that the fact Mr J handled client money breached a restriction that was a matter "*which applied between the principal and the AR inter se, and did not affect liability under s.39*". And I'm satisfied the circumstances can be distinguished from *Frederick & Ors v Positive Solutions* [2018] EWCA Civ 431 which Openwork has quoted as in this case, the handing over of the money did "*occur in the course of his agency for the respondent*".

So, I'm satisfied that Openwork did accept responsibility for Mr J advising Ms S to top up Sterling bonds. Because I'm satisfied Openwork accepted responsibility for the acts complained about here under the agreement it had with Bespoke, I haven't needed to go on to consider issues of apparent authority and whether Openwork made any representations to Ms S that Mr J had its authority.

What I've decided – merits

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

Openwork has argued that the merits of Ms S's complaint shouldn't be considered until the issue of jurisdiction is resolved. In particular, it thinks that the approach to merits issues – that they're decided on the basis of what's fair and reasonable in all the circumstances – influenced the investigator's approach to jurisdiction matters.

I've set out above my view on jurisdiction. I've made it clear how I've approached the issue and that I haven't based any part of my view on a consideration of what's fair and reasonable in all the circumstances.

As it's 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 nature of our role to resolve complaints which are within our jurisdiction speedily and with minimal formality, I now set out my conclusions on the merits of Ms S's complaint also. I don't agree that the DISP rules or the caselaw Openwork has quoted mean this has to be done in separate decisions. And I note that the investigator told Openwork on several occasions that this might be the next step and to make sure it made any arguments it had in relation to merits and compensation.

As I've set out above, I'm satisfied Mr J advised Ms S to make three top ups to Sterling bonds but then failed to arrange two of those top ups. He failed to do so because he was acting dishonestly. Instead, he paid Ms S's money into his account and used it for his own purposes. In order to maintain the concealment of his theft he provided her with fabricated monthly investment returns.

Mr J's conduct in not arranging the recommended top ups as he'd agreed to do but instead stealing the money caused Ms S to lose money. She's also lost the investment return she could have earned on her money. And she's suffered considerable trouble and upset in being the subject of Mr J's conduct.

Is it fair and reasonable that Openwork compensate Ms S?

Clearly Openwork didn't actually authorise Mr J to steal Ms S's money. And it didn't receive it. So, the question is whether it's fair to require Openwork to compensate Ms S for the losses?

I've found that Openwork is responsible for Mr J's conduct in relation to Ms S because I consider the law would impose liability on Openwork for his actions. So, it isn't necessarily unfair to require Openwork to pay compensation for the losses caused by Mr J'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 Openwork to compensate Ms S for the effect of Mr J's actions unless there's a good reason why it shouldn't do so.

Openwork has said, which I referred to above when looking at our jurisdiction, that Ms S acted unreasonably in handing over the cheques to Mr J and shouldn't be considered to have reasonably relied on any representation of authority by him. I've considered these same points again in order to decide whether it's fair and reasonable to require Openwork to compensate Ms S. For the same reasons set out previously, I don't think Ms S acted unreasonably in her belief that Mr J was conducting genuine Openwork business and was acting in her interests. She wasn't careless. She was the innocent victim of a dishonest financial adviser.

In my view it's fair and reasonable in all the circumstances to require Openwork to compensate Ms S.

Putting things right

In assessing what would be fair compensation, I consider that my aim should be to put Ms S as close as possible to the position she would probably now be in if she'd not entrusted Mr J with advising her in relation to the March/April 2010 top ups.

In the particular circumstances of this case, it seems most likely that Ms S would have invested the £30,000 that was misappropriated into the same type of Sterling bond that she actually did invest £15,000 in in March/April 2010. She seems to have been happy with this recommendation and it appears to have been in line with her risk profile.

I'm satisfied that what I have set out below is fair and reasonable given Ms S's circumstances and objectives at the time.

What should Openwork do?

To compensate Ms S fairly, Openwork must:

- Contact Sterling to obtain a notional value, as at the date of this decision, of the £30,000 Ms S thought she'd invested. The £30,000 should be treated as though it'd been invested into two Sterling bonds the same as the one she did in fact invest in on the same date.

- Pay this notional value – less money returned (explained below) – to Ms S.

- Pay to Ms S £300 for the considerable trouble and upset she's been caused. What happened clearly caused Ms S a considerable amount of upset, particularly in light of the circumstances at the time.

- Pay interest on my award of 8% simple a year from the date of this decision to the date of settlement if compensation isn't paid within 28 days of Openwork being notified of acceptance of the decision. Income tax may be payable on any interest.

- Provide the details of the calculation in a clear, simple format.

Money returned to Ms S

Mr J made monthly payments to Ms S under the pretence of investment returns. A proportion of these should be deducted from the notional value at the point they were actually paid so they cease to accrue any return in the calculation from that point on. There's a large number of payments, so to keep calculations simpler, I'll accept if Openwork totals all those payments and deducts the correct proportion at the end to determine the value instead of deducting periodically.

The proportion to be deducted will change over time – my understanding is that initially 10% of the "investment returns" will have related to the £30,000 that's the subject of this decision and then just over 9% when the next set of top ups were made in December 2010.

I also understand that Ms S has received two payments under the Proceeds of Crime Act 2002. Again, Openwork should deduct a proportion of these from the notional value at the point they were actually paid so they cease to accrue any return in the calculation from that point on.

The proportion to be deducted here will be £30,000 as a proportion of the total amount Mr J misappropriated from Ms S which I understand to be £354,000.

My final decision

I uphold Ms S's complaint against Openwork Limited. My decision is that Openwork Limited should pay Ms S the amount produced by the calculation set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms S to accept or reject my decision before 1 March 2023.

Laura Parker
Ombudsman