complaint

Mrs W complains about the actions of a Mr S. She says she believed she was entering a peer-to-peer lending scheme through him but most of the money she paid hasn't been returned. She says Quilter Financial Planning Solutions Limited is responsible for her loss because Mr S was acting on its behalf.

background

Since I issued my provisional decision, Positive Solutions (Financial Services) Ltd has changed its name to Quilter Financial Planning Solutions Limited. In this decision I've largely referred to Positive Solutions for ease. I confirm they're the same business.

Mrs W had a long-standing relationship with Mr S. His business – David Charles Financial Services – operated her company's pension scheme. And from the 1990s, she and her husband used him as their financial adviser for their private pensions and financial products.

Mrs W says she was made redundant in July 2005. She managed to get a new job quickly and so had the redundancy settlement and payment in lieu of notice as extra. Mr S knew this, and she says he suggested using that money to do peer-to-peer lending in August 2005. She says he told her the money would be lent to customers of his who were either start-up or existing businesses that needed short-term loans.

Mrs W entered into the first agreement in September 2005. It was described as a loan to "*DC S of David Charles Financial Services*". It was stated to have an interest rate of 12% a year and to be repayable in full or part with three months' notice. Mrs W says she questioned the fact the agreement was only a page long but Mr S reassured her by saying both he and Positive Solutions had consumer credit licences which allowed them to offer the arrangement. He also gave her terms of business setting out that he was a partner of Positive Solutions.

Over the next nine years Mrs W entered into numerous other similar agreements with Mr S. She says there were nine agreements in total and she's provided copies of these – together with bank statements showing transfers to Mr S that match up with the agreements:

- 5 September 2005 – £20,000.
- 30 September 2006 – £30,000.
- 15 December 2006 – £50,000.
- 17 April 2008 – £95,000.
- 18 December 2008 – £112,000.
- 18 March 2009 – £125,000.
- 28 August 2009 – £25,000.
- 28 August 2011 – £40,000.
- 28 February 2012 – £50,000.

She says the agreements rolled into each other until the one dated 18 March 2009 – in other words the debt under each agreement was refinanced by the next one. And then a new separate chain was started from 28 August 2009. This is because it seems Mr S told her the maximum amount for an agreement was £125,000. This would mean Mrs W has £175,000 owed to her under the agreements – £125,000 under the 18 March 2009 one and £50,000 under the 28 February 2012 one.

Mrs W has provided additional bank statements showing various transfers to Mr S and she says she also made a cash payment to him. She says she doesn't think she was given agreements for these amounts, but the intention was that the money would be used in the same way:

- A transfer of £5,000 on 29 May 2009.
- A transfer of £5,000 on 24 October 2011.
- A transfer of £10,000 on 24 November 2011.
- A transfer of £10,000 on 25 April 2012.
- A transfer of £10,000 on 29 July 2014.
- A transfer of £10,000 on 7 November 2014.
- A transfer of £20,000 on 10 November 2014.
- A cash payment of £5,000 at some point in November 2014.

She's said as far as she was concerned, none of the agreements, nor the £45,000 she paid Mr S in 2014, were ever repaid. In total she therefore says she gave Mr S £220,000 that hasn't been repaid. Mr S seems to agree but Positive Solutions has disputed this figure. However, because I've decided this service can't consider most of the payments Mrs W made, I haven't made a finding on exactly how much was transferred.

Mrs W says the money she transferred to Mr S came from bank accounts, ISAs, premium bonds, investments, an endowment policy and a successful injury at work claim. She says she received interest regularly for the first four or five years but from that point started to let it accumulate with Mr S – only asking for payments occasionally.

Mrs W says she raised concerns about the arrangements a number of times but was always reassured when Mr S told her he acted under Positive Solutions' umbrella. He told her Positive Solutions and the Financial Services Authority (FSA) regularly audited him and his company.

Mr S' name appeared on the FSA's register in connection with Positive Solutions between 1 December 2001 and 31 December 2012. The register shows he was trading as David Charles Financial Services and:

- Between 1 December 2001 and 31 October 2007 he was approved by the FSA to carry out the controlled function "CF 21 Investment Adviser" on behalf of Positive Solutions.

- Between 1 November 2007 and 21 December 2012 he was approved by the FSA to carry out the controlled function "CF 30 Customer" on behalf of Positive Solutions. This means he could advise on, and arrange, investments for Positive Solutions customers.

