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Case No: A4/2018/2931

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
COMMERCIAL COURT
MR JUSTICE JACOBS
[2018] EWHC 2834 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 July 2019

Before:

LORD JUSTICE DAVID RICHARDS
LORD JUSTICE HAMBLEN
and
MR JUSTICE SNOWDEN

- -

Between:

ADAM ANDERSON & Others	**Appellants/ Claimants**
- and -	
SENSE NETWORK LIMITED	**Respondent/ Defendant**

Hugh Sims QC, Gerard McMeel and Jay Jagasia (instructed by **Cubism Law**) for the **Appellants**
Simon Howarth and Alexander Echlin (instructed by **Reynolds, Porter, Chamberlain LLP**) for the **Respondent**

Hearing dates: 2-3 July 2019

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Approved Judgment

Lord Justice David Richards:

Introduction

1. This is an appeal against the dismissal of claims made against the respondent Sense Network Limited (Sense) under provisions contained in the Financial Services and Markets Act 2000 (FSMA) and at common law. The claims arise out of the activities of Midas Financial Services (Scotland) Limited (Midas), the advisors employed by it and its controlling director and shareholder, Alistair Greig. It is not alleged that Sense was itself involved in those activities, but it is alleged to be liable for the losses suffered by the claimants, on the grounds that Midas was an "Appointed Representative" (AR) pursuant to section 39 of FSMA by virtue of contracts with Sense made in 2007 and 2013.

2. Ninety-five claimants issued proceedings against Sense. Case management directions were given for the claims of twelve claimants, as lead claimants, to proceed to trial. The trial of these claims took place over 13 days in July 2018 before Jacobs J, sitting in the Commercial Court, who gave an impressively clear and comprehensive judgment running to over 500 paragraphs on 26 October 2018.

3. Claims were made on a number of different bases, all of which were dismissed. Permission to appeal has been given on just two claims, those made under section 39(3) of FSMA and those made on the basis of vicarious liability at common law. By a respondent's notice, Sense seeks to uphold the dismissal of the statutory claim on the grounds that the scheme operated by Midas and Mr Greig, to which I refer below, was not a collective investment scheme as defined by section 235 of FSMA. There are therefore essentially three issues on this appeal and, after summarising the relevant facts and referring to the regulatory background, I will deal with them in that order.

The facts

4. I summarise here the critical findings of fact made by the judge. I should say that Mr Greig is facing a criminal enquiry in Scotland, but that he has not to date been formally charged with any offences. Mr Greig did not give evidence at the trial of this action and it may be assumed that he denies any wrongdoing. The judge's findings in this case do not bind Mr Greig.

5. Midas was founded by Mr Greig in 2006 and carried on a financial advisory business based in Aberdeen. From its appointment as an AR in 2007, it advised clients on a range of investments for which Sense held agencies and arranged deals in such investments for its clients. Much of the business was mortgage advice.

6. Midas also, without the knowledge of Sense, advised on and operated a scheme (the scheme) whereby clients would invest in what they understood to be short-term deposits carrying very high interest rates. The scheme was masterminded by Mr Greig who had started the similar scheme when he was previously employed as a financial advisor and continued it after he founded Midas, both before and after it became an AR of Sense. The claims in these proceedings all relate to payments made by the claimants under this scheme.

7. Mr Greig represented to clients that their funds were invested under special deposit arrangements with Royal Bank of Scotland (RBS) which was able to obtain high rates of return. He told clients that his relationship with RBS enabled him to gain access to these favourable arrangements.

8. In fact, there were no special deposit arrangements with RBS. It was not in dispute before the judge that Mr Greig was operating a dishonest Ponzi scheme, under which the deposits of later clients were used to repay earlier deposits with interest. When the Financial Conduct Authority (the FCA) intervened in 2014 and obtained appropriate orders from the Court of Session in Scotland, there were some 279 members of the public whose investments had not been repaid. They had paid £12.8 million and were owed £13.6 million. The available funds still held by Midas amounted to only £379,000.

9. On Mr Greig's instructions, steps were taken by Midas staff to conceal the scheme and its operation from Sense, although I should mention that the judge recorded that there was no evidence that any of the staff knew that it was a Ponzi scheme. In particular, no documents in connection with the scheme or containing any reference to it, or to transactions or payments under it, were uploaded to the cloud-based system operated by Sense, by which it monitored the activities of the ARs for which it was responsible. Payments and repayments under the scheme were not made to or from Midas' bank account, which was subject to audit by Sense, but to and from a separate account operated by Mr Greig personally.

Regulatory framework

10. FSMA establishes a framework for the regulation of financial services. It is directed to any "regulated activity" of a specified kind carried on by way of business and relating to an "investment of a specified kind". The relevant activities and investments are specified in delegated legislation, principally the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) (the RAO), as amended. For present purposes, it is enough to note that regulated activities include arranging deals in investments, advising on investments, operating a collective investment scheme and accepting deposits. Specified investments include units in a collective investment scheme, but not deposits.

11. Section 19 of FSMA prohibits a person from conducting a regulated activity in the United Kingdom, unless that person is either "authorised" or "exempt". Under section 23(1), it is an offence to act in breach of the prohibition in section 19.

