DRN-3901670

The complaint

Mr D says he received advice from a financial adviser in 2013. The adviser – I will call him Mr B - was an agent of Abacus Associates Financial Services Limited which is now Tavistock Partners (UK) Limited. Mr D says that he was advised to invest funds for a trust arrangement for his grandchildren in an Abacus Low Plus portfolio to be held on a platform with Standard Life. Mr D thought he was making that investment but instead the money was paid into a bank account controlled by Mr B who stole the money. Mr D holds Tavistock responsible for his losses and claims compensation from it.

What happened

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

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

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

Abacus had 37 financial advisers one of which was Mr B who joined Abacus in April 2012 and was registered with the regulator as a CF30 approved person of Abacus. Mr B was a self-employed agent of Abacus/Tavistock until May 2018 when he resigned. This means Mr B worked under the terms of an agency agreement with Abacus rather than as its employee. Mr B was authorised by Abacus to advise on investments on its behalf. He was also appointed a supervisor responsible for a team of advisers based in the North of England. In turn he was under the supervision of the director and owner of the business.

In December 2018 Mr B was convicted of 14 counts of fraud after a police investigation revealed he had stolen around £4.5 million. He is said to have used the money to fund a lavish lifestyle and gambling addiction.

The trust arrangements and Mr B

The following was set out by one of our investigators and is not, I understand, in dispute.

Mr D and his late brother were trustees of the D Trust fund, which was set up in 2008 following the passing of their mother. She had bequeathed money to be held in a Trust, which was to be used to gift £10,000 to each of her grandchildren and

great-grandchildren on their 25th birthday.

In October 2008, the D Trust invested £75,019.68 from Mrs D's mother's estate into a Teachers Assurance portfolio on the recommendations of Mr B - who was working for Teachers at that time.

In April 2012, Mr B left Teachers and became an agent for Abacus. In August 2012, Mr D says Mr B met with the trustees and advised their funds weren't protected with Teachers so recommended they move the investment to an Abacus fund.

On 12 September 2012, the trustees completed a purported Standard Life terms and conditions acceptance form and a letter was provided by Mr B on the same day outlining the investment with Teachers would be transferred to a "Abacus Low Plus" portfolio administered by Standard Life on behalf of Abacus Associates. It said the portfolio value at the date of transfer was £116,666.04 and fees equated to £3,499.98, so the net transfer would be £113,166.06.

The investment with Teachers Assurance was then surrendered. On 25 September 2012, £113,166 was deposited into an account under the name 'Abacus Associates' – but the account was in fact controlled by Mr B who stole the money.

Mr D met with Mr B again on 2 April 2013 with the purpose of investing further funds into the Low Plus portfolio following Mr B's previous recommendations. Following the Trust being set up, three further grandchildren had been born and Mr D wanted to also gift them £10,000 each on their 25th birthdays. He says this was a separate arrangement to the D Trust. I'll explain this in more detail below.

Mr D wrote a cheque to 'Abacus Associates' for £30,000 on 2 April 2013, intending for the funds to be added to the Low Plus portfolio. However, again, the Abacus account was one that was in fact controlled by Mr B.

On 25 April 2013, Mr D received a letter on Standard Life headed paper showing a personal illustration of the £30,000 invested. The illustration showed it was for 'personal portfolio mutual fund investments' for Mr D and named the three additional grandchildren. Under the heading 'What will be paid into my investment?' it said a single payment of £30,000. Abacus Associates were listed as the adviser. We now know this illustration was forged by Mr B.

Mr D wrote another cheque for £10,000 at his meeting with Mr B on 15 January 2014, following the birth of another grandchild. He was provided with a document called 'Your Wrap information' at the meeting which had the Abacus Associates logo and gave him another illustration of the earlier April 2013 investment for one of the grandchildren. Mr D has said that the investment of this further money was part and parcel of the overall strategy for additional grandchildren agreed with Mr B in April 2013.

Mr D met again with Mr B on 15 April 2015 and was provided with another 'Your Wrap information' document. The accompanying letter was on Abacus Associates paper and said it enclosed the *'full report for the trust fund you have in place for [one of the grandchildren]. I haven't printed off full reports [the other grandchildren] as the content will be identical and over time will fill your files up with unnecessary paperwork!'.* The monies invested were shown to have grown on the document.

Similar documents were provided at subsequent meetings up until 2018. Again, we now know all these documents to be forgeries by Mr B as he had in fact stolen the money and not invested it at all.

