Case No: CO/3152/2017

Neutral Citation Number: **[2018] EWHC 459 (Admin)**
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/03/2018

Before :

MR JUSTICE OUSELEY

- -

Between:

The Queen on the application of	
TENETCONNECT SERVICES LIMITED	**Claimant**
- and -	
FINANCIAL OMBUDSMAN	**Defendant**
- and -	
JOHN AND FRANCES THORPE	**Interested Parties**

- -
- -

MR BEN HUBBLE QC AND MR SIMON PRITCHARD
(instructed by **KENNEDYS LAW LLP**) for the **Claimant**
MR JONATHAN MOFFETT QC
(instructed by **THE FINANCIAL OMBUDSMAN SERVICE**) for the **Defendant**
The Interested Parties did not appear and were not represented

Hearing dates: 21 February 2018

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Judgment

MR JUSTICE OUSELEY:

1. Mr Dhanda is a convicted fraudster, serving a sentence of imprisonment for defrauding 37 people of some £2.9m in a Ponzi-type fraud. Among those defrauded are Mr and Mrs Thorpe, Interested Parties to these proceedings. They lost in the order of £65,000 from their life savings. Mr Dhanda was their financial adviser, trading as Dhanda Financial. Nothing turns on that distinction, and I call them Dhanda, indifferently. Dhanda was an "appointed representative" of TenetConnect Services Ltd, the Claimant, Tenet. "Appointed representative" is a status provided for under s39 Financial Services and Markets Act 2000, FSMA. Dhanda advised them to sell "specified investments", a Friends Life Policy, bonds and ISAs, and to send £55,000 to him for him to invest in a property in Goa, and lesser sums for him to use as business-related loans to Dhanda. In fact, Dhanda never invested the money in property in Goa. He gambled the money away or used it to pay off his gambling debts. He may have done the same with the loans.

2. Mr and Mrs Thorpe, among 20 or so others, complained to Tenet about the activities of Dhanda but without obtaining redress. They then complained to the Financial Ombudsman Service. After two Provisional Decisions, the Ombudsman's Final Decision, dated 3 April 2017, was that it would be fair and reasonable for Tenet to compensate Mr and Mrs Thorpe for the loss caused to them by the fraudulent activities of Dhanda in relation to "regulated activities".

3. Tenet contended that, although Dhanda, in advising Mr and Mrs Thorpe to dispose of their specified investments, was undertaking a regulated activity, and was doing so as its appointed representative, Dhanda was not undertaking a regulated activity, nor was he acting as Tenet's appointed representative, when he advised Mr and Mrs Thorpe on what to do with the money realised from the disposal of the specified investments. It was that advice which caused the losses to Mr and Mrs Thorpe. Tenet also contended that the advice on the disposal of the specified investments fell outside the scope of the complaints made to the Ombudsman, which had focused on advice related to the further investments, rather than on the advice to sell their existing specified investments, which was the only regulated activity. Accordingly, the Ombudsman had no jurisdiction to find as he did. The Ombudsman rejected those arguments because of what he saw as the close connection between the two aspects of Dhanda's advice to Mr and Mrs Thorpe. It is that jurisdictional decision which is challenged in this case by judicial review.

4. As the arguments progressed, it became clear that a central issue was how closely those two aspects of the advice were entwined, and whether or not a bright or smudgy line could or should be drawn between them.

The FOS's jurisdiction

5. The FOS scheme, created by s225 FSMA, grants compulsory jurisdiction to the Ombudsman over complaints in the following terms, so far as material, as provided by s226:

> "(1) A complaint which relates to an act or omission of a person (the respondent) in carrying on an activity to which

> compulsory jurisdiction rules apply is to be dealt with under the ombudsman scheme if the conditions mentioned in subsection (2) are satisfied.
>
> (2) The conditions are that –
>
> …(c) the act or omission to which the complaint relates occurred at a time when compulsory jurisdiction rules were in force in relation to the activity in question.
>
> (3) "Compulsory jurisdiction rules" means rules –
>
> (a) made by the FCA for the purposes of this section; and
>
> (b) specifying the activities to which they apply.
>
> (4) Only activities which are regulated activities, or which could be made regulated activities by an order under section 22, may be specified."

The "compulsory jurisdiction rules" are in the Financial Conduct Authority's Handbook, in the section entitled "DISP2 Jurisdiction of the Financial Ombudsman Services". Rule 2.3.1.R provides that:

> "The *Ombudsman* can consider a *complaint* under the *Compulsory jurisdiction* if it relates to an act or omission by a *firm* carrying on one or more of the following activities:
>
> (1) *regulated activities* …;
>
> …or any ancillary activities, including advice, carried on by the *firm* in connection with them."

6. DISP2 also contains the following relevant guidance:

21.4.1G interprets "carrying on an activity" as including:

> "(1) offering, providing or failing to provide a service in relation to an activity;
>
> (2) administering or failing to administer a service in relation to an activity;"

2.3.3G interprets "complaints" in this way:

> "*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)."

The provisions governing "regulated activities", "specified investments" and "appointed representatives"

7. S19 FSMA prohibits a person from carrying on "a regulated activity" or purporting to do so unless he is "an authorised person" or "an exempt person".

8. S22 defines "regulated activities" and, up to a point, "specified 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; or…
>
> (4) *"Investment"* includes any asset, right or interest.
>
> (5) *"Specified"* means specified in an order made by the Treasury."

9. The relevant Order is the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 S.I. No. 544, which yields this nugget in article 4:

> "**4. – Specified activities: general**
>
> (1) The following provisions of this Part specify kinds of activity for the purposes of section 22(1) of the Act (and accordingly any activity of one of those kinds, which is carried on by way of business and relates to an investment of a kind specified by any provision of Part III and applicable to that activity, is regulated activity for the purposes of the Act)."

The upshot of this is that the investments sold by Mr and Mrs Thorpe were "specified investments"; the use of the money in their bank account was not a specified investment.

10. Paragraph 53, so far as material provides:

> "(1) 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, or in his capacity as agent for an investor or a 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 exchanging, redeeming, holding
>
> or underwriting a particular investment which is a security structured deposit or a relevant investment, or…"

11. It was not at issue that Dhanda's advice to Mr and Mrs Thorpe on the sale of their Friends Life investment fell within paragraph 53, and was a regulated activity.

12. Tenet was an authorised person; Dhanda was not. He was an "exempt person". S39(1) and (3) create an exemption from s19 for "appointed representatives" in these terms:

> "(1) If a person (other than an authorised person) –
>
> (a) is a party to a contract with an authorised person ("his principal") which –
>
> (i) permits or requires him to carry on business of a prescribed description, and
>
> (ii) complies with such requirements as may be prescribed, and
>
> (b) is someone for whose activities in carrying on the whole or part of that business his principal has accepted responsibility in writing,
>
> he is exempt from the general prohibition in relation to any regulated activity comprised in the carrying on of that business for which his principal has accepted responsibility…
>
> (3) 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."