12. A person is "authorised" if permitted by the FCA to carry on regulated activities. Permission may be restricted to particular kinds of activity. Sense was at all material times an authorised person, permitted to advise on investments, to arrange deals in investments, and to agree to carry on either of those regulated activities.

13. The category of "exempt" person relevant to this case is that of AR. Instead of being authorised by the FCA, a person may be appointed as an AR by an authorised person who thereby becomes responsible for the AR's compliance with regulatory requirements. Regulation of ARs may thus be said to be outsourced by the FCA to the relevant authorised person. It is designed to reduce the regulatory burden on both the

FCA and the large number of tied agents and independent financial advisors whose activities are conducted on a relatively modest scale.

14. The AR system is created and governed by section 39 of FSMA which, in the terms in force during the time relevant to this case, provided:

> **39.-Exemption of appointed representatives.**
>
> (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.
>
> (1A) But a person is not exempt as a result of subsection (1) –
>
> (a) if his principal is an investment firm or a credit institution, and
>
> (b) so far as the business for which his principal has accepted responsibility is investment services business,
>
> unless he is entered on the applicable register.
>
> (1B) The "applicable register" is –
>
> (a) …[not relevant]
>
> (b) …[not relevant]
>
> (c) in any other case, the record maintained by the Authority by virtue of section 347(1)(ha).
>
> (2) A person who is exempt as a result of subsection (1) is referred to in this Act as an appointed representative.
>
> (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.

(4) In determining whether an authorised person has complied with a provision contained in or made under this Act, or with a provision contained in any directly applicable Community regulation made under the markets in financial instruments directive, anything which a relevant person has done or omitted as respects business for which the authorised person has accepted responsibility is to be treated as having been done or omitted by the authorised person.

(5) "Relevant person" means a person who at the material time is or was an appointed representative by virtue of being a party to a contract with the authorised person.

(6) Nothing in subsection (4) is to cause the knowledge or intentions of an appointed representative to be attributed to his principal for the purpose of determining whether the principal has committed an offence, unless in all the circumstances it is reasonable for them to be attributed to him.

(7) A person carries on "investment services business" if –

(a) the business includes providing services or carrying on activities of the kind mentioned in Article 4.1.25 of the markets in financial documents directive, and

(b) as a result of providing such services or carrying on such activities he is a tied agent or would be if he were established in an EEA State.

(8) In this section –

"competent authority" has the meaning given in Article 4.1.22 of the markets in financial instruments directive;

"credit institution" means –

(a) a credit institution authorised under the banking consolidation directive, or

(b) an institution which would satisfy the requirements for authorisation as a credit institution under that directive if it had its relevant office in an EEA State;

"relevant office" means –

(a) in relation to a body corporate, its registered office or, if it has no registered office, its head office, and

(b) in relation to a person other than a body corporate, the person's head office."

15. The types of business which an AR may be permitted or required to carry on pursuant to section 39(1)(a)(i) are prescribed by paragraph 2 of the Financial Services and Markets Act 2000 (Appointed Representatives) Regulations 2001 (SI 2001/1217) (the AR Regulations). They include arranging deals in investments and advising on investments. They do not include operating collective investment schemes or accepting deposits.

The AR Agreement between Sense and Midas

16. The first AR Agreement between Sense and Midas was dated 27 September 2007 and was replaced by a new agreement dated 7 February 2013. The terms of the agreements were materially the same and, like the judge, I will refer to the second of these agreements.

17. Clause 3.1 provides:

> 3.1 Subject to clause 2 and in particular subject to the scope of the AR's authorisation as set out in the Letter of Authorisation regarding Authorised Products and the provision of the Services, the Company:
>
> > 3.1.1 authorises the AR acting through its Registered Individuals to sell and advise on Authorised Products and to provide Designated Investment Services, Personal Protection Insurance Services, General Insurance Services, and/or Mortgage Services using a Company Agency: and/or
> >
> > 3.1.2 authorises the AR acting through its Registered Individuals to provide Additional Services using a Company Agency; and
> >
> > 3.1.3 agrees that the AR may undertake Separate Business provided that the AR observes the restrictions set out in this Agreement and in the Compliance Manual."

18. It does not appear that Sense provided the "Letter of Authorisation" referred to in clause 3.1, or at least none was shown to us or to the judge. It is defined as "the letter of authorisation issued to the AR and its Registered Individuals by which the Company authorise the AR and its Registered Individuals to advise on or sell Authorised Products". "Authorised Product" is defined as "those products, policies or services comprising Designated Investment Services, Personal Protection Insurance Services, Mortgage Services and/or General Insurance Services which the AR and its Registered Individuals are authorised to sell or advise on as notified in the Letter of Authorisation provided by the Company".

19. Clause 3.1.1 includes "using a Company Agency" as a restriction on the services that Midas was authorised to provide. "Company Agency" is defined as "an agency which the Company maintains or has maintained with an institution".

20. Clause 5.1 provides that Midas "shall carry out all business dealings in relation to [the services listed in sub-clauses 3.1.1] as an Appointed Representative of the Company

and only through and using Company Agencies". Clause 5.1.6 provides that Midas shall carry out all business dealings "in relation to Separate Business, so as to be wholly distinct from the business referred to in clauses 5.1.1 to 5.1.5. The AR shall make it clear that such business is wholly unconnected with the Company, including making no use of the Company name and stationery". Clause 5.3.3 provides that Midas shall not while the Agreement was in force "act or purport to act outside the scope of its actual authority under this Agreement".