The complaints

Mr D complained to Tavistock in 2018. Mr D said on his complaint form that he first complained on 18 September 2018. I am not sure what Mr D's very first complaint said but it seems to have been acknowledged by a letter dated 9 October 2018.

Mr D replied to that letter on 7 November 2018. He explained the above background. And it should be noted that the letter began

> *"… I enclose details of my two separate complaints against [Mr B] as requested."*

The letter said Mr D had two complaints: the first about the D Trust investment and the second about the later trust set up by Mr D and his wife in 2013.

The settlement agreement

On 11 February 2019 Tavistock issued its response to Mr D. It wrote one letter about both complaints. The letter was headed *"Complaint about the [D Trust] against Tavistock…"* It set out the factual background. It explained that Mr B had paid the money received into a bank account he controlled and had stolen the money.

Tavistock said Mr B was its agent but that he was not authorised to act in the way he had and that it did not consider it was responsible for the illegitimate advice Mr B had given. It did however say that Mr B was authorised by it to give advice on the Teachers Assurance investments and that Mr B should not have advised that the investments be surrendered. It said it was prepared to make an offer in respect of that money, less the money that had been paid out to the beneficiaries.

Tavistock went on to say it was not prepared to make an offer in respect of the further £40,000 paid over to Mr B by Mr D as it did not consider it was responsible for the advice Mr B gave in order to carry out his fraud.

Tavistock's letter said it upheld part of the Trust's complaint but was unable to uphold "your complaint" in relation to the remainder of *"the purported investments made by the Trust on the advice of [Mr B]".*

The letter included an acceptance for which said:

> *"PROPOSED REDRESS PAYMENT BY TAVISTOCK …TO THE D TRUST*
>
> *We, the Trustees of the D Trust, confirm that we would like to receive the proposed redress payment by Tavistock … set out in this form …*
> *We have read and understood the conditions of the proposed redress payment by Tavistock, which are as follows:*
>
> 1. *Tavistock will pay the Trust £92,925.79 plus growth the trust fund would have obtained from Teachers Assurance investments which were encashed in September 2012 between 14 September 2012 and the date of this letter in full and final settlement of any and all claims, complaints or actions the Trust may have against Tavistock concerning the acts or omissions of [Mr B].*
> 2. *In accepting this offer, we understand that the Trust will lose the right to pursue a claim via the Courts or a complaint via the Financial Ombudsman Service in relation to these matters…"*

Mr D responded to that letter on 4 April 2019 setting out why he thought Tavistock had

been at fault. That letter included:

> *"My mother [JD] intended to gift all of her grandchildren and great grandchildren, even those born after her death … with £10,000. She made me and my brother [DD] promise to include any additional great grandchildren to benefit from the D Trust Fund ensuring they would all be treated the same, when attaining 25.*
>
> *This trust was set up by my late Mother's Will, [Mr B] was employed to carry out the wishes of my late mother.*
>
> *…We employed the services of Abacus Associates/Tavistock [and it] had a duty of care to make sure The D Trust was safe…"*

Mr D repeated that his cheques had been made payable to Abacus Associates and asked about how it had been monitoring Mr B.

Mr D made the point that the D Trust paid "*every possible care and attention in securing a safe and reputable company Abacus Associates/Tavistock to care for all my Mother's great grandchildren's inheritance…"*

Abacus responded on 8 May 2019. It began by summarising its final response letter of 11 February 2019. It said:

> *"We were able to uphold The D Trust's complaint in relation to the payment …which was made [in] 2012….*
>
> *We were not able to uphold The D Trust's complaint in relation to the further sums which were paid to [Mr B] (£30,000 on 2 April 2013 and £10,000 on 15 January 2014)."*

The letter went on to explain why it was not making an offer in respect of the later payments and concluded:

> *"We hope that the above has provided clarity on the points you raised. We look forward to hearing from you in response to Tavistock's proposed redress payment set out in its letter of 11 February 2019."*

Mr D did not accept the offer that had been made. On 11 July 2019 Mr D made contact with our service to say he wished to make a complaint about Tavistock. A complaint form was sent to him. He returned the form in October 2020. It included:

> **how have you been affected - financially or otherwise?**
> *"I am not able to leave a gift for my grandchildren, I thought I was adding to the D Trust Fund."*
> **how would you like the business to put things right for you?**
> *"To return my £40,000 and interest that would have accumulated in the last six years."*

The complaint form was completed by and signed by Mr D only.