13. The Financial Conduct Authority's Handbook deals with "appointed representatives" in SUP Chapter 12. It gives this guidance at 12.1.3G:

> "The main purpose of these *rules* is to place responsibility on a *firm* for seeking to ensure that:
>
> (1) its *appointed representatives* are fit and proper to deal with *clients* in its name; and
>
> (2) *clients* dealing with its *appointed representatives* are afforded the same level of protection as if they had dealt with the *firm* itself."

14. 12.4.1A G says that the effect of ss20 and 39 is that the regulated activities covered by the appointed representative's appointment need to fall within the scope of the principal's permission.

15. I set out here the relevant terms of the Appointed Representative Agreement between Tenet and Dhanda. By clause 4.1:

> "The Company hereby appoints the Member as an Appointed Representative of the Company and grants the Member during

> the Term a non-exclusive agency to carry on the Business and to obtain Applications upon the terms set out in this Agreement."

16. "Applications" are defined as "applications for any contracts". "Contracts" is widely defined as "any policies of assurance, annuity contracts, pension plans…instruments and insurance or financial products and services of such other nature as shall for the time being be dealt in by Tenet". "Business" "means engaging in the following types of Investment Business on behalf of the Company; viz: arranging deals advising".

17. Clause 13.3 prohibited Dhanda from demanding:

> "…that a Client make any payment directly to it and shall not handle any monies belonging to the Clients and shall not maintain any client account during the term of this Agreement."

The facts

18. Much of the factual material is set out in the second Provisional Decision, and was adopted, in a more summarised form in the Final Decision. The developing chain of events comes up in three different places in the Decisions. I have drawn them together. What actually happened in terms of the sequence of events was not at issue; what was at issue was how the events and their relationship to each other should be characterised.

19. Mr and Mrs Thorpe had begun using Dhanda as a financial adviser in 2004; he advised them on a number of specified investments over the years; they were happy with his advice, and had twice yearly review meetings with him. They said that he had conducted "a lot of business" for them; they acted on his advice and paid him a monthly fee of £100.

20. I am only concerned with the facts relating to what the Decisions refer to as Loans 2 and 3, and the £55,000 balance of the money purportedly required to purchase the property in Goa. Loan 1 of £10,000 made to Dhanda in 2009 was repaid as envisaged in 2011. Loans 4 and 5, and the £5,000 deposit purportedly for the property in Goa, though obtained for the same fraudulent purpose as the other moneys obtained from Mr and Mrs Thorpe, were paid out of money already in Mr and Mrs Thorpe's bank accounts, and so the advice was not seen as related to any regulated activity, notably advice to sell specified investments. No compensation was ordered in respect of those losses, and no challenge is made to those conclusions. I am not concerned separately either with losses incurred in relation to the fee agreement with Dhanda; the parties agreed sensibly that the decision of the Ombudsman that some compensation was required in respect of them stands or falls with his decision on Loans 2 and 3, and the £55,000.

21. The Ombudsman summarised the three transactions for which he required compensation to be paid by Tenet, as follows:

> "Mr and Mrs T met with Mr D at his offices on 2 September 2010. At that time he advised them to buy an off-plan property in Goa ("the property investment"). He asked them to pay a

> £5,000 deposit to secure the property, and arranged withdrawals from five of their existing investments to raise a further £55,000. So Mr and Mrs T paid Mr D a total of £60,000 in relation to the property investment.
>
> On 22 October 2011 Mr D sent an email to Mr T in which he said that markets remained volatile and he was happy to offer another "arrangement" as an alternative. Shortly after this, Mr and Mrs T loaned Mr D another £10,000 ("loan 2"), to be repaid at £360 a month (again including a monthly £100 fee). They made a withdrawal from their Friends Life policy to fund the loan. The loan was considered repaid by November 2013.
>
> In May 2012, Mr and Mrs T made a further loan to Mr D of £10,000 ("loan 3"). They again made a withdrawal from their Friends Life policy to fund this. This loan was to be repaid at £305.55 a month. The loan was only partly repaid – only about half the capital was returned to Mr and Mrs T."

22. Mr and Mrs Thorpe's letters of complaint to Tenet in 2014 refer to its failures to monitor Dhanda adequately, to his advice in relation to the Goa property, and to his advice on their providing loans to him, from funds "withdrawn on his advice, from our investments with Friends Life." In July 2014, they wrote to Tenet, complaining about Dhanda misrepresenting the position while acting as its representative, when advising on the purchase of the property in Goa, adding:

> "He further abused his position as our IFA and your appointed representative by encouraging us to furnish him with two outstanding loans at 5% interest which he advised would give us a good return on our investment. This money was withdrawn, on his advice, from our investments with Friends Life. To date there is the sum of £4,278.25 outstanding from a loan made in May 2012, and £7,520 from a loan made in October 2013."

23. In August 2014, they wrote: "He used his position as our IFA and your appointed representative to apply his knowledge of our investments to advise on the withdrawal of monies to fund the Goa investment. This was conducted at his business premises to where we were invited to approve the withdrawals, presented on his advice." The applications for the withdrawal of those funds was arranged there and administered by his staff. "The loans were withdrawn from investments that he had arranged for us as our IFA…"

24. Mr and Mrs Thorpe's letter of complaint to the Ombudsman of 21 August 2014 stated that the kind of service they were complaining about was the investment in Goa and the loans, which Mr Hubble QC for Tenet said pointed to a complaint about unregulated activities. But, under the heading on the complaint form asking them to say what the complaint was about, they referred to an accompanying letter. It disputed Tenet's rejection of their complaint. It included this:

"We dispute their findings and would add that we had no means of differentiating between what were regarded as regulated or unregulated activities. Mr Dhanda was an appointed representative of TenetConnect; we were his clients. All business was conducted and transacted with a belief that he was acting in our best interest, under the correct regulatory procedures.

The property investment in Goa was presented to us during an appointed review meeting in his offices as a sound financial investment…. The finance was arranged from investments that he originally set up for us and was processed by his administrator, Margaret Heseltine, under his instructions. Further, the Deed of Bare Trust was witnessed on his business premises by his administrator, Kirsty Rogers….

As regards the loans, these were requested and presented as an attractive investment, providing a better rate of interest (5%) than we were receiving from our Friends Life Investment …. He arranged the withdrawals during meetings at his offices and they were processed by his employees…

It beggars belief that Tenet can apparently wash their hands of all responsibility given that Mr Dhanda was only in a position to mis-sell us the investment in Goa and obtain loans under false pretences because he operated under their authority as their appointed representative. We believed all transactions to be above board and conducted appropriately under his remit as our trusted IFA."

25. Mr and Mrs Thorpe also provided the Ombudsman with the following timetable of events, summarised from documents they also provided:

"Aug/Sept 2010

We were offered the opportunity to make an off plan purchase of Flat 401, Block 3, Milroe Kadamba, Goa, India, for £60,000, on the advice of our IFA Alok Dhanda. He assured us that it was a sound investment which would appreciate substantially in value and would offer us a fabulous lifestyle in a part of India that was renowned for its value, culture and beauty. We trusted Alok's advice and having recently retired were contemplating the purchase of a holiday home at the time to use for the foreseeable future for ourselves and family members. So, after much deliberation and assurances from A.D. we decided to go ahead with the purchase.