21. Clause 4.2 provides:

> "The Company accepts responsibility to third parties only to the extent required by Section 39 of the Act in relation to the actions of the AR when the AR is carrying out regulated activities on the terms of this Agreement."

Issues on the appeal

22. Although the claimants advanced several grounds for contending that Sense was liable for the wrongful activities of Midas in relation to the scheme, all were rejected by the judge and permission to appeal has been granted only as regards liability under section 39(3) and vicarious liability for the tortious conduct of Midas. A claim based on actual or ostensible authority was rejected by the judge but does not arise on this appeal. The claim based on section 39(3) rests on the submission, accepted by the judge, that the scheme constituted a collective investment scheme, as defined by FSMA, and that the claimants invested in a collective investment scheme. If the scheme involved no more than the making of deposits by the claimants, section 39 would not be applicable. Although this could be seen as a threshold issue, I (like the judge) will first consider the application of section 39(3) on the assumption that the claimants were investing in a collective investment scheme.

Liability under section 39(3) FSMA

23. There were two preliminary points taken by Mr Sims QC on behalf of the appellants.

24. First, it was not a necessary, or indeed any, part of their case that Midas was operating, and inducing the claimants and others to invest in, a *dishonest* scheme. It was clearly not an authorised collective investment scheme and it lacked all safeguards for investors. Accordingly, it was at least negligent of Midas to advise clients to invest in it and to arrange for them to do so. I accept this point and will consider the appeal on that basis.

25. Second, the appellants' case was not based on Midas having operated the scheme but on Midas having advised clients to invest in it and arranged for them to do so. Mr Sims submitted that the judge wrongly conflated advising clients to invest in the scheme with operating it. It is right to say that in part, but not all, of his reasoning for dismissing the claim under section 39, the judge treated the giving of this advice as no more than an adjunct to the operation of the scheme. At [140], he said that "…the scheme, and advice in connection with that scheme, were well beyond the scope of the "business" for which Sense accepted responsibility pursuant to the AR agreement". At [145], the judge said that "Any advice that was given in connection therewith [the scheme] was therefore closely connected with unauthorised activities,

and therefore must fall outside the scope of section 39". I think there is some force in Mr Sims' submission. If Sense had accepted responsibility for all investment advice given by Midas, I would not for my part consider that advice to invest in a scheme apparently operated by Midas or Mr Greig would on that account fall outside the business for which Sense had accepted responsibility.

26. The appellants' submissions before the judge on the construction and application of section 39(3) are summarised by the judge at [124]-[130], submissions which Mr Sims also made to us. A broad approach should be taken to the identification of the business for which a principal (as defined in the section) accepts responsibility, especially in light of the public policy basis of the provision. Because Midas was authorised to give advice on, and arrange deals in, investments, Sense's responsibility extended to advice given on, and deals arranged in, any type of investment that fell within the definition of "investment" in the RAO. As units in collective investment schemes are "investments" as so defined, Sense was liable in respect of advice given on investing in units. This was irrespective of any restrictions contained in the AR Agreement. Such restrictions, particularly the limitation imposed by the words "using a Company Agency" in clause 3.1.1 of the AR Agreement, were a matter which affected only the relationship between Sense and Midas and had no impact on Sense's liability under section 39(3).

27. Attention was drawn to the words of section 39(1)(a)(i) which permit an AR to carry on business "of a prescribed description". As noted above, the prescribed descriptions of business are defined in the AR Regulation which describes such business in wide, generic terms, such as "an activity of the kind specified by article 53 of [the RAO] (advising on investments)". The exemptions in section 39 are conferred in broad generic terms and are based on the principal's own authorisation. Section 39(3) applied to mis-selling as long as it occurred in the conduct of one of the generic categories of business for which Sense had received authorisation and for which an exemption had in turn been passed on to Midas.

28. Mr Sims expanded on this last point before us by submitting that under section 39 a principal has responsibility for the activities of its AR in the carrying on of any regulated activity falling within one or more of the prescribed business activities (within the AR Regulation) which the principal is itself authorised to carry on, as stated in the publicly available register for which section 39 (1A) and (1B) makes provision. In this way, effect is given to the purpose of section 39 as domestic legislation, that the AR is treated as if it were an employee of the principal. It also gives effect to one of the purposes of Directive 2004/39/EC on Markets in Financial Instruments (MiFiD I), enacted by section 39(1A) and (1B), that those dealing with investment advisors are able to check their authorised activities on the public register.

29. In determining the extent of the liability imposed by section 39(3) on Sense for the activities of Midas, I will start with the language of section 39, read as a whole in its statutory context.

30. Section 39(3) imposes liability on the authorised person (Sense, in this case) for the acts or omissions of the AR "in carrying on the business for which he (i.e. the authorised person) has accepted responsibility". The quoted words define the extent of the authorised person's liability.

31. Those words refer back to section 39(1) which, for these purposes, contains three critical steps. First, there must be a contract (the AR Agreement) between the authorised person and the AR which "permits or requires him [the AR] to carry on *business of a prescribed description*". As Mr Sims rightly submits, that is a reference to one or more of the businesses prescribed in generic terms in regulation 2 of the AR Regulations.