There is a section in the form that asks if the complainant is complaining on behalf of a business, charity or trust. This section has not been completed. There was a further box asking for details of the net assets of the trust if complaining on behalf of a trust. A line has been drawn through that box.

Our service told Tavistock that Mr D had referred a complaint to us. It will therefore have been aware that Mr D had not accepted the offer than had been made and wished to make a claim in respect of the £40,000 payment he had made.

Although Mr D had complained to our service in July 2019, correspondence between Tavistock and the trustees of the D Trust continued. To complicate matters Mr D had an accident and was quite seriously injured. And relations between the two trustees of the D Trust were difficult.

The accident was in November 2019 and soon afterwards Mr D's wife - Mrs D - wrote to Tavistock to ask if there was any way things could be resolved as she was concerned about how the stress of the unresolved dispute was affecting her husband's recovery. Mrs D mentioned that Mr D had sent the signed acceptance form to the joint trustee of the D Trust (AD) in June 2019.

On 19 December 2019 Tavistock contacted Mrs D to say it had been in touch with AD and understood she was taking legal advice. It then set out details of the offer being made "*to assist Mr D in determining whether to accept the offer".*

In March 2021 Tavistock informed our service that it had reached a settlement with Trustees and that the case need no longer be reviewed. Tavistock said Mr D had signed a settlement form in October 2020 and that AD had confirmed that she also accepted the offer.

The settlement form said:

> *"PROPOSED REDRESS PAYMENT BY TAVISTOCK …TO THE D TRUST*
> *We, the Trustees of the D Trust, confirm that we would like to receive the proposed redress payment by Tavistock … set out in this form …*
> *We have read and understood the conditions of the proposed redress payment by Tavistock, which are as follows:*
> 1. *Tavistock will pay the Trust £132,480.74 in full and final settlement of any and all claims, complaints or actions the Trust may have against Tavistock concerning the acts or omissions of [Mr B].*
> 2. *In accepting this offer, we understand that the Trust will lose the right to pursue a claim via the courts or a complaint via the Financial Ombudsman Service in relation to those matters…"*

On 5 February 2020 the second trustee of the D Trust, AD, had emailed Tavistock. The email was headed "Re: The D Trust Fund. AD said:

> *…As mentioned when we spoke at the end of last year, I needed to take advice on the Trust fund and if any changes could be made as [Mr D] wished to add additional beneficiaries.*
>
> *Having now taken this advice, I have been informed that you are recognising the Trust but only as it stood in September 2012 (with all figures calculated assuming the Trust continued to perform as it should and without the fraudulent activities of your employee), the fund cannot be diluted to include additional beneficiaries that myself and Mr D subsequently added. The only way that changes could be made to the distribution of the Trust's Funds, would be if all the existing beneficiaries were to agree. As several of the beneficiaries are under age this is impossible… Now the legal position has been clarified, I am willing to accept the reinstatement of the trust under the terms you have proposed with the remaining six beneficiaries receiving the amount stated.*

> *…[A]ny sum agreed needs to be placed in trust to be invested and distributed to the six remaining beneficiaries in the way the Trust Deed requires…."*

To pause for a moment I understand there was a delay in actually paying the agreed sum to trustees because they do not have a trustee bank account. The implementation of that settlement is not however an issue I am concerned with here. The issue is whether a complaint about the payments made by Mr D in 2013 and 2014 totalling £40,000 is within the scope of that settlement.

Our investigator then told Mr D that Tavistock considered the matter settled. Mr D did not think that it was. He said the settlement only relates to the money invested originally with Teachers Assurance. It does not cover the money he paid to Mr B in in 2013 and 2014. He says that is his loss and he still looks to recover it. He said he had tried to get Tavistock to treat it all as one matter but it would not.

Mr D had also said:

> *"Not being very clever with all this I agreed to the D Trust Fund redress because I was worried that the D Trust Fund money could disappear and six of her great grandchildren would lose her gift altogether."*

He also said

> *Tavistock informed me that the D Trust Fund money was paid into [Mr B's] bank account on 25/09/2012, so when I made the payments of £30,000 in April and £10,000 in January 2014, they could not have been classed as part of the D Trust Fund, or am I misreading this? We still feel that Abacus/Tavistock are entirely to blame for the money - £40,000 – being stolen because at all times [Mr D] represented Abacus/Tavistock…"*

The investigator told Tavistock that Mr D's claim is a separate claim and not covered by the settlement. She went on to explain why she thought Mr D's complaint should be upheld.