2nd September 2010

Met with A.D. at his offices at 52, Dean Street, Newcastle upon Tyne, NE1 1PG, and on his advice agreed to arrange

> withdrawal requests from ISASs and Bond Investments to raise the purchase of the Goa property. We were further assured that this was a sound investment which would suit our needs.
>
> 3rd September 2010
>
> Issued cheque to A.D. on 3rd September 2010 for £5,000 as deposit for Goa property. …."

A few days later they received withdrawal request forms from Dhanda's administrator for the release of funds, with instructions to sign them and return them to Dhanda's offices. This they did, authorising the release of funds from specified investments, which they listed, and which were fully surrendered; their proceeds were received into Mr and Mrs Thorpes' bank account.

> "…17th September 2010
>
> Issued cheque to A.D. for £55,000 as balance of purchase price of apartment in Goa"

(This was drawn on Mr and Mrs Thorpe' bank account into which the proceeds of the surrenders had been paid).

> "…5. Loan of £10,000 to A.D. (Request made to help with the transition of business from Dhanda Financial to Truly Independent Limited). We wanted A.D. to arrange the release of £10,000 from Friends Life to purchase a motor home. He asked would we help him for the reason given and we agreed." (Loan 2)

Mr Thorpe's s9 statement to the police referred to Loan 2, very much as set out above, and also to Loan 3:

> "During a separate meeting in May 2012, Alok DHANDA disclosed that he was still having financial difficulties caused by business running cost, banks refusing to lend him money and family issues.
>
> Upon his request and terms, I agreed to loan him £10,000 over 36 months that would include 5% interest…I obtained these funds from my Friends Life contract…and…transferred £5,000 into Alok DHANDA'S account…I am…still owed £4,278.25"

26. Their correspondence with the Ombudsman included this from an email of 15 February 2015:

> "We were advised by Mr Dhanda of Dhanda Financial, authorised by Tenet, to surrender existing investments and ISAs and to invest the proceeds in apartment in Goa, full details of which were supplied to yourselves and to TenetConnect.

> What are referred to as personal loans in your submission to Tenet were, to our understanding, investments, withdrawn from existing investments, on Mr Dhanda's advice."

The Decisions

27. In the Final Decision, the Ombudsman set out extracts from these documents, in order to explain his decision on the scope of Mr and Mrs Thorpe's complaint. Tenet had contended that their complaint had been about the Goan investment and loans, which Tenet said were unregulated activities, and so outside the scope of the Ombudsman's jurisdiction, rather than about advice on the surrender of specified investment. He commented on what Tenet contended should be inferred from the s9 statements of Mr and Mrs Thorpe, at what, helpfully, the parties have numbered as paragraph 93, as follows:

> "I have also carefully read Mr and Mrs T's police statement. I do not agree with Tenet that the statement does not contain any reference to their complaint about the advice to surrender investments to finance the transactions in question or that it suggests they had already decided to 'withdraw their pension funds' and were merely seeking advice about the use of those funds. The statement gives full details of the advising and arranging activities that pertained to their existing investments. It speaks of the inducement to provide part of that money to the adviser in order to facilitate the property arrangement and the loans. It speaks of the loss of that money and the subsequent arrest of the adviser for fraud. The statement, by its very nature, seems to me to be a complaint to the police about the loss of their money, together with a full description of the circumstances connected with that loss, which included both the advice to sell their investments and to purchase the unregulated deal and loan."

28. He rejected Tenet's argument. First, he said that he should not consider the nature of the complaint in a precise or meticulous manner, but more broadly. Thus examined, he concluded as follows in [96-98].

> "Secondly, I do not agree with Tenet in any event that the evidence suggests Mr and Mrs T's complaint was restricted to the advice to invest in the property investment or to provide loans to the adviser. To my mind, there is ample evidence in the correspondence provided by both Mr and Mrs T and Tenet that in expressing their dissatisfaction with the financial service provided by the adviser, they referred broadly to the advice he gave them to sell their investments, the arranging of those sales by him and his colleague, the inducement to use the funds released to purchase property and make loans and, of course, the subsequent loss of their money because of the adviser's misappropriation. I cannot see any evidence in the

> correspondence to indicate their dissatisfaction was limited to the advice to purchase the property or to make the loans.
>
> Thirdly, even if Tenet was correct to say that Mr and Mrs T's complaint did not only relate to the advice to invest in the property investment or loans, I have already indicated why those activities were done in the carrying on of the other regulated and ancillary activities. They did not take place in a vacuum; the activities (both regulated and unregulated) were intrinsically linked. As I say, the ultimate misappropriation of Mr and Mrs T's money was merely the final step in a series of linked activities, the inception of which was the advice to sell the existing investments.
>
> So even if the focus of the complaint as expressed by Mr and Mrs T was the unregulated activities, or even just the loss of their money, it doesn't necessarily follow that I cannot look at the circumstances of the complaint in the round. As I say, DISP2.3.1R prescribes that I must look at both the acts complained of and their connection to the regulated and ancillary activities in order to assume jurisdiction. Further, it is only fair and reasonable that I do so when considering the merits of the complaint."

29. As those paragraphs foreshadow, the question of the scope of the complaint is, here at any rate, wholly intertwined with the question of what constituted regulated activities, and indeed with the question of whether s39(3) of FSMA applied to them, so as to make Tenet responsible for Dhanda's activities.

30. The Ombudsman concluded that Dhanda's activities in advising Mr and Mrs Thorpe to sell "specified" or "regulated" investments and to purchase the Goan property and to make loans 2 and 3 to Dhanda were very closely related. His analysis is summarised in the Final Decision, adopting the fuller analysis in the Second Provisional Decision which I set out as its full strength is diluted by the summary. He said at [181-193]:

> "Loan 2 and 3, and the payment of the £55,000 balance due for the property investment, all took place immediately following the surrender of regulated investments, which it appears Mr D had earlier recommended Mr and Mrs T make. Tenet maintains that these surrenders were "happenstance". I do not agree. In each case the surrenders followed contact by Mr D and the money released was given to him within a matter of days. It was not therefore coincidental that these surrenders took place – they were clearly made at the instigation of Mr D, and were the first step in his theft of Mr and Mrs T's money.
>
> Advising on the merits of buying or selling a particular investment which is a security or a relevant investment, and making arrangements for another person to buy or sell or subscribe for a security or relevant investment are both

regulated activities. The first test is therefore met, in relation to these arrangements – all of the investments surrendered were relevant investments.

For the second test to be met, the act complained of must be the act of the respondent firm. Section 39(3) of the FSMA provides:

> S39(3): 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 the business for which he has accepted responsibility.

So these instances of fraud are something we can consider as part of the complaint against Tenet if they were carried out by the appointed representative (Mr D) in carrying on the business for which Tenet accepted responsibility.

There is, in my view, sufficient evidence to conclude that at the time of loan 2 and 3 and the property investment Mr and Mrs T were given advice to sell investments which I understand Tenet permitted Mr D to give advice in relation to and give Mr D the money.