32. Second, the AR must be someone "for whose activities in carrying on *the whole or part* of *that business* [the authorised person] has accepted responsibility *in writing*". There are a number of points that arise. The acceptance of responsibility must be in writing, normally but not necessarily in the AR Agreement. In order to determine the extent of the acceptance of responsibility it will be necessary to refer to the terms of the document by which the authorised person accepts responsibility. The words "that business" refer back to "business of a prescribed description" in section 39(1)(a), which the authorised person permits or requires the AR to carry on. The words "the whole or part" demonstrate that the acceptance of responsibility need not relate to all activity that could fall within a generic type of business described in the AR Regulations and specified in the AR Agreement. The acceptance of responsibility may relate to part only of such business, as stated in the written acceptance of responsibility.

33. Third, if paragraphs (a) and (b) of section 39(1) are satisfied, the AR "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*". The italicised words refer back to paragraph (b), requiring identification of "the whole or part of that business" for which responsibility is accepted. These words of exemption do not need to repeat "the whole or part of" because paragraph (b) permits the authorised person to accept responsibility for part of a generic type of business and they are, therefore, necessarily encompassed within the italicised words.

34. The scheme of section 39(1) is thus clear. An AR is an exempt person only to the extent that an authorised person has accepted responsibility for the business to be carried on by the AR. If an authorised person has accepted responsibility for only part of a category of business, the AR will be exempt only in respect of that part. This makes sense. Acceptance of responsibility is the equivalent of authorisation and is essential to the enjoyment of exempt status by the AR. The AR will be subject to the general prohibition as regards any activity falling outside the business, or part of the business, for which the authorised person has accepted responsibility.

35. I have up to this point focused on the construction of section 39(1), but that is critical because section 39(1) defines the scope of section 39(3). The responsibility, and hence potential liability, of an authorised person under section 39(3) is limited to the acts or omissions of the AR "in carrying on the business for which [the authorised person] has accepted responsibility". Those words take one back to section 39(1), and specifically to section 39(1)(b). Again, the structure of the section is clear. As the quid pro quo for accepting responsibility for the activities of an AR in carrying on the whole or part of a prescribed business, and thereby exempting the AR from obtaining its own authorisation, the authorised person becomes personally liable to third parties for the AR's acts or omissions in the course of those activities. Exemption and liability under section 39(3) are co-extensive.

36. In my judgment, Mr Sims' submission that the authorised person necessarily must accept responsibility for the whole of a generic description of business, provided it falls within its own FCA authorisation, cannot be reconciled with the terms of section 39. As the judge said at [133], "There is no indication in the wording of section 39, or in the case-law, that indicates that the business for which responsibility is accepted is to be determined not by reference to the contract, but by reference to the authorisations granted to the principal which are to be found in the Financial Services register".

37. Mr Sims submits that the purpose of the words "the whole or part of that business" is to enable an AR to have agreements under section 39 with more than one authorised person. They cater for the situation where more than one authorised person has accepted responsibility for the business to be carried on by an AR and each authorised person is itself authorised for only one or some but not all of the businesses to be carried on by the AR. An authorised person cannot accept responsibility for a business for which it does not have authorisation from the FCA. While I accept that the words "the whole or part of" facilitate the involvement of more than one authorised person with the same AR, I do not see the basis for restricting the clear and unqualified words of section 39(1) to this situation. The purpose of section 39(1) is to confer exempt status on persons in a manner which will fulfil the underlying regulatory and protective purposes of the legislation. It may make perfect sense to limit an AR to a partial exemption, having regard to the breadth and depth of the expertise of that AR or indeed of the authorised person. If, as Mr Sims submits, the legislative intention is to make an authorised person responsible for all the activities of an AR that fall within the authorised person's own authorisation, it is inexplicable that section 39(1) is not drafted in clear terms to have that effect. For my part, I find it impossible to spell it out of section 39(1) as it is in fact drafted.

38. Mr Sims further submitted that the words "part of" enabled an authorised person, as a matter of contract, to "delegate" part of its own statutory licence to an AR. For example, an authorised person with authority to conduct general insurance intermediation and mortgage intermediation could delegate only one of those to a particular AR. Mr Sims submitted that this would prescribe the scope of AR's statutory exemption under section 39(1) and would be relevant to the internal relationship between the authorised person and the AR, but it would have no impact on the liability of the authorised person for the activities of the AR under section 39(3). It will be apparent from what I have already said that this appears to me to be an impossible construction. Not only is the extent of the authorised person's responsibility defined by the acceptance in writing required by section 39(1)(b), which in terms refers to "the whole or part of that business" but, for the reasons given above, the acceptance of responsibility under section 39(1) and the imposition of liability under section 39(3) are co-extensive.

39. Mr Sims submitted that this construction deprives the words "as if" in the phrase "is responsible, to the same extent as if he had expressly permitted it" of any legal meaning. I address below the purpose of these words but, in short, they recognise that at common law giving authority for an activity will not necessarily impose liability on the principal for all actionable acts or omissions of the agent that may occur in relation to the conduct of that activity, particularly as regards tortious liability. These words overcome those difficulties.