Positive Solutions says his role changed after that and he became a mortgage broker for it. It says it would have written to Mr and Mrs W explaining this in January 2013. But it says because of the time that's passed, it no longer has a record of that. It's provided a copy of the text of the letter it says would have been sent.

Mrs W says the money she transferred in November 2014 was only intended to be a short-term loan and so she became suspicious when it wasn't repaid when it should have been. She visited Mr S' office but discovered none of the other staff knew about the agreements. There was then a large amount of email correspondence over several years between Mrs W,

her husband and Mr S. Mr S was declared bankrupt and eventually told Mrs W he couldn't repay the money she'd lent. I understand there's been a police investigation and Mr S has now been charged.

Mrs W complained to Positive Solutions. Positive Solutions said it wasn't responsible for her complaint. It said:

- Mr S was free to enter into contracts outside of his agreement with it. It'd spoken to him and he said he'd been clear with Mrs W that he was entering into the agreements in his personal capacity as a sole trader – not in his capacity as a registered individual of Positive Solutions.
- It had no knowledge of the agreements and received no money as a result of them.
- There's no evidence that Mr S led Mrs W to believe it'd allowed him to carry out the activity. And it'd done nothing to give that impression.
- If Mr S had held himself out as acting on behalf of it, he'd acted outside the scope of his agreement with it and both of their regulatory permissions.
- No regulated activities had been carried out.

I issued a provisional decision on 12 December 2019. A copy of my provisional findings is attached and forms part of this decision. In summary, I said:

- I was satisfied the regulated activity of accepting deposits had taken place.
- Most of the money Mrs W transferred to Mr S didn't involve a regulated activity. But £10,000 of it came from a Skandia policy that was surrendered on 22 November 2011. And I was satisfied Mr S had advised on the surrender of this investment, as well as making arrangements for it. So there were additional regulated activities in relation to that £10,000.
- Positive Solutions hadn't given Mr S actual authority.
- For the payments Mrs W made to Mr S that only involved the regulated activity of accepting deposits, Positive Solutions hadn't given him apparent authority; wasn't vicariously liable; and wasn't responsible under section 150 of the Financial Services and Markets Act 2000 (FSMA) so we couldn't consider a complaint about those payments.
- For the £10,000 payment that came from surrendering a Skandia investment, I was minded to say Positive Solutions had given Mr S apparent authority; that it was vicariously liable; and that it had responsibility under section 150 FSMA so we could consider a complaint about that payment.
- I didn't need to make a finding for the purposes of this complaint whether Positive Solutions told Mr and Mrs W when Mr S moved from being a financial adviser to a mortgage broker because the position he held doesn't affect whether it's in this service's jurisdiction.

- I didn't think the complaint should be dismissed.

- Although we could consider the £10,000 payment that came from surrendering a Skandia investment, I was satisfied it was most likely that payment had been repaid to Mrs W quickly and certainly within three months. So I didn't think the advice Mr S had given her caused her any loss and it wouldn't be fair to require Positive Solutions to pay compensation in the circumstances.

Positive Solutions replied saying it doesn't want to make any further representations. Mrs W initially said she wanted to but never did so.

my findings

I've reconsidered all the available evidence and arguments to decide whether this complaint is one this service can consider. And where it is, I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

As no further comments or evidence have been provided in support of either case since my provisional decision, I don't feel it's necessary to comment further. My conclusions remain as set out in my provisional decision for the same reasons.

my final decision

My decision is that this service can't look into most of Mrs W's complaint against Quilter Financial Planning Solutions Limited. And although we can look into her complaint in relation to the £10,000 she transferred on 24 November 2011, my decision is that no compensation is due because it seems Mr S repaid that £10,000 within a fairly short period of time.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs W to accept or reject my decision before 23 April 2020.

Laura Parker
ombudsman

COPY OF MY PROVISIONAL FINDINGS

my provisional findings on jurisdiction

I've considered all the information provided by both parties to decide whether this complaint is one we can consider against Positive Solutions. I know Mrs W will be disappointed but I'm currently planning to decide most of it isn't. I've explained my thinking below.

This service isn't able to look at all complaints. We operate under a set of rules and guidance that tell us what we can and can't look at. These are published as part of the Financial Conduct Authority's (FCA) Handbook – in a section called "*Dispute Resolution: complaints*" (the DISP rules).