At the time of the property investment Dhanda Financial's administrator sent Mr and Mrs T withdrawal forms to complete and return to Dhanda Financial's offices, in order to release the £55,000, they required to complete the investment. £55,000 was transferred to Mr D almost as soon as these withdrawals had completed. So the two events – the withdrawals from the investments and giving the money to Mr D – were clearly linked.

And at the time of loan 2 and 3 Mr D contacted Mr and Mrs T, and advised them to enter into a loan arrangement as an alternative to their investments. In both cases Mr D recommended a loan arrangement as an attractive alternative to the Friends Life Investment they held. Mr and Mrs T were advised to make withdrawals from the Friends Life Investment and give the money to Mr D.

Mr T also said, in a sworn statement:

"we met with Mr D at his offices…and on his advice agreed to arrange withdrawal requests from ISAs and Bond investments to raise the purchase price of the Goa property. We were further assured that this was a sound investment which would suit our future needs."

> And later in the statement, Mr T says the withdrawals from the Friends Life investment to make loan 2 and loan 3 were made at the instigation of Mr D. He said:
>
> "All loan requests were initiated by Mr D on whose advice, following agreement, we made either full or partial withdrawals from funds."
>
> So, in each of these instances, Mr and Mrs T were given advice to sell investments which Tenet permitted Mr D to advise on and give the money to him. So there was one transaction, the start of which was the advice to sell the permitted investments. I am therefore satisfied that the £55,000 used to pay the balance due for the property investment, loan 2, and loan 3 each occurred in the carrying on of investment business that Tenet had authorised Mr D to conduct. In each of those instances, giving the money to Mr D was part of a singular chain of events which began with him carrying on business which Tenet accepted responsibility for."

31. The Ombudsman said this in his Final Decision at [107]:

> "All in all, I remain of the view that I am able to assume jurisdiction in this case. I do not agree with Tenet that the activities involving regulated investments and those involving the unregulated investments and loans were effectively separate transactions, rendering the unregulated activities outside the scope of my jurisdiction. For all the reasons mentioned above and in my provisional decision, I am satisfied those transactions were intrinsically linked. The adviser recommended the sale of the existing investments in order to finance the purchase of the property and the making of the loans. The arrangements were then completed in a timely manner, so that the entire transaction seems to have proceeded seamlessly, ending, sadly with the misappropriation of Mr and Mrs T's money."

32. The Second Provisional Decision also contained an analysis of whether the acts of which Mr and Mrs Thorpe complained were done in the course of carrying on a "regulated activity". This was adopted in the Final decision, but its shorter form does not capture the full basis for the conclusions. It inevitably drew on the Ombudsman's own conclusion as to the degree to which those acts of advising on selling and "re-investing" were intertwined.

He said in relation to the Goan property at [275-280]

> "All in all I am satisfied that on 2 September 2010, Mr D gave advice to Mr and Mrs T on the merits of selling particular investments which were securities or contractually based investments. It is clear that Mr and Mrs T had an established relationship with Mr D in which he would give them regular financial advice. Further, as it appears the list of suggested

investments for surrender was sent to Mr and Mrs T on the same day as the advice to sell was given. I am satisfied the sale of those particular investments must have been recommended by Mr D at the earlier advice meeting and that regulated investment advice was given. So the advice to surrender is an activity we can consider under DISP2.3.1R.

I am further satisfied that the sole purpose for recommending the sale of those investments appears to have been to finance the property investment. I agree that the property investment is not a security or contractually based investment and in turn, that advice cannot comprise a regulated activity. However, it seems clear that the advice to surrender the investments was intrinsically linked to the advice to purchase the property in the sense that the one could not proceed without the other. In turn, it is my view that the advice to purchase the property investment is also an activity this service can consider in accordance with DISP2.2.1R.

I am also satisfied Mr D arranged the sale of the investments in question. This in turn comprises the regulated activity of arranging deals in investments and is an activity this service can consider in accordance with DISP2.3.1R.

So I maintain my view that the payment of £55,000 to Mr D to fund the property investment and the subsequent theft of that money, was done in the carrying on of the regulated activities of advising on investments and arranging deals in investments as well as the ancillary activity of advising on the purchase of the property investment. It is clear that Mr D recommended the surrender of the investments in question in order to facilitate the purchase of the property investment. I am satisfied the payment of that money and its ultimate theft were joined in close sequence with the original advice to sell, the arrangement of those sales, and the ancillary advice to purchase the property.

But I remain satisfied the payment and theft of £5,000 deposit falls outside our jurisdiction. That money was not drawn from the proceeds of the investments that were surrendered on the advice of Mr D. It was paid to Mr D before the surrenders completed. So I am satisfied this payment was not done in the carrying on of a regulated activity or ancillary activity.

In summary, the payment and theft of £55,000 for the property investment involved a regulated activity which is within our jurisdiction, but the £5,000 deposit paid in relation to the property investment did not."

33. The Ombudsman then turned to the loans. Loan 2 had followed on from the repayment of Loan 1. The Ombudsman said at [286-290]:

> "So, Mr D asked for a further loan, undertook to review Mr and Mrs T's investments, and carried out that review at a meeting. Following that meeting, Mr T made a surrender from his Friends Life policy and then transferred that money to Mr D a few days later.
>
> Elsewhere in the witness statement Mr T says:
>
> *"all loan requests were initiated by [Mr D] on whose advice, following agreement, we made either full or partial withdrawals from funds."*
>
> I am therefore satisfied that Mr D gave advice to Mr and Mrs T on the merits of selling particular investments which were securities or contractually based investments in order to take the money which constituted loan 2. It is not contested that the Friends Life Investment was a security or contractually based investment.
>
> The evidence shows there was again a close sequence of events, which began with advice to sell a specific investment. Mr D sent an email asking for a loan, and suggested this loan as an alternative to "market" based investments, on the basis of the markets being volatile. He then met with Mr and Mrs T to review their investments and see if they needed to *"adjust or change anything"*. Following that meeting, Mr T made a surrender from his Friends Provident investment and gave the money to Mr D. Mr T says he was advised to do this by Mr D *on whose advice, following agreement, we made either full or partial withdrawals from funds*.
>
> So the payment of £10,000 for loan 2 involved a regulated activity which is within our jurisdiction. This money was not however stolen – the loan was repaid. So it will need to be considered whether Mr and Mrs T suffered a loss. I'll go into that later when I look at compensation."

34. Mr Thorpe also withdrew funds from his Friends Life Policy to provide Loan 3, which Dhanda asked for on the same terms as Loan 2. The Ombudsman found this at [293-297]:

> "This meeting was around six months since the last meeting. It therefore seems likely that it was one of the investment review meetings that Mr D undertook in return of the £100 monthly fee paid to him by Mr and Mrs T. So it is likely that the meeting encompassed a review of all of Mr and Mr T's investments and consideration of whether anything needed to be adjusted or changed, as it had previously.