40. A further submission made by Mr Sims was that, even if statutory responsibility may be restricted to only part of a business, liability cannot be excluded by reference to a failure properly to conduct that business. I agree with that, but I do not agree with Mr Sims' next submission that it is impossible to distinguish between "what" and "how", so that the only sensible answer is to define the authorised person's responsibility by reference to its authority to conduct business of a prescribed, generic description. In my view, it will be a rare case which presents any difficulty in distinguishing between what activity may be carried on and how a permitted activity is carried on.

41. In reaching these conclusions on the construction of section 39, I have so far not mentioned section 39(1A) and (1B) which, together with the definitions in section 39(7) and (8), were added by the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2007 (SI 2007/126). By the same Regulations, provisions were added to section 347 of FSMA. These amendments were made to give effect to provisions in MiFiD I as regards a public register.

42. MiFiD I requires the maintenance of a public register of financial advisors. Recitals (1) to (3) explain the need, "due to the increasing dependence of investors on personal recommendations", to extend the harmonisation of the regulation of financial services to the provision of investment advice. Article 5.1 requires that carrying on investment services or activities as a business be subject to prior authorisation in accordance with the Directive. Article 5.3 requires member states to "establish a register of all investment firms. This register shall be publicly accessible and shall contain information on the services and/or activities for which the investment firm is authorised. It shall be updated on a regular basis."

43. Section 39(1A) provides that an AR is not exempt "(a) if his principal is an investment firm or a credit institution, and (b) so far as the business for which his principal has accepted responsibility is investment services advice", unless "he is entered on the applicable register". As I understand it, it was not disputed that the conditions in (a) and (b) were satisfied in the case of Sense and Midas. It was common ground that the "applicable register" for the purposes of section 39(1B) was the record maintained by the FCA by virtue of section 347(1)(ha): see section 39(1B)(c).

44. Section 347 requires the FCA to maintain a record of authorised persons and others (the FCA Register), which was extended by the Regulations made in 2007 to include ARs such as Midas. Section 347(2) requires the Register to "include such information as the Authority considers appropriate and at least the following information…" In the case of an authorised person, the information must include "information as to the services which he holds himself out as able to provide". No requirement as to the information, if any, to be included in respect of an AR appears in section 347. We were shown some entries on the Register for Sense, but it is difficult to derive much help from them. In one case, under the heading "Appointed representatives", it was stated "An appointed representative is a firm or individual that can carry on certain regulated activities without being authorised on the basis that another, authorised, firm or individual (its 'principal') has accepted responsibility for those activities". Another, referring to particular types of business (insurance distribution, for example), stated "For details of the precise activities that an AR can undertake on behalf of its Principal firm(s) please contact the Principal firm". If anything, these statements are more consistent with Sense's case than the appellants' case.

45. Mr Sims submits that section 39 should be interpreted so that the information as to Sense's services as included in the FCA Register determined the activities of Midas for which it accepted responsibility to the extent that they fell within the generic categories of prescribed business referred to in section 39(1). Otherwise, the record does not identify the activities that the AR is permitted to carry on and the domestic legislation will not have given effect to MiFiD I in this respect.

46. I am unable to see how the introduction of section 39(1A) and (1B) can have changed the meaning and effect of section 39 as regards the extent of the liability of the authorised person for the activities of an AR. Neither they, nor the provisions of MiFiD I to which we were taken, say anything about liability for the AR's activities. They do not, in my judgment, assist in the process of construction of section 39 required to determine the extent of that liability.

47. Mr Sims referred in his skeleton argument to some authorities but none of them, in my judgment, assists him. In *Martin v Britannia Life Ltd* [2000] Lloyd's Rep PN 412, the claimants had taken out an endowment policy and a pension policy with an insurance company on the advice of one of its ARs. That was business within the terms of his AR agreement. He also gave associated advice, including advice in relation to the surrender of a number of life policies to provide funds for the new investments and a re-mortgage of their home, which was outside the terms of the AR agreement. Jonathan Parker J held that, because of the close connection between these transactions, the advice on the surrender of policies and the re-mortgage could not be separated from the advice on the new policies. The insurance company, or its successor, was liable under section 44 of the Financial Services Act 1986, the predecessor of section 39, in respect of all the advice. The basis of the decision is accurately summarised in *Jackson and Powell on Professional Liability* (8th ed. 2017) at 15-027:

> "…while the terms of an appointed representative's express authority might be limited to providing investment advice to customers in relation to particular products of his principal, conduct that is incidental to the provision of that advice (such as soliciting the customers, identifying the financial and personal circumstances of the particular customer, assisting in any application that the customer might to choose to make) will still fall within the actual authority of that representative…[in *Martin*] the advice was inherently bound up with and incidental to the advice given by him in relation to other investments."

48. The same analysis applies to the decision of Ouseley J in *R v Financial Ombudsman (on the application of Tenetconnect Services Ltd)* [2018] EWHC 459 (Admin), [2018] 1 BCLC 726.

49. Mr Sims also relied on *Ovcharenko v InvestUK Ltd* [2017] EWHC 2114 (QB) in which the authorised person was held liable for investment advice given by an AR where the advice fell within the business authorised by the AR agreement but the AR offered an inducement in breach of a term of the AR agreement. This was a case that concerned not what business the AR was authorised to carry on, but how he carried out that business.