Tavistock does not agree. Its lawyers say the correspondence should be viewed in its entirety. The complaints concerned money Mr D believed were held on trust for the benefit of his grandchildren. Because Tavistock believed the two complaints made were essentially one and the same it responded to Mr D's letter of complaint in a single letter. And the reference to *"these matters"* was to *all matters* subject to the complaints brought by Mr D. They say the settlement agreement is clear in stating that offer was in full and final settlement of any and all claims, complaints or actions the Trust may have against Tavistock. Tavistock says Mr D decided to accept the offer and our service cannot reasonably take advantage of the lack of clarity in the complaint to say the later payments are not covered.

Tavistock says Mr D is prevented from now complaining about the issues he still wishes to complain about on the basis of estoppel.

The lawyers went on to say it was only commenting on the issue of whether or not the complaint was compromised. Tavistock asked for the matter to be reconsidered and says it reserve its position on the other points made by the investigator in relation to the merits of the complaint.

The matter was then referred to me.

I issued a provisional decision on 20 December 2022 explaining why I believed the complaint had not been compromised, why we had jurisdiction to consider the complaint against Tavistock and why it should be upheld.

The parties had nothing further to add following my provisional decision. As such my findings below remain as they were in my provisional decision save for some minor corrections – including a reference to will writing work which Mr B did not appear to undertake for Mr D.

My findings – Jurisdiction

I have considered all of the evidence and arguments in order to decide whether we may consider Mr D's complaint.

Has the complaint been settled/compromised?

Tavistock says the original letter of complaint was not clear and both complaints appeared to refer to trusts of which Mr D was a trustee and in relation to both of which Mr D claimed to have personally contributed money.

It also says that because Mr B persuaded Mr D to transfer/pay all monies into his bank account no trusts actually existed. And that it has seen no trust documentation in relation to either trust and does not believe any exists. And for these reasons Tavistock responded to both complaints in a single final response.

I think the trust arrangements are sometimes confused by the parties. I think that is because Mr D and Mrs D and AD are not professional trustees. They are just trying to do what they think is the right thing and occasionally those good intentions sometimes come up against legal distinctions that mean little or nothing to them.

Mr D mentions that he and his brother, the original trustees of the D Trust, topped up the D Trust fund in 2008. As mentioned, I have not seen declaration of trust but assume this was permitted as it does not seem to have caused any problems.

The confusion arises in relation to payments made in respect of JD's great grandchildren born after she died. Both AD and Mr D apparently wanted to provide for them in accordance with their mother's wishes. Mr D has referred to a second trust arrangement set up with his wife in 2013. He has also referred to the same payments as being money added to D Trust Fund. However Mr D was technically incorrect to refer to it in that way if, as seems to be the case, it was separate arrangement with his wife in respect of his grandchildren. So the later trust was similar to the D Trust in providing for grandchildren of JD's children when they reached 25 but the trustees were different. They were two separate arrangements. Mr D was a trustee of both arrangements but AD was not.

The fact that Mr D was a trustee of two similar trust arrangements does not make those trust arrangements one and the same.

It is correct to say that no trust documents have been produced but that does not mean trusts do not exist. Similarly the fact that Mr D misappropriated the assets of the trusts does not mean the trusts do not exist.

Mr D's letter of 7 November 2018 was clear in that it expressly referred to *"two separate complaints."* Those were expressly stated to relate to different trust arrangement. Mr D was a trustee of both. But according to his complaint the first complaint related to the D Trust – although I accept he does not expressly call it that in his letter – of which Mr D

was trustee with (by that time) his sister in law, AD. And the second complaint related to a different trust arrangement set up to compliment the first, but it was set up with Mrs D not AD. It was set up to benefit only Mr D's three (later four) named grandchildren who were born after JD's death and so did not benefit under her Will Trust. The intention as clearly stated in the letter was that these younger grandchildren of Mr D/great grandchildren of JD would benefit in the same way as the beneficiaries under the D Trust under this arrangement because they were not included in the D Trust arrangement.

The later arrangement may well not be formally documented but it was clear on the face of Mr D's complaint letter that it was a different, not the same matter – though it had been caused losses by Mr B like the D Trust.

It was understandable that Mr D would complain about both matters in one letter. And I can see that from time to time in some of the letters the distinction between the two arrangements has become blurred.