> The surrender of the Friends Life investment took place after Mr and Mrs T had met with Mr D, and the money obtained was transferred to Mr D shortly afterwards.
>
> So I think it likely that, during the meeting that took place in May 2012, Mr D recommended surrender be made from Mr T's Friends Life policy and that the money again be given to him as a loan.
>
> So although the evidence is more limited here, I think it more likely than not that Mr D again gave advice to Mr and Mrs T on the merits of selling particular investments which were securities or contractually based investments. I think it likely that Mr D advised Mr T to make a surrender from his Friends Life investment in order to take the money which constituted loan 3.
>
> So the complaint relating to the payment and partial theft (some of the money was repaid) of £10,000 for loan 3 falls within our jurisdiction."

35. The Ombudsman maintained his view that all the activities were "regulated", on his analysis of what has happened, saying in his Final Decision at [114 – 116]:

> "I agreed with Tenet that the advice to invest in property and to give loans to the adviser was not regulated advice. But, in my view, the evidence indicated the adviser had also given advice to Mr and Mrs T to surrender particular investments that were regulated investments. I also saw evidence that indicated the adviser had arranged the sale of some of those investments on Mr and Mrs T's behalf. It was therefore clear that regulated activities (i.e. advising and arranging investments) had taken place. It was also clear that activities ancillary to those activities had taken place (the advice to use the funds released to purchase the property and make the loans and the monthly fee).
>
> I further noted that because of the close proximity in time between the advice to sell the investments; the arrangement of those sales (where that took place), and the reversion of the sale proceeds back to the adviser to finance the loans and property investment, the connection between those regulated activities and the payments to the adviser was very close indeed. It further seemed clear to me that the sale of the investments was always intended to facilitate the payments back to the adviser for the loans and property investment. That was their purpose. The transactions were coextensive and intrinsically linked.
>
> In turn, I was satisfied Mr and Mrs T's complaint about the adviser's fraudulent inducements to make payments to him and the subsequent loss of their money clearly related to acts done

> in the carrying on of regulated activities (the advice to sell the investments and the subsequent arrangement of those sales) or activities ancillary to them (the advice to invest in the property and to make the loans and the imposition of the retainer fee). As a result, I was satisfied the first test to be satisfied in order to assume jurisdiction under DISP2.3.1R (above) was met."

36. The Ombudsman pointed out, in relation to Tenet's responsibility for the acts of Dhanda, that Tenet accepted that he was authorised to advise on and to arrange the surrender of the investments, the proceeds of which Dhanda obtained fraudulently from Mr and Mrs Thorpe. Its case was that Dhanda was not authorised to advise, as Tenet's appointed representative, on unregulated investments, which it was what he did in relation to the purchase of the property in Goa, and Loans 2 and 3. He said at [315-319, and 323]:

> "I remain of the view that the complaints in connection with loans 2 and 3, and the £55,000 used to pay the balance due for the property investment are the responsibility of Tenet. As mentioned earlier, I think there is enough evidence to conclude that, in each of these instances, Mr and Mrs T were advised by Mr D to surrender a particular existing investment and give the proceeds to him as a loan or to purchase property. And it is not contested that Tenet had authorised Mr D to give advice to surrender investments.
>
> In my view the effect of the decision in *Martin v Britannia Life* is that the business for which Tenet has accepted responsibility will extend not just to the advice to sell investments but to any associated or ancillary transaction. So here, Tenet is responsible for anything done in carrying on advice to sell, and anything done in carrying on any activity ancillary to the advice to sell.
>
> Mr D's advice to loan him money or invest in what purported to be a property development was not "investment business" as defined by legislation. But these were transactions that were ancillary to the investment business of advising Mr and Mrs T to sell existing investments. And the theft was done in the course of this.
>
> I think it is also significant that Mr and Mrs T paid what amounted to a "retainer" to Mr D, in the form of a monthly fee. This was clearly intended as payment for ongoing financial advice, which Mr D provided as Dhanda Financial, an appointed representative of Tenet. So I do not think it can be said that Mr D was acting in a private capacity when the loans or property investment was made. He was acting in his capacity as a financial advisor.

> So, the complaints in connection with loans 2 and 3, and the £55,000 used to pay the balance due for the property investment are the responsibility of Tenet…
>
> Following Martin v Britannia Life Limited if, as part of a package of giving regulated advice, advice which is not regulated on a stand-alone basis is also given, we can look at that advice because it is an act which occurred in the carrying on of a regulated activity."

37. The Final Decision of the Ombudsman at [103 to 106], maintained that view. He accepted that Tenet certainly did not expressly authorise Dhanda to give advice on property deals or loans but said that that did not mean that such activities fell outside his actual authority, where they were incidental authorised activities:

> "Because I am satisfied the unregulated advice to purchase the property and provide the loan was intrinsically linked with the advice to sell regulated investments (which was within the scope of the authority), I am satisfied such advice did fall within the adviser's *actual* authority", even though not expressly authorised by the agreement with the appointed representative. By s 39 (3), Tenet was responsible "for *anything done in carrying on* that advice."

38. Actual authority to advise on the sale of regulated investments extended to anything incidental to the provision of that advice. "This must include the advice given to Mr and Mrs T about how the released funds should be invested, irrespective of the fact that that advice went beyond Tenet's express authority." The Ombudsman was satisfied that the fraudulent nature of the advice "in this instance is not enough on its own to take his acts outside the scope of the business authorised by Tenet."

39. The Ombudsman concluded at [108]**:**

> "Further, I remain of the view that the adviser was acting in his capacity as an appointed representative of Tenet at the time of the transaction. He was not acting in his personal capacity. As outlined in my provisional decision, the facts here indicate that the advice in question was given to Mr and Mrs T in the context of an established advisory relationship for which Mr and Mrs T had paid a monthly retainer. There had been a series of meetings to review investments which the adviser had already recommended as Tenet's representative, and which the adviser had previously reviewed in that capacity. It is of note, of course, that the adviser only had access to the details of those investments by virtue of his role as Tenet's representative. In turn, I remain satisfied the adviser acted throughout in his role as the appointed representative of Tenet."

40. The Ombudsman then considered the business for which Tenet was responsible. He concluded that what Dhanda had done fell within DISP 2.3.1R, as acts of Tenet, because they were done in carrying on the business for which Tenet had accepted responsibility rather than in Dhanda's personal capacity. Actual authority, which covered the surrender of regulated investments, extended to incidental and connected conduct. It fell within the scope of s39(3), because it was something done in carrying on advice to sell regulated investments or in activity ancillary to or connected with the advice to sell. At [120], he said:

> "Further, I decided that on the basis of the evidence I'd seen, the adviser was recommending the sale of the investments as a representative of Tenet. There was no evidence he was on a frolic of his own. In particular, I noted the long advisory relationship between Mr and Mrs T and the adviser and the likelihood that the recommendations in question were given as part of the regular investment advice they received from him as their adviser and for which they had paid a monthly retainer. I further noted that the adviser would not have had access to Mr and Mrs T and their investment portfolio were it not for his relationship with them as a representative of Tenet."

41. Accordingly, he concluded that the complaint fell within his compulsory jurisdiction and he proceeded to his conclusions on the merits of the complaint, which he upheld. No complaint is made about his conclusions on the merits if the Ombudsman had jurisdiction.