Amongst other requirements, these say:

- The complaint has to relate to an act or omission by a firm carrying on one or more listed activities, or ancillary activities (DISP 2.3.1R).

- Those acts must be the acts of a regulated firm, or ones for which it's responsible (DISP 2.3.3G).

Positive Solutions is clearly a "*firm*" under our rules. So to decide whether it's responsible here, there are two issues I need to consider:

- Were the acts about which Mrs W complains done in the carrying on of a regulated activity – or ancillary to a regulated activity?

- Did the principal firm, Positive Solutions, accept responsibility for those acts?

were the acts Mrs W complains about done in the carrying on of a regulated activity – or ancillary to a regulated activity?

The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO) says that regulated activities include:

- Accepting deposits (article 5 RAO).

- Advising on the merits of buying or selling a particular investment which is a security or relevant investment (article 53 RAO).

- Making arrangements for another person to buy or sell or subscribe for a security or relevant investment (article 25 RAO).

I'm not persuaded any of the other regulated activities are relevant here.

the agreements Mrs W entered into

The investigator was satisfied the agreements Mr S entered with Mrs W amounted to instruments creating or acknowledging indebtedness and so were a security or relevant investment. He was also satisfied Mr S had provided advice in relation to them. Positive Solutions didn't agree.

Taking everything into account, I agree with Positive Solutions. The general view, as expressed in the *Encyclopedia of Financial Services Law Volume 2* at 3A-086, is that loans aren't instruments creating or acknowledging indebtedness for the purposes of the RAO. And there's nothing that satisfies me these agreements should be treated differently.

But – as set out above – there's also a regulated activity of accepting deposits. And I'm satisfied this activity was carried out in relation to all the agreements.

Article 5(1) RAO says:

> *Accepting deposits is a specified kind of activity if –*
>
> *(a) money received by way of deposit is lent to others; or*
>
> *(b) any other activity of the person accepting the deposit is financed wholly, or to a material extent, out of the capital of or interest on money received by way of deposit.*

And article 5(2) RAO defines "*deposit*" as:

> *a sum of money, other than one excluded…paid on terms –*
>
> *(a) under which it will be repaid, with or without interest or premium, and either on demand or at a time or in circumstances agreed by or on behalf of the person making the payment and the person receiving it; and*
>
> *(b) which are not referable to the provision of property (other than currency) or services or the giving of security*

I'm satisfied there were deposits as defined here. There were written agreements saying the money would be repaid on the giving of three months' notice. No property, services or security were given in return. And none of the exclusions seem to apply.

The issue then is whether either (a) or (b) of article 5(1) RAO were satisfied.

In relation to (a), it seems as though the money received as deposits wasn't lent to others. But the intention was that it would be. DISP 2.1.4G(1) says carrying on an activity includes "*offering, providing or failing to provide a service in relation to an activity*". Because the intention was that the deposits would be loaned by Mr S to start-up companies, I'm satisfied Mr S offered to provide a deposit accepting service. Either he provided that service (if any of the money was actually lent on) or failed to provide it (if none of the money was lent on) so the regulated activity of deposit taking was carried on. I therefore haven't gone on to consider (b).

Article 4(1) RAO requires the activity of accepting deposits to be "*carried on by way of business*" in order to be a regulated activity. Article 2 of the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 sets out what this means in relation to the activity of accepting deposits. Article 2(1) says a person carrying on the activity of accepting deposits isn't doing so by way of business if:

> *(a) he does not hold himself out as accepting deposits on a day to day basis; and*
>
> *(b) any deposits which he accepts are accepted only on particular occasions, whether or not involving the issue of any securities.*

Looking at the agreements and what happened here, I'm satisfied Mr S accepted the deposits by way of business. It seems he accepted deposits when they were offered and at random points in time. I also note that Mrs W had an existing advisory relationship with him at the point the deposits started, and the payments were stated to be made to David Charles Financial Services.

I'm therefore satisfied the test for our jurisdiction set out at DISP 2.3.1R is fulfilled because the complaint concerns acts or omissions relating to the carrying on of the regulated activity of accepting deposits. But as set out below, I'm also satisfied there was an additional regulated activity that Mr S carried out in relation to £10,000 of the money Mrs W transferred to him.

where the money deposited with Mr S came from

As set out above, the RAO says that regulated activities include:

- Advising on the merits of buying or selling a particular investment which is a security or relevant investment (article 53 RAO).