Tavistock as a regulated firm is required to assess a complaint fairly and I can see it tried to resolve the complaint as it understood it taking into account its understanding of the way our service would resolve complaints.

However in my view it made an error in treating the complaints as one and the same when they were not. They were complaints about similar events. But the complaints were two separate complaints as Mr D expressly said. According to the complaint as made they involved events that occurred when providing different services to Mr D at different times when Mr D acted in two different capacities. They were, as he expressly said at the outset, separate.

Further the email from AD, headed "The D Trust Fund" is also relevant to the point. I accept it does not expressly spell out the boundaries of the complaint in clear terms but it does make clear that her understanding, following legal advice, was that "additional beneficiaries" could not be added to the original D Trust as she and Mr D had wanted to do. This again seems to show that matters relating to the later beneficiaries were not covered by the original D Trust or settlement.

AD said:

> *I am willing to accept the reinstatement of the trust under the terms you have proposed with the remaining six beneficiaries receiving the amount stated.*

The remaining beneficiaries is a reference to the six remaining beneficiaries under the D Trust. The letter also seems to show a misunderstanding on AD's part. She referred to Tavistock

> *"recognising the Trust but only as it stood in September 2012 (with all figures calculated assuming the Trust continued to perform as it should and without the fraudulent activities of your employee), the fund cannot be diluted to include additional beneficiaries that myself and Mr D subsequently added."*

But Tavistock's offer was not conditional on recognising "the Trust" as at any date or based on any view about "the Trust" being diluted by additional beneficiaries. The offer related only to Tavistock's view about its responsibility for Mr D's wrong-doing and the loss caused only by the conduct for which it thought it was responsible - without admitting liability – which should take account of the money paid out to beneficiaries from the

money released by Teachers Assurance.

In my view AD's email shows AD thought that it was Tavistock's view that "the Trust" was only the original D Trust, as set up by JD's Will, which could not be added to or diluted and so the arrangements in relation to additional beneficiaries were separate to the D Trust. And that after taking advice now understood that was correct and that "the Trust" was only the original D Trust with its remaining six beneficiaries.

It seems to me that AD's thinking at the time of her email was like Mr D's at the time of his complaint letter in November 2018 – that there was the original D Trust and separate arrangements for the later grandchildren which in his cases was a separate trust arrangement set up with his wife in 2013.

Accordingly when the Tavistock made its offer to the Trustees of the D Trust to make a payment to the D Trust it was only making an offer to the Trustee of the D Trust to settle actions and claims by the D Trust. It was not agreeing to settle any other claims Mr D has as a trustee of a separate trust arrangement – i.e. the arrangement he referred to in his second complaint in his original letter of complaint. This second complaint was not part of the D Trust complaint.

AD had no capacity in relation to Mr D's separate/second trust complaint and so she could not in her capacity accept any offer or that trust. She could only accept the offer made to her in relation to the D Trust in her capacity as a trustee of that trust. And Mr D - acting in his capacity as trustee of the D Trust - did not agree to settle any disputes he had in a separate capacity of a separate trust arrangement for the benefit of his additional grandchildren.

In my view the settlement the trustees of the D Trust agreement to does not compromise the complaint made by Mr D in his capacity as trustee of the later trust arrangement and the payments made by Mr D pursuant to that arrangement in 2013 and 2014. The complaint has not been compromised and there is no basis, in the circumstances, for saying Mr D is estopped from bringing the complaint.

Other jurisdiction matters

Given my findings above, I set out my findings on other jurisdiction matters and the merits of the complaint.

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

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

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

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

The regulatory background:

I have taken into account the Financial Services and Markets Act 2000 (FSMA), the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO), and the Conduct of Business Sourcebook section of the FCA Handbook (COBS).

Regulated activities

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

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

- advising on the merits of buying or selling a particular investment which is a security or a relevant investment (article 53 RAO),
- making arrangements for another person to buy or sell or subscribe for a security or relevant investment (article 25 RAO), and
- agreeing to carry on either of those activities (article 64 RAO).

The general prohibition

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

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

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

The approved persons regime

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

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

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

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

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

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

Breach of statutory duty

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

Section 138D(2) of FSMA said:

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

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

One such rule in place at the time of the events Mr D 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 D 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 B because he was not himself a 'firm' or an 'authorised person'. His status as Abacus' CF 30 advisor only allowed him to perform particular functions (including advising on investments and arranging deals) in relation to regulated activities that Abacus carried on and for which Abacus was answerable under the FCA rules.