The parties' contentions in summary

42. Mr Hubble made two groups of submissions. First, he submitted that the complaint was about unregulated activities, and Dhanda's regulated activities had caused no loss to Mr and Mrs Thorpe; the unregulated activities in relation to the property purchase in Goa, and the two loans, fell outside the scope of the Ombudsman's jurisdiction. Second, as a matter of agency law and s39(3) FSMA, Tenet was not responsible for Dhanda's unregulated activities, and especially not for his fraudulent activities. This too meant that the Ombudsman had no jurisdiction to consider the complaint made by Mr and Mrs Thorpe.

43. Mr Moffett QC for the Ombudsman submitted that Tenet was taking issue with the Ombudsman's factual conclusions, which could only be challenged on rationality grounds. It had either not attempted to or could not make out such grounds. His factual conclusions as to the way in which Dhanda's advice about the sale of the investments were "intrinsically linked" to his advice about the loans to him, and the intended payment of the balance of the purchase price of the property in Goa were rational. Tenet otherwise had to contend that there was a bright line, regardless of the circumstances, which had to be drawn between regulated and unregulated activities. That would be wholly artificial, and contrary to the purposes of the Ombudsman's scheme and the statutory language.

44. Mr Hubble submitted that the Ombudsman could not determine for himself the nature or scope of the complaint he was considering, if that issue went to his jurisdiction. I considered the basis upon which a judicial review challenge could be raised to the

Ombudsman's decision as to whether he had jurisdiction to entertain a complaint in *Chancery (UK) LLP v FOS* [2015] EWHC 407 (Admin). I concluded at [66-67 and 70-71] that the Ombudsman had to interpret the law correctly, and reach rational findings of fact, but that it was for the Court to decide whether his application of the law to the facts was wrong, and not whether it was reasonable. I said at [70-71] that, although the Ombudsman's fact-finding was reviewable only on *Wednesbury* grounds, the same did not apply to his application of the law to the facts:

> "Of course, on any view, the FOS must direct itself correctly on the law, as to the meaning of words and phrases, and as to the defining characteristics which must be present for a phrase to apply. The FOS should expect that a reviewing court would regard its assessment of the way in which the law, correctly understood, applied to the facts, as at least persuasive. But that is not the complete answer. If the Court is persuaded that on the facts found by the FOS, the correctly understood law had been applied wrongly, the Court must rule that the FOS had no jurisdiction."

There was no dispute as to the correctness of that approach, in this case.

The scope of the complaint

45. I agree with Mr Moffett that the first issue sensibly to be considered concerns the scope of the complaint made by Mr and Mrs Thorpe. Mr Hubble submitted that, reading the correspondence, complaint form and statements to the police, it was plain that the complaint was about the advice given as to where they should invest their money, that is to say it was a complaint about the advice they were given to purchase the property in Goa, and to make Loans 2 and 3 to Dhanda. He submitted that the Ombudsman's conclusion to the contrary was perverse. The encashment advice given by Dhanda to Mr and Mrs Thorpe caused them no loss. The advice about where to spend the proceeds of encashment was separate unregulated advice.

46. I cannot accept Mr Hubble's submissions. It was accepted by both parties that the Ombudsman was not confined to a close examination of the terms appearing on the complaint form, although it is to be borne in mind that that was accompanied by a more lengthy explanation, intended to be part of the complaint. Both parties referred to other correspondence and statements in support of their contentions. This was entirely in line with *R (Full Circle Asset Management) v FOS* [2017] EWHC 323 (Admin), Nicol J.

47. The Ombudsman has to decide, in the first place, whether he has jurisdiction to entertain the complaint. The Ombudsman Scheme is intended to be an informal, reasonably speedy procedure for the resolution and remedying of complaints, without the precise definition which pleadings are intended to bring to a legal claim. He is ideally placed to reach a judgment on what the complaint is about and whether it falls within the scope of his jurisdiction. The "complaint" issue here is whether the complaint was confined to the advice given as to where the proceeds of the surrender of the specified investments should be placed, or whether it included complaint about the advice that those investments should be surrendered.

48. Whether the complaint did or did not include a complaint about Dhanda's advice on the surrender of the investments is a matter of fact for the Ombudsman, subject to review on rationality grounds, as Mr Hubble accepted. The Ombudsman's appraisal of the scope of the complaint is not merely rational; it is the only possible conclusion to which he could have come. I have set out his conclusion at paragraph 28. If it had been a matter for this Court, I would have had no hesitation in reaching the same conclusion in the light of the complaint form and associated letter, the statements to the police, and the complaints to Tenet.

Regulated activities

49. It was inevitable, given the interlinking between the two issues, that the Ombudsman's conclusion on the scope of the complaint would foreshadow his conclusions as whether Dhanda's advice concerned "regulated activities", as the second and third paragraphs of the extract from his Decision at paragraph [28] above show.

50. The second issue does however need to be distinctly considered. This is whether the complaint, appraised as having the scope found by the Ombudsman, falls within his compulsory jurisdiction. It does so if that complaint related to an act or omission by a firm carrying on regulated activities or any ancillary activities, including advice, in connection with them" DISP 2.31R. Regulated activities include advising a person as an investor on the merits of his selling a specified investment. So the issue for the Ombudsman was whether Dhanda was advising Mr and Mrs Thorpe on the merits of selling the Friends Life Policy when he was advising that they should spend £55,000 as the balance of the purchase price of the Goan Property, and other sums furnishing him with loans 2 and 3. The selling of the policy as such created no compensateable loss; that could only arise if the further investment itself was part of a "regulated activity", which it was not, when taken in isolation.

51. Mr Hubble submitted that, in so far as the advice related to the unregulated investments, it was not a regulated activity to which the compulsory jurisdiction of the Ombudsman could apply. S22 FSMA did not permit the Ombudsman to assume jurisdiction over an unregulated activity, whether or not it might relate, intrinsically or otherwise, to a regulated activity or specified investment. The notion of "an intrinsic link" conflated two matters, one regulated and the other unregulated, here the advice to "sell" and advice to "buy", in a way which the legislation did not permit, whether in law or fact. His submission, at least in the first place, was that the law drew, even forced the drawing of, a bright line between the regulated and the unregulated which, had to be observed, no matter what the factual interlinking. And if there were no bright line, nonetheless on the facts of this case, the activity which created the loss was not so intrinsically linked with the regulated activity as to be part of it.

52. I do not accept those submissions. I accept Mr Moffett's submission that such a bright line approach is wholly artificial, and not warranted by the legislation or case law. It would create significant problems were it to be correct. It is plainly artificial to draw such a distinction where, on the facts, an adviser specifically recommends that a regulated investment should be sold because an alternative unregulated investment is preferable, but would not have made such a recommendation when no such preferable alternative existed. I accept that at the other end of the factual spectrum may be cases where a particular regulated investment has ceased to be suitable, for example

because of market volatility, and is encashed on the IFA's advice, and some time later the proceeds are placed in an unregulated investment on a later recommendation as to what now should be done. In between, there may be all sorts of links between recommendations to buy and sell. But to rule the link to be irrelevant in all circumstances is plainly artificial. It would mean, for example, that regulated advice by an appointed representative to sell a specified investment specifically in order to make an unwise unregulated investment, or to put it into a Ponzi-fraud operated by such an IFA, would fall outside the scope of the compulsory jurisdiction over the principal.