- Making arrangements for another person to buy or sell or subscribe for a security or relevant investment (article 25 RAO).

Most of the money Mrs W transferred to Mr S didn't involve a regulated activity. It came from sources such as premium bonds, cash ISAs, bank accounts, a redundancy payment and an injury at work claim. Although Mrs W has referred to some of the money coming from a stocks and shares ISA, she hasn't provided anything that demonstrates this. And although some of the money came from investments and endowment policies, from what Mrs W has said, the advice Mr S gave her was only in relation to the cash that came from these – there wasn't any advice to surrender them. For example, a Legal & General investment Mrs W has referred to had matured when the money was moved from it.

The only regulated activity I've identified in relation to where the money came from relates to a Skandia policy that was surrendered on 22 November 2011. Mrs W said:

> *We had a review in October/November 2011, Mr S advised us an approximate value of our Skandia Funds. After 10 years the fund hadn't performed very well, so he advised us, if we surrender the fund and reinvested in peer to peer lending, he would waiver his charges on us surrendering the Skandia Fund and could get us a better rate of return.*

She's provided an email she received from Mr S on 3 November 2011. This said:

> *Please find attached the surrender form for Skandia.*
> *Please complete and sign and post back to me*

Under articles 25 and 53 of the RAO, any advice to surrender the Skandia investment, or the making of any arrangements to surrender it, would be a regulated activity. In the circumstances here, I'm satisfied Mr S advised on the surrender of the Skandia investment. I'm also satisfied he made the arrangements for this. So there were regulated activities in relation to the Skandia investment.

I can see that £10,217.02 was received into Mr and Mrs W's bank account on 22 November 2011 from "*Skandia Multifunds*". And two days later £10,000 was transferred to Mr S. Mrs W says she doesn't think she received an agreement that related to this money. But I'm satisfied it's most likely this money was transferred to Mr S as part of the purported peer-to-peer lending scheme. I say this because I can see the money was paid direct to Mr S – in the same way the rest of the transfers in question were made.

Taking everything into account I'm satisfied Mr S' advice to surrender the Skandia investment and transfer the money to him to use for a purported peer-to-peer lending scheme was regulated advice. In the case of *TennetConnect Services Limited v Financial Ombudsman and John and Frances Thorpe* the judge analysed the position where the consumers had been advised to switch out of regulated investments into a fictitious, unregulated overseas property investment. He said:

> *It was simply really fraudulent "regulated" advice…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.*

I'm satisfied the same analysis can be applied here. But to decide whether we can look at the merits of the complaint, I also need to consider whether Positive Solutions was responsible for those activities.

is Positive Solutions responsible for those acts?

Mrs W didn't deal with any employees of Positive Solutions – although Mr S was an agent of Positive Solutions, he wasn't its employee. But Positive Solutions might still be responsible, even if none of its employees were involved.

This could be through having given actual authority; having given apparent or ostensible authority; being vicariously liable; and/or having statutory responsibility.

did Positive Solutions give Mr S actual authority?

Positive Solutions has provided copies of the agreements it says would have been in place between it and Mr S – one before 2013 and one after.

The agreement that was in place between Positive Solutions and Mr S before 2013 said:

Clause 2.1:

> *The Company hereby appoints the Registered Individual as its Registered Individual for the purpose only of introducing Applications by Clients for new Contracts, for submission to Institutions specified by the Registered Individual and approved by the Company.*

Clause 2.4:

> *…the Company shall not be bound by acts of the Registered Individual which exceed the authority granted under the provision of this Agreement or by fraudulent acts of the Registered Individual or of the Registered Individual's staff.*

Clause 10.2:

> *The Registered Individual shall limit, conduct and transact classes of investment to which the Company is authorised to do.* ***The Company is not authorised to handle clients' money.***

Whilst the agreement that was in place between Positive Solutions and Mr S at the time of the November 2014 agreement said:

> *Independent Mortgage Brokers may only provide advice in relation to mortgages, general insurance and protection contracts to clients, excluding any contracts having an investment content, they must not provide any other form of advice covered by the Financial Services and Markets Act 2000…*
>
> *The Company hereby appoints the Independent Mortgage Broker* [Mr S] *as its Independent Mortgage Broker for the purpose only of introducing Applications by Clients for new Contracts, for submission to Institutions specified by the Independent Mortgage Broker and approved by the Company…*
>
> *the Company shall not be bound by acts of the Independent Mortgage Broker which exceed the authority granted under the provision of this Agreement or by fraudulent acts of the Independent Mortgage Broker…*
>
> *The Independent Mortgage Broker shall limit, conduct and transact classes of business to which the Company is authorised to do. The Company is not authorised to handle clients' money.*

Accepting deposits with the purported intention of using them for peer-to-peer lending is clearly not something Positive Solutions authorised Mr S to do under either of these agreements. And in fact, holding client money is something Positive Solutions itself didn't have permission to do.

I've also considered the authorities on how fraud impacts whether actual authority is given. *Bowstead & Reynolds on Agency 21st Edition* says at 3-010 – 3-011:

> ***No Authority to Act Other Than for Principal's Benefit***
>
> *Authority to act as agent includes only authority to act honestly in pursuit of the interests of the principal.*
>
> ***Comment***
>
> *It is implicit in a conferral of authority that the principal intends the agent to exercise the relevant powers in the interests of the principal. An agent who deliberately or recklessly exercises powers against the interests of the principal must know that he acts without his principal's consent, and therefore acts without authority.*

In other words, there's an implied limitation on an agent's actual authority that he can't abuse it by acting otherwise than what he honestly thinks is in his principal's best interest.

Although I haven't been provided with the findings the police reached, I understand Mr S has now been charged. Taking everything into account, it seems most likely he wasn't acting honestly in the interests of Positive Solutions. When Mr and Mrs W were trying to work out what had happened to the money, he didn't produce any verified evidence showing who the money had been given to and when. And if the money had in fact been given as loans to businesses, it seems unlikely that he'd have been unable to return any of the money.

In the circumstances here, I'm satisfied Positive Solutions didn't give Mr S actual authority.

did Positive Solutions give Mr S apparent or ostensible authority?

Although Mr S didn't have actual authority from Positive Solutions, it could also have given what's called apparent or ostensible authority.

the relevant case law

It was described in *Freeman & Lockyer v Buckhurst Properties (Mangal) Ltd*:

> *An "apparent" or "ostensible" authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.*
>
> *In ordinary business dealings the contractor at the time of entering into the contract can in the nature of things hardly ever rely on the "actual" authority of the agent. His information as to the authority must be derived either from the principal or from the agent or from both, for they alone know what the agent's actual authority is. All that the contractor can know is what they tell him, which may or may not be true. In the ultimate analysis he relies either upon the representation of the principal, that is, apparent authority, or upon the representation of the agent, that is, warranty of authority.*
>
> *The representation which creates "apparent" authority may take a variety of forms of which the commonest is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal's business with other persons. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with the other persons of the kind which an agent so acting in the conduct of his principal's business has usually "actual" authority to enter into.*

Although the judge referred to contractors, the law on apparent authority applies to any third party dealing with the agents of a principal – including consumers like Mrs W.

In *Hely-Hutchinson v Brayhead Ltd*, one of the judges said:

> *Ostensible or apparent authority is the authority of an agent as it appears to others. It often coincides with actual authority. Thus, when the board appoint one of their number to be managing director, they invest him not only with implied authority, but also with ostensible*

> *authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without the sanction of the board. In that case his actual authority is subject to the £500 limitation, but his ostensible authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation. He may himself do the "holding-out". Thus, if he orders goods worth £1,000 and signs himself "Managing Director for and on behalf of the company", the company is bound to the other party who does not know of the £500 limitation.*

And in *Martin and another v Britannia Life Limited* the judge quoted Article 74 in *Bowstead and Reynolds on Agency* 16th edition to explain apparent or ostensible authority:

> *Where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf he is bound by the acts of that other person with respect to anyone dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no such actual authority.*

This was endorsed in the case of *Anderson v Sense Network*, where the judge said:

> *In my view, a case of ostensible authority requires much more than an assertion that Sense conferred a "badge of respectability" on MFSS. As Martin shows, it requires a representation that there was authority to give advice of the type that was given…the relevant question is whether the firm has "knowingly or even unwittingly led a customer to believe that an appointed representative or other agent is authorised to conduct business on its behalf of a type that he is not in fact authorised to conduct"…*