50. Mr Sims referred to the Gower Report (*Review of Investor Protection*, 1984, Cmnd 9125) which provided the basis for major reforms of financial services regulation introduced by the FSA 1986. At that time, it was still common for life insurance and pensions companies to have large direct sales forces, sometimes numbering several thousand, who were for the most part self-employed; see para 8.11 of the Report. The control that the companies exercised over the sales forces was limited, and as the Report noted at para 8.50:

> "The companies say that they already accept [full responsibility for their activities]; but they are not necessarily legally bound to do so in relation to self-employed salesmen since the vicarious liability of a principal for the acts of an agent who is an independent contractor differs somewhat from that of a master for the acts of his servants and, especially in relation to tortious liability, is less extensive. Moreover it is not clear that the salesman always acts as an agent of the company rather than of the client."

51. Professor Gower's recommendation for this issue was set out in the same paragraph:

> "Hence, I suggest that if the tied salesmen are to continue to be self-employed it should be specifically enacted that the company to which they are tied is fully responsible for their acts to the same extent as if they were its employees with full authority to act on its behalf. This should apply even if, in any particular case, the salesman sold the product of another company."

52. The White Paper (*Financial Services in the United Kingdom: A new framework for investor protection*, 1985, Cmnd 9432) which followed the Gower Report stated at para 10.6 that authorised business should be required "to take total responsibility for sales by tied agents as well as their employees". This was reflected in the drafting of section 44 of the FSA 1986 which defined an AR as "a person who is employed by an authorised person (his "principal") under a contract for services". That provision was omitted when section 39 replaced section 44. Moreover, the provision imposing liability in section 44 was not in the terms recommended by the Gower Report but in the terms which appear now as section 39(3).

53. Reference to the Gower Report is useful for identifying the general purpose of section 44 and, to the extent that its provisions were carried over, of section 39 and of the problems which they were designed to address, but it is not a guide to the detailed interpretation of section 39 nor is it permissible to use it as such.

54. The Gower Report does, however, provide the answer to a question posed by Mr Sims: what does section 39(3) add to the liability of a principal for an agent at common law? The deeming words of section 39(3) ("to the same extent as if he had expressly permitted it") overcome the difficulties identified by Professor Gower of the circumstances, particularly in the case of tortious liability, when a principal will or may not be liable for the acts or omissions of an agent. I would add these words may also be necessary because the wide drafting of section 39(3) could see the appointment of ARs whose agency role is either very limited or perhaps non-existent.

55. Turning finally to the terms of the AR Agreement in this case, it contains in clause 3.1 two express restrictions on the scope of the business authorised by Sense, beyond generic descriptions such as "Designated Investment Services". First, the scope is limited by reference to "the Letter of Authorisation". As earlier explained, it is not clear whether there was a Letter of Authorisation, so on the facts of this case there is no such limitation. Second, it required Midas to use "a Company Agency", in other words, a product provider which had authorised Sense to sell its products. There is no doubt that Sense had Company Agencies which it notified to Midas and its other ARs.

56. The written acceptance of responsibility to third parties by Sense in clause 4.2 was "only to the extent required by section 39 of the Act in relation to the actions of the AR when the AR is carrying out regulated activities on the terms of this Agreement".

57. In my judgment, and in agreement with the judge, the restriction in clause 3.1 to business using a Company Agency constituted, for the purposes of section 39, an acceptance by Sense of responsibility for part of the generic business prescribed in the AR Regulations. Advising clients to entrust their money to the scheme being operated by Midas and Mr Greig did not involve the use of a Company Agency and therefore fell outside the business for which Sense had accepted responsibility. The restriction of responsibility in this way enabled Sense to have effective controls and supervision of the authorised business of Midas: see the judgment at [120].

Vicarious liability

58. The appellants submitted to the judge that, in the light of the recent extension in the scope of vicarious liability at common law to cover independent contractors as well as employees, Sense was liable for the tortious acts of the individual Midas advisors in recommending investment in the scheme. They submitted that, applying the decision of the Supreme Court in *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660, Sense created the risk of such tortious acts by entering into the AR Agreement and thereby exempting Midas from obtaining authorisation from the FCA.

59. The judge cited from the judgment of Lord Reed, with whom all the members of the court agreed, at [24]:

> "…a relationship other than one of employment is in principle capable of giving rise to vicarious liability where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party), and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question."

60. He also cited a passage from [30]:

> "…The individual for whose conduct it may be vicariously liable must carry on activities assigned to him by the defendant as an integral part of its operation and for its benefit. The

> defendant must, by assigning those activities to him, have created a risk of his committing the tort."

61. The judge held that, applying those principles to the present case, Sense was not vicariously liable for any actionable advice or other acts as regards investment in the scheme. He said that Midas was "clearly carrying out a recognisably independent business of its own", as evidenced by the numerous features of its operations summarised at [327] and that the activities of the advisors were entirely attributable to Midas' own business. Further, there was no basis in the evidence for suggesting that their activities were assigned to them as an integral part of Sense's business and for its own benefit.

62. Although counsel for the appellants in their skeleton argument at paragraph 106 rightly observed that the premise of this route to liability was the negligent advice given by each Midas advisor, they criticised the judge at paragraph 116 for focusing on the individual advisors, rather than on the relationship between Sense and Midas. It seems to me that the judge was right in his approach but, in the end, I do not think it makes any difference.