53. The purpose of the FSMA, and the language of the Order, the very nature of the Ombudsman Scheme, and the Financial Conduct Authority's Handbook are all against an artificial bright line. Of course, the FSMA draws a clear distinction between regulated and unregulated activities. But that does not answer the question of what activities amount to regulated activities where a single braided stream of advice is given to a client about regulated and unregulated investments. Paragraph 53 of the 2001 Order deals with advising as a specified kind of activity; it is a regulated activity when "advising" in relation to a specified investment on the merits of an investor or potential investor selling a relevant investment. Rule 2.3.1 of DISP2 provides that a complaint can be considered if it "relates to an act or omission by a firm carrying on one or more of the following activities." "Carrying on an activity" includes offering or providing or failing to provide a service in relation to an activity. That language does not permit a bright line to be drawn between advice on selling the regulated investment and buying the unregulated investment, where the purpose of the sale is to enable a purchase. The advice on such a sale is inextricably linked to the advice on the purchase. A bright line, one side of which is regulated and on the other side of which is unregulated, would only reflect the facts of the situation where the regulated and unregulated activities were themselves brightly divided. But their edges may be blurred; or they may be inextricably linked. The law governing the Ombudsman's jurisdiction could not force facts into unrealistic compartmentalisation without undermining its purpose and effectiveness. Here the aim of the informal scheme is quick, non-legalistic redress for bad advice to sell specified investments because of the purpose of the advice to sell.

54. Such case law as there is does not support Mr Hubble either. In *Martin v Britannia Life Ltd* [2000] Lloyd's Reports P.N. 412, Jonathan Parker J had to consider the package of advice given by an IFA to the claimants who wished to arrange a pension scheme. The package included re-mortgaging a property, surrendering existing life policies, taking out a new endowment policy and charging it as collateral security for the mortgage. The claimants sued the defendant, as the successor to the company whose appointed representative the IFA had been. Liability was admitted in relation to the advice given on the products within the package issued by Britannia's predecessor. The re-mortgage was not issued by Britannia's predecessor, and liability for the advice given in relation to it was denied. One issue concerned actual authority, material to which were the terms of the predecessor legislation to the FSMA 2000, and not for these purposes materially different. The predecessor to paragraph 53 of the 2001 Order was at issue. At 5.2.5, Jonathan Parker J said this:

> "In my judgment, advice as to the "merits" of buying or surrendering an "investment" cannot sensibly be treated as

> confined to a consideration of the advantages or disadvantages of a particular "investment" as a product, without reference to the wider financial context in which the advice is tendered. As the wide terms of the Fact Find form illustrate, and as one would expect, any advice as to the merits of purchasing or surrendering an "investment" is designed to be based on as full an examination of the client's personal circumstances as the client is prepared to allow. For example, in advising as to the merits of taking out a mortgage-related policy such as the Homeplan Plus policy it would in my judgment be (at best) wholly unrealistic, and (at worst) positively misleading to leave out of account the merits or otherwise of entering into the underlying mortgage transaction which the policy is designed to support…
>
> In my judgment it is neither appropriate in the context of the 1986 Act, nor for that matter would it be realistic, to seek to limit the concept of "investment advice" by reference to the extent to which the advice relates to the "merits" (i.e. to the advantages or disadvantages) of a particular "investment" as defined; and if that be accepted, it seems to me that it must follow that the concept of "investment advice" will comprehend all financial advice given to a prospective client with a view to or in connection with the purchase, sale or surrender of an "investment", including advice as to any associated or ancillary transaction notwithstanding that such transaction may not fall within the definition of "investment business" for the purposes of the 1986 Act."

55. In *Emptage v Financial Services Compensation Scheme Ltd* [2013] EWCA Civ 729, Moore-Bick LJ at [5] said this, upon which Mr Hubble laid stress:

> "Section 213 of the Act imposes on the FSA a duty to set up a scheme for providing compensation in cases where financial advisers whom it has authorised to act as such are unable to satisfy claims against them in respect of regulated activities and to establish a scheme manager to run it. As Miss Carss-Frisk Q.C. was anxious to emphasise, the Act and the subordinate legislation draw a sharp distinction between activities which are regulated and those which are not. Only persons who are approved by the FSA or exempt may carry out regulated activities. A contract under which a lender provides credit secured by a first legal mortgage on land, at least 40% of which is used as a dwelling by the borrower, is a regulated mortgage contract and accordingly advising a person in his capacity as a borrower on the merits of entering into a particular contract of that kind is a regulated activity. By contrast, advising on the sale or acquisition of land, whether in the United Kingdom or abroad, is not a regulated activity. The compensation scheme applies to regulated activities alone."

56. But this case does not support him either. The decision on the facts shows his understanding of *Emptage* is not correct. The IFA had advised Ms Emptage that she could buy the property she wanted in Spain by remortgaging her house in the UK on an interest only mortgage in the UK. In due course the Spanish property could be sold to pay off the new mortgage. The property market in Spain then collapsed. The first question was whether the IFA's duty was breached by bad advice to take out the mortgage (regulated) or bad advice to buy the property in Spain (unregulated). The FSCS accepted liability on the basis that the mortgage advice was bad because she could only repay the principal if the Spanish investment was sound, and the mortgage advice had exposed her to the risk that it was not. But the FSCS argued that losses flowing from the failure of the unregulated Spanish property investment were not recoverable. The Court held that that loss flowed from the bad mortgage advice, for which she should be compensated. The FSCS had been wrong to hold that it could exclude losses, which flowed from the failure of the Spanish investment, from the scope of the compensation.

57. Mr Hubble's position on the facts, were there to be no bright line, was a difficult one, and it was difficult to see why these facts should not have been characterised as they were. His argument was very close to maintaining that there was a bright line between regulated and unregulated advice. The question, whether the advice to invest the proceeds of sale of the regulated investments in the purchase of the Goan property and in the loans was so related to the advice to sell the specified investments that it should be characterised as "regulated" advice, is for the Court, on the basis of my decision in *Chancery LLP*, but giving considerable weight to the Ombudsman's characterisation of the primary facts.

58. I would have concluded, even had the Ombudsman not, that the advice to buy, to put it simply, though taken by itself and in isolation, was unregulated, was here all part and parcel of the advice to sell, and was "regulated". This is not a case where the advice to sell arose from the need to dispose of an underperforming or risky asset, whereafter the IFA would look for something better. It is not simply that the advice was given at the same time, or that the trades took place so closely in time. That helps to evidence that the advice to buy was what led to the advice to sell. The advice to sell was given so that the alternative unregulated investments could be made; they were compared, and their advantages persuaded Mr and Mrs Thorpe to accept the advice to sell. The advice, put simply was that, because they could do better in unregulated investments, they should sell the specified investments. The advice on unregulated investment justified the advice on the specified investments, and in that way, became part of the regulated advice. The Ombudsman was bound to conclude that they were part and parcel of the same advice. I conclude that the whole advice was regulated activity, and that the Ombudsman had jurisdiction.