And in *Armagas Ltd v Mundogas S.A.* one of the judges said:

> *In the commonly encountered case, the ostensible authority is general in character, arising when the principal has placed the agent in a position which in the outside world is generally regarded as carrying authority to enter into transactions of the kind in question.*

In *Sino Channel Asia Ltd v Dana Shipping and Trading (Singapore) Ptd Ltd* the judge said:

> *the foundation of ostensible authority is the representation of the principal and "it is generally trite law that an employee/agent cannot purport to create his own ostensible authority". However, though a communication is made directly (or immediately) by the agent, it may be inferred that the representation is that of the principal, arising from his conduct…*
>
> *As explained by Lord Pearson in the Hely-Hutchinson case…"That may be shown by inference from the conduct of the board of directors [the principal] in the particular case by, for instance, placing the agent in a position where he can hold himself out as their agent and acquiescing in his activities, so that it can be said they have in effect caused the representation to be made. They are responsible for it and, in the contemplation of law, they are to be taken to have made the representation to the outside contractor"…*
>
> *As expressed by the High Court of Australia, in Pacific Carriers Ltd v BNP Paribas…"The holding out might result from permitting a person to act in a certain manner without taking proper safeguards against misrepresentation"…*
>
> *In Gurtner v Beaton…Neill LJ observed…"The development of the doctrine has been based in part upon the principle that where the court has to decide which of two innocent parties is to suffer from the wrongdoing of a third party the court will incline towards placing the burden*

> *upon the party who was responsible for putting the wrongdoer in the position in which he could commit the wrong".*

Here, I'd therefore need to decide that Positive Solutions made representations to Mrs W that Mr S had the necessary authority. It isn't enough for Mr S to have said he was acting on behalf of Positive Solutions. But it would be enough if Positive Solutions had placed Mr S in a position which would objectively be viewed as carrying its authority to do the acts complained of.

I'd also need to decide that Mrs W reasonably relied on those representations. In the case of *Anderson v Sense Network*, the judge said:

> *a relevant ingredient of a case based on apparent authority is reliance on the faith of the representation alleged…In Martin, Jonathan Parker J. held that the relevant representation in that case (namely that the adviser was authorised to give financial advice concerning a remortgage of the property) was acted on by the plaintiffs in that each of them proceeded throughout on the footing that in giving advice* [the adviser] *was acting in every respect as the agent of* [the alleged principal] *with authority from* [the alleged principal] *so to act.*

The case law is clear that whether representations were relied upon very much depends on the facts of the case.

<u>the agreements not funded by the Skandia proceeds</u>

Looking at the agreements not funded by the Skandia proceeds, the regulated activities were Mr S' acceptance of the deposits. So the question is whether Positive Solutions gave him apparent authority to carry on that activity on its behalf.

Whilst I can't be sure exactly what Mrs W was told, I haven't seen any evidence that Positive Solutions made any representations that would have led her to believe Mr S was acting as its agent in accepting deposits. And I can't say Positive Solutions put Mr S in a position which would objectively be regarded as carrying its authority to accept deposits – people generally wouldn't expect financial advisers or mortgage brokers to accept deposits.

This is supported by the document Mrs W was given by Mr S which she's shared with us. It explained he was an "*IFA partner of Positive Solutions*", but included a page of terms of business which included a section headed "***WE DO NOT HANDLE CLIENTS' MONEY***".

It also appears Mr S took steps to distance himself from Positive Solutions in relation to the purported peer-to-peer lending scheme:

- All nine agreements we've been given are between Mrs W and "*DC S of David Charles Financial Services*".
- Most of the agreements are on unbranded paper and don't mention Positive Solutions at all.
- Mrs W has said all the face to face discussions she had with Mr S were during home visits.

And there's evidence that suggests Mrs W viewed the agreements as being personal agreements with Mr S. For example, the fact she asked to be included as a creditor in Mr S' bankruptcy.

In the circumstances I can't conclude Positive Solutions is responsible for most of the activities of Mr S that this complaint relates to.