63. The appellants submitted that giving investment advice was a field of activity assigned to Midas by Sense when it appointed Midas as an AR. Sense had no revenue stream or business without its ARs, who were therefore integral to its business. The activities assigned to its ARs were the business of the Sense network of ARs. Sense created the risk of negligent advice not only by appointing Midas but also by training, authorising and supervising its advisors in the provision of financial advice to the public.

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 advisors provided financial advice, they were doing so as part of Midas' 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.

Collective investment scheme

66. It was common ground that in order to succeed in their claims under section 39, the appellants had to establish that the scheme operated by Midas and Mr Greig was a collective investment scheme, as defined in FSMA. Giving advice on investing in collective investment schemes is within the prescribed descriptions of business under the AR Regulations which may be the subject of an AR agreement. If it was not a collective investment scheme, the appellants were simply making deposits with Midas, and giving advice on deposits is outside those descriptions.

67. Having analysed the evidence given by claimants as to what they were told about the scheme and their investment in it, the judge held that it was a collective investment scheme. By a respondent's notice, Sense has challenged this but, if my Lords agree with my conclusion that the appellants' appeal against the dismissal of their claim under section 39 fails, this issue does not affect the outcome of the appeal. Nonetheless, it has been fully argued and it is appropriate to address it.

68. Collective investment scheme is a term defined in section 235 of FSMA:

> **"235. Collective investment schemes.**
>
> (1) In this Part "collective investment scheme" means any arrangements with respect to property of any description, including money, the purpose or effect of which is to enable persons taking part in the arrangements (whether by becoming owners of the property or any part of it or otherwise) to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income.
>
> (2) The arrangements must be such that the persons who are to participate ("participants") do not have day-to-day control over the management of the property, whether or not they have the right to be consulted or to give directions.
>
> (3) The arrangements must also have either or both of the following characteristics -
>
> (a) the contributions of the participants and the profits or income out of which payments are to be made to them are pooled;
>
> (b) the property is managed as a whole by or on behalf of the operator of the scheme.
>
> (4) If arrangements provide for such pooling as is mentioned in subsection (3)(a) in relation to separate parts of the property, the arrangements are not to be regarded as constituting a single collective investment scheme unless the participants are entitled to exchange rights in one part for rights in another.
>
> (5) The Treasury may by order provide that arrangements do not amount to a collective investment scheme -
>
> (a) in specified circumstances; or
>
> (b) if the arrangements fall within a specified category of arrangement."

69. The judge noted that there was very little paperwork provided to the appellants in relation to the scheme. There was no promotional literature nor any statement of how it would operate or of its terms and conditions, other than a letter issued when a client

made a payment, headed "Short Term Deposit", followed by "Guaranteed Capital Return" and "Guaranteed Growth [X]%". The letter confirmed that the client had placed a specified amount "using the above product" and that a specified higher amount, being the capital and the "guaranteed growth", would be paid to the client on a specified date.

70. A number of witnesses gave evidence of what they had been told of the scheme and, while they were not precisely the same, a common theme emerged that the payments were pooled and invested in a special account with Royal Bank of Scotland (RBS). It was said that Mr Greig had close contacts with RBS which gave him, and hence his clients, access to this special account on which RBS offered significantly higher returns than on accounts available on the high street. Many of the witnesses were told, or understood, that their money was safe because it would be paid into this account with RBS. The judge accepted the appellants' summary of the evidence that "investors were told that they would be participating in a scheme and getting the benefit of the relationship of Mr Greig/MFSS with RBS and therefore enhanced returns on their money".

71. The fact that none of this was true is not material to whether Midas' "scheme" was a collective investment scheme, the Supreme Court having held in *Asset Land Investment plc v FCA* [2016] UKSC 17, [2016] Bus LR 524 that the focus is on the common understanding of the parties when investment is made, not on what subsequently occurs. The issue is whether Midas was advising on what were apparently investments in a collective investment scheme.

72. The judge held that the arrangements described to the appellants constituted a collective investment scheme, satisfying each of the conditions contained in section 235. First, they were "arrangements", a word with a very broad meaning. Second, they were arrangements with respect to money which were intended to enable participants to "receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income". While the judge does not set out in detail what was intended to be the form of "the acquisition, holding, management or disposal" involved in the arrangement, it seems to me that it was the investment of the money into the RBS special account and the receipt of such money plus interest from RBS on the maturity of deposits.

73. Sense submits that section 235(1) was not satisfied, because the guaranteed return was not dependent on the performance or otherwise of the funds but was a fixed return payable irrespective of whether profits or income were received. The statements made about the special account with RBS were simply explanations as to how such high returns could be paid. I do not accept this analysis. As explained to investors, the whole point of the scheme was to enable them to have access to the supposedly high rates of return that Mr Greig could obtain from RBS. Payment of their contributions into the (non-existent) special account with RBS was of the essence of the scheme. The fact that Midas promised a fixed return, for which it was legally liable irrespective of the performance of the RBS special account, does not in my view prevent the scheme from falling within section 235(1). First, section 235 does not define or limit the form of an investor's participation. There is no reason why it should not take the form of a fixed return. Second, whatever the bare legal rights of investors against Midas, the nature of the arrangements was clear. If one asks the question: was the apparent purpose or effect of the scheme to enable the investors to

receive income from the acquisition, holding and disposal of the rights constituted by the payment of their contributions into the RBS special deposit account, the answer is "yes".