What is the complaint?

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

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

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

Mr D's complaint relates to the monies paid in April 2013 and January 2014 amounting to £40,000. Following Tavistock's final response letter, Mr D clarified his complaint. In his letter in April 2019 he said:

> *'We expected that these appointed staff would work to a high standard that would be expected of a Professional IFA firm which is regulated by the FCA, and that we would feel safe and secure in the knowledge that you are committed to the highest of professional and regulatory standards… I relied on the fact that a financial advisor was acting on behalf of Teachers and Abacus Associates/ Tavistock – nothing what so ever to do with a personal connection otherwise we could have invested The D Trust Fund money elsewhere. We paid the appropriate fee for professional advice… not only did we pay for the original advice, we paid an ongoing fee for the advice which was evidence to us that we were receiving ongoing professional advice'.*

In my view Mr D's complaint is that he consulted Mr B 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.

One point to add here is that we recently contacted Mr D to ask whether the advice meetings in 2013 and 2014 were two separate services. He confirmed that the meeting in January 2014 was a continuation of the overall strategy agreed in April 2013. That is why we are treating the two payments totalling £40,000 as a complaint about one financial service.

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

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

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

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

At the time, 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 Art 53 there must be advice – not just, say, the provision of information. And the advice must

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

There isn't a great deal of evidence relating to events in 2013 and 2014. Mr B was a fraudster and he did not use Abacus's usual record keeping systems. I do however have

Mr D's version of events and also evidence in the form of the previous advice for the D Trust and the forged "Your wrap" statements that were later provided by Mr B to Mr D. Though Mr B is known to be a dishonest person the previous letter and statements are still an indication of what was likely discussed at the time.

Based on the evidence that is available to me it is my finding that Mr B did advise Mr D to invest in a wrap account with Standard Life in the same way he'd previously (and indisputably) advised on the D Trust fund money. Or more specifically Mr B advised Mr D to invest in the Abacus Low Plus Portfolio within the Standard Life wrap. He likely recommended that he make that investment, he advised him it was suitable for his investment needs. This is advice to Mr D 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 D and Mr B were discussing – and Mr B 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 B 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 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 B's original letter of 2012 to the D Trust) 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 B did that must be reviewed: he never gave investment advice and never intended to do so. He only intended to persuade Mr D to pay money into his personal bank account and this was therefore a "purported" – and not real investment.

However when viewed from Mr D'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 B's viewpoint, he advised them to do so – it was an essential part of his fraud. This is not a case where, say, the adviser persuades the investor to lend money to the adviser personally or join in a joint investment project with the adviser personally. Mr D did not know he was paying the money to Mr B 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 B's fraudulent intention not to arrange the recommended investment means that no investment was in fact recommended.

In my view Mr B 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 D to make the recommended investment and give him a cheque in payment for the

investment.

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 B's conduct didn't fall within those activities, the conduct was in my view at least "ancillary" to one or more of them. For example, the steps Mr B took to cover his tracks, by suggesting to Mr D 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 D complains about?

Agency is a relationship between two parties where they agree that one will act on behalf of the other so as to affect its relations with third parties. The one on whose behalf acts are to

be done is called the principal. The one who is to act is called the agent. In other words, the principal authorises the agent to act on its behalf.

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

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

It isn't in dispute that Mr B did not have Abacus' actual authority to carry out the acts here. He did not act in accordance with the agency agreement. He was authorised to give investment advice to clients such as Mr D 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 D and Tavistock received no payments or commissions etc.

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

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

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

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

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

The first question is whether there was a representation in relation to the advice and acts of Mr B - in this case at the meetings when Mr D invested initially £30,000 in 2013 and later a further £10,000 in 2014. To answer that question, it is right for me to consider whether Abacus placed Mr B in a position which would objectively carry Abacus' authority for Mr B to conduct business of the *type* he purported to conduct.

As a reminder, Mr D had an existing relationship with Mr B. Mr B had given Mr D (as a trustee of the D Trust) advice to disinvest D Trust moneys from a Teachers' fund to the Abacus Low Plus Portfolio. Mr D's dealings with Mr B leading up to the meetings in 2013 and 2014 were all as an Abacus adviser.

At the meetings in 2013 and 2014, I am satisfied that Mr B was acting as an independent financial adviser able to 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 B.