<u>the £10,000 transfer on 24 November 2011 that resulted from advice to surrender a Skandia investment</u>

I'm minded to reach a different conclusion in relation to the £10,000 that came from surrendering the Skandia investment. But as I'll go on to explain, I don't think Mrs W suffered a loss as a result. So I've only briefly set out my reasons for reaching a different jurisdiction outcome. In summary, I'm satisfied:

- At the relevant time, Positive Solutions was holding Mr S out as an IFA for it to the outside world. He was approved by the FSA to carry out the controlled function "CF 30 Customer" which meant he could advise on, and arrange, investments for Positive Solutions customers. These are activities that would be expected of an IFA firm. The agreement it had with him also required him to provide Positive Solutions' "Terms of Business" to each of his clients – which we know he did here. Advising on the investment and arranging its surrender are exactly the kind of activities that would be expected of an IFA. And they're activities that Positive Solutions in principle allowed its registered individuals to do. Taking everything into account I'm satisfied Positive Solutions represented – and intended to do so – that Mr S had the necessary authority in relation to surrendering the Skandia investment.

- Mrs W relied on those representations and that reliance was reasonable. The FSA register is clear that Mr S could only give investment advice if he was acting on Positive Solutions' behalf. And I think it's unlikely she would have followed his advice if she knew he didn't have actual authority from Positive Solutions.

- Mrs W was relying on Mr S to not give her an unsuitable recommendation to move her money from a sound investment to an unsound one. I don't think she'd have assumed that because the "reinvestment" part of the switch was a private arrangement that the switch recommendation was nothing to do with the normal arrangements under which he gave regulated financial advice. Instead, because the switch advice Mr S gave her was suitability advice (in other words that the Skandia investment was less suitable for her than his purported peer-to-peer lending scheme), I think it's most likely she would have thought it was given in the same capacity as any other advice about retail investments.

So I consider that Positive Solutions did give Mr S apparent authority to advise Mrs W on its behalf to make the switch out of the Skandia investment into the purported peer-to-peer scheme, by way of a loan to himself.

For the sake of completeness, I would add that I also think it's fair to hold Positive Solutions responsible for that switch advice. It was in a position where it could monitor what Mr S was doing; it didn't tell Mrs W that there were any limits on his actual authority; and in giving financial advice and arranging the surrender of an investment, Mr S was carrying out normal business of Positive Solutions.

is Positive Solutions vicariously liable for Mr S' actions?

The law of vicarious liability has been evolving over recent years. As set out above, it seems Mr S acted fraudulently. So the tort of deceit is relevant. The test for vicarious liability is therefore as set out by the Court of Appeal in the case of *Winter v Hockley Mint*. And it requires:

> *a holding out or representation by the principal to the claimant, intended to be and in fact acted upon by the claimant, that the agent had authority to do what he or she did, including acts falling within the usual scope of the agent's ostensible authority.*

This means the situation would have to be one in which Positive Solutions gave Mr S ostensible authority to act on its behalf in making the relevant representations to Mrs W. I've already set out my analysis of that above and so I won't repeat it here.

statutory responsibility under section 150 of the Financial Services and Markets Act 2000 (FSMA)

At the relevant time, section 150(1) FSMA said:

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

Section 150(1) FSMA therefore only covers acts and omissions "*by an authorised person*" – in this case, by Positive Solutions. So here it bites only to the extent that Positive Solutions is responsible (whether by actual or ostensible authority or vicarious liability) for an act or omission of Mr S.

For the reasons I've already set out, Positive Solutions is responsible for the advice to switch out of the Skandia investment into the purported peer-to-peer lending scheme. So to that extent, section 150(1) FSMA is another potential route to responsibility for that limited part of the complaint only.

But section 150(1) only applies where a person has suffered a loss as a result of contravention of a regulatory rule. For the reasons below, I don't think the Skandia switch caused Mrs W to suffer any loss. So section 150(1) isn't engaged on the facts and doesn't need to be considered any further.

whether Mr and Mrs W were told when Mr S' role at Positive Solutions changed

Mrs W says Positive Solutions should have notified her and her husband at the point Mr S moved from being a financial adviser to a mortgage broker in December 2012. They say he continued to give financial advice to them after that date.

Positive Solutions says it would have written to them, but it no longer has a record of this. I don't believe I need to make a finding on this for the purpose of this decision. I say this because – unlike the investigator – I don't think that whether Mr S was a financial adviser or a mortgage broker affects whether this complaint is in this service's jurisdiction.