59. Mr Hubble was concerned at the description of buying and selling as "intrinsically linked". On these facts, that is a fair characterisation of the relationship, but it cannot be a sound general description of every relationship between selling and buying investments. I do not think that the Ombudsman's description of the advice to buy or the "purchase" transactions themselves as "ancillary" to the advice to sell is accurate. Neither aspect of the advice was in reality ancillary here; both were the significant components of the single stream of advice; the regulated advice was motivated by the proposals for unregulated investment. The FSMA intended that regulated activity, and

the Ombudsman's jurisdiction should be part of a financial service consumer's protection. The legislative provisions should be construed so that, if part of what is done as a single activity is regulated, the whole is regulated rather than the other way round. Otherwise, the regulated part loses the protection which the FSMA requires that it should have. If, to accord that protection, aspects which by themselves would not be regulated are brought into the protective scope of regulation and the Ombudsman's jurisdiction, those giving advice will have to make sure that their regulated and unregulated activities are separated, rather than using the unregulated to escape the consequences of intermingling them with the regulated.

60. I add that, it seems to me, the Ombudsman's analysis would have been the same if the proposed investment in the Goan property had in fact been made, but had turned out to be unwise, and if loan 3 had not been repaid, because the true purpose for which it had been made had failed. But that is not what happened, at least in relation to the Goan property. The proceeds of sale of the regulated investments were stolen. Indeed the purpose of the advice to sell them for the Goan purchase was so that Dhanda could get his hands on the £55,000 to use it for his own ends. (I cannot exclude that some of the loans may have been used to shore up his failing business, and loan 2 and part of loan 3 were repaid). The money was never used on buying Goan property, and it appears, the whole £55,000 was simply gambled away or used to pay off gambling debts, or also perhaps in part on his failing business. No Goan property was bought at all. I understood Mr Hubble to accept that. I have some difficulty, then, in understanding why the Ombudsman, though no doubt feeling it necessary to deal with Tenet's submissions to him, did not simply treat the "unregulated" advice, at least in relation to the Goan property, as simply fraudulent misrepresentation made by Dhanda to obtain the specified investments for his own gambling purposes, or for his failing business. It was simply really fraudulent "regulated" advice. Consideration of advice about "unregulated" investments is a red herring, and consideration of it for the purposes of deciding whether what Dhanda did was regulated activity is also a red herring, at least in relation to the £55,000. The effect of advice to sell a specified investment, based on a fraudulent misrepresentation that the money would be placed in an unregulated investment, when the intention was that it would instead be stolen, cannot be different from the effect of a fraudulent misrepresentation that the money would be placed in a specified investment, when the intention was that it would be stolen. Regulation does not turn on the precise terms in which the fraudulent intention is disguised. If that is correct, Mr Hubble's submissions are even less sound.

The responsibility of Tenet as the authorised person

61. I turn now to grounds 3 and 4. The issue for the Ombudsman was whether, under s39(3) Tenet, as the principal of Dhanda, was responsible for the advice given by Dhanda, its authorised representative, in relation to the "unregulated" investments. Tenet said that it was not, because what Dhanda did was not done "in carrying on the business for which [Tenet] had accepted responsibility". Although the Agreement between Tenet and Dhanda used widely defined words in "applications", "contracts" and "business", which certainly covered investment advice on buying or selling regulated investments, that was limited to those "dealt in by Tenet", which did not include Goan property or loans to Dhanda. Nor could it cover fraud, or any payments made directly by a client to Dhanda. The issue for me, on the Ombudsman's

jurisdiction, which again is how the issue arises, is whether the Ombudsman was right to appraise or characterise the advice in relation to those "unregulated" investments as "co-extensive with" or "intrinsically linked to" or "very closely connected to", the advice to sell, such that they were done "in carrying on the business" for which Tenet had accepted responsibility, even though not of itself, advice on the administration of investments dealt in by Tenet. The parties agreed that the question under grounds 3 and 4 was not to be determined as a matter of the contractual law of agency; s39(3) imposed its own basis for holding that an authorised person was responsible for the acts of its appointed representative. I accept that that is the correct analysis. Jonathan Parker J said this about agency in *Martin v Britannia*, above at [5.2.12]:

> "In my judgment, just as "investment advice" extends beyond advice as to the merits or otherwise of a particular "investment" as a product (see paragraph 5.2.5 above), Mr Sherman's authorised activities under the 1990 Agreement (which, as I pointed earlier, mirror the provisions of section 44(3) of the 1986 Act) similarly so extended. If anything, the provisions of section 44(3) serve to reinforce my conclusion as to the width of the concept of "investment advice". An activity consisting of "giving advice…about entering into investment agreements" seems to me to involve much more than advising as to the terms of a particular investment agreement, without regard to the question whether it is appropriate for the client to enter into such an agreement, given his particular financial situation."

62. HHJ Waksman QC's analysis in *Ovcharenko v InvestUK Ltd* [2017] EWHC 2114 (QB) is consistent with that, and correct. An appointed representative gave investment advice, but in doing so gave an inducement to the client which the terms of his appointment forbade. Nonetheless, the principal was liable for his defaults. The argument to the contrary was rejected in the following terms:

> "I regard that proposition as wholly unarguable for the following reasons. First of all, as would be expected, 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. The business for which responsibility had been accepted encompasses the services set out in clause 3 of the authorised representative agreement. It matters not whether, as between the client, the authorised representative was not entitled to proffer those services. That is an entirely separate matter….
>
> All that does is to regulate the position *inter se* between D1 and D2. It says nothing about the scope of the liability of D2 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 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. D2 will be, as it were, on the hook to the claimants as in respect of the defaults of D1 and if those defaults have arisen because D1 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 D2 against D1. If Mr Marquand 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 D2 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."

63. The decision in *Emanuel v DBS Management Ltd* [1999] Lloyds Reports P.N. 593 (a decision of 1994) does not address that particular issue and the distinction, seemingly rigidly drawn between acts which were or were not done in the course of acting as an appointed representative, is not at odds in fact with the approach in the two later cases. They are also in line with the obligations in chapter 12 of the Financial Conduct Authority's Handbook.

64. In my judgment, the same analysis which persuaded the Ombudsman and me that the activities were so closely linked that they amounted to "regulated" activities, impels the conclusion that they come within s39(3). Indeed, the decisions in *Martin v Britannia* and in *Ovcharenko* are clearly against Mr Hubble. The fact that Dhanda had no actual authority, express or implied, to act as he did on Tenet's behalf, nor was he held out by Tenet as having such authority, does not answer the s39(3) issue. The fact that Dhanda's acts were fraudulent does not take them outside the scope of statute. Fraud in the course of giving "regulated" advice comes within s39(3), for the reasons give in *Ovcharenko*, but with added force precisely because it concerns fraud.

Conclusion

65. Accordingly, the Ombudsman had jurisdiction to consider the merits, and there is no challenge to his decision on the merits.

66. This application is dismissed.