This is illustrated in the marketing material relating to Abacus that I have seen that was given to other customers at around the same time. There is no evidence that the marketing material was given to Mr D and so I *do not say* that the material was itself a representation made by Abacus to Mr D in December at the meetings in 2013 and 2014, 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 B was authorised to give investment advice by Abacus. He was held out by Abacus as one if its advisers. He was registered, by Abacus, as one of its CF30 financial advisers on the FCA Register which is a register which is freely available to the general public.

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

Abacus placed Mr B in a position which would, in the outside world, generally be regarded as having authority to carry out the acts Mr D 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 D, to understand that it was taking responsibility for the advice given by its financial advisers. I am satisfied that Abacus intended Mr D to act on its representation that Mr B was its financial adviser.

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

I've also taken account of the letter that Mr D was sent a few months earlier in in 2012 in connection with the D Trust which said :

"The on-going review of investments is a vital cog in helping you achieve your goals and I would recommend that you meet your adviser annually to fully review your financial plan and your aims and objectives….We have agreed a full annual review service which will be conducted on a face to face basis with no additional cost to be added to your current trail fee agreement following this investment"

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."*

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

Did Mr D reasonably rely on Abacus' representation?

There are two points here – did Mr D 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 D believed that Mr B was acting at all times as an Abacus adviser and authorised to give investment advice of the type given here. That was an essential part of the overall fraud perpetrated by Mr B.

But was it reasonable for him to do so?

Mr D had earlier in 2012 dealt with Mr B with regard to the D Trust and the disinvestment from the Teachers Assurance plan and the purported reinvestment in the Abacus Low Plus Portfolio – and at all times indisputably believed these acts to be undertaken by Mr B as an Abacus adviser with authority to do so from Abacus. He had been provided with a business card and Abacus paperwork.

I think Mr D acted reasonably in believing that Mr B was still acting in this capacity a few months later when he essentially received advice on making further investments in the same fund.

I don't think the lack of documentation about the investment at the 2013 and 2014 meetings means that Mr D acted unreasonably in his belief that Mr B 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 D to trust that Mr B, a regional sales manager of Abacus, a regulated firm, would invest his funds in the way he'd advised and was acting in Mr D's interests.

Tavistock has said in other cases that it was not reasonable for Mr D to have believed Mr B 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 B) 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 D could reasonably be obliged to understand that Abacus is not authorised to hold client money or to even understand what that concept means.

Tavistock in other complaints has pointed to the *Sense* case and said that, just as with

the claimants in that case, it could not be said that Mr D 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 D had clearly heard of Abacus and, in my view, proceeded (correctly) on the basis that Mr B was authorised to provide the financial advice services he gave in connection with the Abacus Low Plus Portfolio.

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

My conclusion on agency

It is my conclusion that Abacus is responsible for the acts and omission of Mr B from 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 B – independently of whether apparent authority also operated such as to fix Abacus with liability for the actions of its agents.

What is vicarious liability?

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

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

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

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

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

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

Various Claimants v Catholic Child Welfare Society [2012] UKSC 56 ("the Christian Brothers")
Cox v Ministry of Justice [2016] UKSC 10
Mohamud v WM Morrison Supermarkets plc [2016] UKSC 11

Armes v Nottinghamshire County Council [2017] UKSC 60
WM Morrison Supermarkets plc v Various Claimants [2020] UKSC 12 Barclays Bank v Various Claimants [2020] UKSC 13

It has long been recognised that an employer can be vicariously liable for the fraudulent acts of an employee acting in the course of his employment. There is no requirement that the fraud be for the benefit of the employer. This was confirmed by the House of Lords in *Lloyd v Grace Smith & Co* in 1912. In that case a law firm was held to be vicariously liable for the fraud of a solicitor's clerk who dishonestly persuaded a client to transfer property over to him.

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

Tavistock 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 in 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 B's conduct in advising Mr D 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 D 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 B's handling of the cheque and to the question of Abacus' responsibility for all his statements and conduct under s.138D FSMA. I am not extending the law, but simply applying it. As such I have also considered the general two stage test.

The stage 1 test:

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

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

In this case Mr B was not an employee. He was a self-employed agent of Abacus. But he was not carrying on his own independent business like the doctor in the *Barclays* case. Or like the appointed representative Midas in the *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 B and Abacus such that Abacus may be held vicariously liable for their actions. But even if this was one of the "doubtful cases" that Lady Hale referred to, I consider that the five incidents Lord Phillips identified in the *Christian Brothers* case would still point towards the relationship being one to which vicarious liability could apply. Those five points are:

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

I note:

- Abacus is considerably more likely to have the means to compensate Mr D than Mr B. Abacus can be expected to have insured against that liability and may even have been required to hold professional indemnity insurance as a condition of its authorisation by the Financial Conduct Authority.