74. Sense repeats the submission it made to the judge that the guaranteed return was not dependent on any particular level of funds being held pursuant to the scheme, but I agree with the judge that there is nothing in the wide language of section 235(1) which requires this feature.

75. It was common ground before the judge that the requirement in section 235(2), that the participants would not have day-to-day control over the management of the property, was satisfied.

76. The judge held that the conditions in both paragraphs (a) and (b) of section 235(3) were satisfied, although he considered there was some uncertainty about paragraph (a).

77. The condition specified by section 235(3)(b) is that "the property is managed as a whole by or on behalf of the operator of the scheme". Midas and/or Mr Greig was the operator and the property was the deposit or deposits in the RBS special account and funds held pending transfer to the RBS account. As mentioned above, a common theme of the evidence was that investors understood that they were participating in a scheme under which their investments would be pooled with the funds contributed by other investors and transferred to the RBS account. The judge summarised this evidence at [182] when he said that "the basic idea was that a scheme existed under which members of the scheme would pay money to Mr Greig/Midas, and that this would be given with other scheme monies to the RBS who would then be able to pay substantial rates of interest back to Mr Greig to be passed back to members of the scheme".

78. Sense submits that the judge was wrong to hold that the participants' contributions were "managed as a whole" by Midas. Simply to accept a deposit and repay it with a pre-determined premium on the agreed date is not management. The judge rejected this submission, saying that "Management does not necessarily require a great deal of hard work. It can simply be receiving money, paying it over to a person (RBS) with whom there is a close relationship and a special deal enabling high rates of interest to be earned, and receiving it back and accounting to the investors for the principal and interest." I agree with the judge. "Management" is, as Lord Sumption said in *FCA v Asset Land* at [98] "a protean word which can embrace a wide range of activities involving varying degrees of control over the property being managed". See also *Re Sky Land Consultants plc* [2010] EWHC 339 (Ch) at [77]-[79], cited by Lord Carnwath in *FCA v Asset Land* at [19]. Further, in view of the evidence that investors' contributions were all expected to be paid into, and all repayments calculated and made from the aggregate balance on a single RBS account, the judge was entitled to hold that the property was managed "as a whole".

79. For good measure, I also agree with the judge that the condition in section 235(3)(a) was satisfied. It is a recurrent theme of the evidence, as mentioned above, that the appellants thought that their contributions would be pooled with those of other investors (although the words "pooled" or "pooling" was not used) and paid into the RBS special account. The deposit and interest or premium would be repaid by RBS to

Midas and then distributed to investors. For the obvious reason that the scheme was bogus, the precise details of its intended operation are unclear in some respects, but in my view the judge was entitled on the evidence to conclude that the arrangements satisfied section 235(3)(a) as well as section 235(3)(b).

80. In the alternative, Sense submits that the scheme fell within the exception provided by paragraph 6 of the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 (SI 2001/1062), which provides:

> **"6. Common accounts**
>
> Arrangements do not amount to a collective investment scheme if –
>
> "(a) they are arrangements under which the rights or interests of participants are rights to or interests in money held in a common account; and
>
> (b) that money is held in the account on the understanding that an amount representing the contribution of each participant is to be applied -
>
> (i) in making payments to him;
>
> (ii) in satisfaction of sums owed by him; or
>
> (iii) in the acquisition of property for him or the provision of services to him."

81. The judge rejected this submission. He held that paragraph 6(b) was not satisfied. The funds were paid by participants to Midas or Mr Greig "on the basis that he was operating a scheme whereby various participants would give money to him, and this money would find its way to the RBS [sic], and RBS in due course would repay the money together with enhanced rates on interest". In my view, he was right to say that such application of their pooled contributions cannot fall within any of the uses listed in paragraph 6(b). As they are the only permitted uses if the exemption in paragraph 6 is to apply, it follows that the exemption does not apply. Sense submits that the application of the funds in making the deposit with RBS involves "the acquisition of property for him [i.e. each participant]". In my view, this is untenable. The rights against RBS resulting from a deposit with it would not be acquired for any participant, certainly not individually (as required by paragraph 6(iii)) or indeed collectively. The rights against RBS would belong to Midas, albeit forming the property to which section 235(1) would apply. Section 235(1) states expressly that a collective investment scheme does not require the participants to become owners of the underlying property. Sense also submitted that paragraph 6(b)(i) applied, but that is equally untenable, essentially for the same reason. The money held in the deposit account with RBS is not held on the understanding that an amount representing the contribution of each participant is to be applied in making payments to him. It is held on the basis that the entire sum plus interest or a premium will be repaid to Midas on maturity.

82. I would therefore reject the case advanced by Sense in its respondent's notice that the scheme presented to the appellants by Midas and Mr Greig did not constitute a collective investment scheme.

Conclusion

83. It is accepted, at least for the purposes of this case, that the appellants have been the victims of a callous fraud. On any footing they have suffered severe losses. However, those losses are not in my view recoverable from Sense for the reasons given in this judgment and for the reasons given by the judge. I would accordingly dismiss this appeal.

Lord Justice Hamblen:

84. I agree.

Mr Justice Snowden:

85. I also agree.