If Mr and Mrs W are unhappy with any other advice Mr S gave them after his role changed, that would need to be the subject of a separate complaint.

my provisional findings on dismissing the case

Positive Solutions says we should dismiss this complaint under DISP 3.3.4AR:

> *The Ombudsman may dismiss a complaint referred to the Financial Ombudsman Service on or after 9 July 2015 without considering its merits if the Ombudsman considers that:*
>
> > *…(5) dealing with such a type of complaint would otherwise seriously impair the effective operation of the Financial Ombudsman Service.*

It's referred to DISP 3.3.4BG which says:

> *Examples of a type of complaint that would otherwise seriously impair the effective operation of the Financial Ombudsman Service may include:*
>
> > *(1) where it would be more suitable for the complaint to be dealt with by a court or a comparable ADR entity*

Positive Solutions says this complaint is more suitable for court because Mrs W and Mr S disagree on many factual issues. I don't agree. As I explained when I decided an oral hearing wasn't needed, I'm satisfied it's clear what their respective recollections are. It's therefore simply a case of considering those recollections and deciding what's most likely to have happened. That's something this service regularly does and there's nothing about the circumstances in this complaint that make me think it would be more suitable for a court.

my provisional findings on merits

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. To be clear, this is only in relation to the £10,000 that was transferred to Mr S on 24 November 2011 as a result of surrendering a Skandia investment.

When asked what money she got back from Mr S Mrs W replied:

> *I have received two payment back from D S/David Charles Financial one for £5,000 and one for £10,000. I think these repayment must relate to document numbers 39 to 42 where I found that I had transferred money, but had no agreements.*

I've looked at documents 39-42 in the bundle Mrs W provided:

- Document 39 is a bank statement showing a payment of £5,000 to Mr S on 29 May 2009.
- Document 40 is a bank statement showing the Skandia payment going in on 22 November 2011 and a payment of £10,000 to Mr S on 24 November 2011.
- Document 41 is a bank statement showing a payment of £5,000 to Mr S on 24 October 2011.
- Document 42 is a bank statement showing a payment of £10,000 to Mr S on 25 April 2012.

I queried the fact that documents 39-42 totalled more than the £15,000 Mrs W said had been repaid. She responded setting out the money she believed was still owed to her. This list didn't include any of the four transfers set out above. But she went on to say:

> *For the payments 39-42 that I do not have agreements for, I cannot remember if an agreement was ever drawn up. Or if any of this has been repaid.*

She went on to speculate that maybe only the 25 April 2012 transfer had been repaid.

Unfortunately, I can't know for certain whether the £10,000 that was transferred to Mr S on 24 November 2011 as a result of surrendering a Skandia investment was ever repaid. But taking everything into account, I'm satisfied it's most likely it was.

I say this because Mrs W has a very good record of the agreements she entered into with Mr S. She's even kept copies of agreements that were superseded by later ones. I therefore think it's unlikely that there was ever an agreement that covered the £10,000 Mrs W transferred on 24 November 2011.

For the money given to Mr S in 2014, Mrs W has said:

> *Mr S was meant to draw up an agreement for £45,000 which was for money transferred between July 2014 and November 2014, it was agreed the investments would be repaid by 1st March, Mr S failed to draw up an agreement. I had serious health issues between December 2014 to May 2015, so I did not chase him up for this agreement. When I was well enough we visited Mr S' office concerning this money.*

I therefore think it's likely that Mrs W would have chased an agreement for the £10,000 she transferred on 24 November 2011 unless she wasn't expecting to receive one. The only reason I can think of to explain why she'd be comfortable with Mr S not issuing an agreement is that the plan was that the money would be repaid reasonably quickly – and this was then done. The next agreement she entered into was on 28 February 2012. If the £10,000 she'd transferred on 24 November 2011 was still outstanding at that point I'd have expected her to ask for it to be added to that agreement. But this wasn't done and I haven't seen anything that suggests Mrs W asked for it to be done. It therefore seems most likely that the £10,000 was repaid before 28 February 2012.

Mrs W has told us Mr S advised the Skandia investment should be surrendered because it hadn't performed well. If everything happened as it should have, it seems most likely that this advice would have been the same. But the advice would have been to reinvest in something more suitable than the purported peer-to-peer lending scheme. However, it seems Mr S repaid the money to Mrs W, who had access to the money again almost immediately and it was then for her to decide what to do with it. In these circumstances, I don't think the relevant advice caused her any loss and I don't think it'd be fair to require Positive Solutions to pay any compensation.