- Abacus had assigned to Mr B the activity of giving investment advice and arranging investments on its behalf. The acts Mr D 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 B undertook on Abacus' behalf.

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

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

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

However, the fact that the relationships in question are capable of giving rise to vicarious liability does not mean that Abacus is automatically liable for everything Mr B did. To decide whether Abacus is liable in the circumstances of this complaint (according to the general tests), I must also consider whether the act complained of is sufficiently connected to Mr B's duties on behalf of Abacus – the stage two test.

The stage two test

Under this test there are two important questions:

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

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

Mr D contacted Mr B 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 B appeared on the Financial Conduct Authority's Register as an 'approved person' able to give such advice on Abacus' behalf. For the purposes of the application of the stage two test to Mr D's complaint, I consider that the field of activities assigned to Mr B by Abacus should be described as the giving of investment advice and arranging recommended investments (and agreeing to do both).

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

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

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

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

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

- I would not expect an ordinary consumer in Mr D's position to have noticed the deficiencies in the advice process. He knew of Mr D as a result of the recommendation from a friend.

- I do not consider that Mr D, or an ordinary consumer in the position of Mr D, could reasonably have known that Mr B had no intention of arranging the investment he was recommending seemingly on behalf of and connected to Abacus – the Abacus 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 B was motivated by personal greed to act dishonestly but rather whether he was acting dishonestly when going about his employer's business or whether the was pursuing private ends. In this case Mr B was pursuing Abacus' business. He 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 D or Abacus. He was just dishonestly performing his duties as an Abacus investment adviser.

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

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

Statutory responsibility under section 138D(2) of FSMA

For the reasons I've given above, I am satisfied that when Mr B advised Mr D 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 D's money.

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

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

As I am of the view that we have jurisdiction to consider the complaint. I've gone on to consider all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Mr D contacted Mr B in 2013 and 2014 in order to get advice about how to invest money. He was advised to invest in the Abacus Low Plus portfolio in a Standard Life wrap.

As I understand it, what should have happened is that Mr B should have confirmed his recommendation in writing and had that advice checked (or reviewed) before confirming it to Mr D. On the assumption the advice was checked/reviewed and approved and then accepted by Mr D, 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 B 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 B 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 D, failing to act honestly, fairly and professionally in accordance with the best interests of his client, Mr D.

Mr B had agreed to arrange the investment but instead stole Mr D's money. He paid Mr D'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 B's conduct in not arranging the recommended investment as he had agreed to do but instead stealing the money has caused Mr D 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 B's active concealment of the theft which began almost immediately after receiving the cheque, when he gave Mr D "portfolio" information and valuations. But for those deceptions, all of which were carried out in Abacus' name and with apparent authority, Mr D would doubtless have demanded his money back almost as soon as he handed it over and at a time when Mr B is most likely to have had the ability to repay him.

Is it fair and reasonable that Tavistock compensate Mr D?

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

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

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

I don't think Mr D acted unreasonably in his belief that Mr B 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 D.

Fair compensation

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

It seems reasonable to say Mr D would have invested the same sum. It is the case that Mr B'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 D's best interests. But I am satisfied that what I have set out below is fair and reasonable given Mr D's circumstances and objectives when he invested.

What should Tavistock do?

To compensate Mr D fairly, Tavistock must:

- Compare the performance of Mr D's £40,000 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 D £300 for the considerable upset Mr D has suffered as a result of losing his investment because of Abacus' adviser's actions. This has clearly been a difficult time for Mr D and it has no doubt also impacted his family too.

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 was stolen	for half the investment: FTSE UK Private Investors Income Total Return Index; for the other half: average rate from fixed rate bonds	The date of the £30,000 investment in 2013 and additional £10,000 in 2014	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 £40,000 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 D 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 D'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 D into that position. It does not mean that Mr D 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 D could have obtained from investments suited to his objective and risk attitude.

My final decision

I conclude that the Financial Ombudsman Service has jurisdiction to consider Mr D'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 D to accept or reject my decision before 14 February 2023.

Abdul Hafez
Ombudsman