complaint

Mr F complains about advice he says he was given by Mr D P of Picton–Jones Independent Financial Services (PJ) to switch his personal pension to a SIPP and then invest in an unregulated collective investment scheme (UCIS). This was the 'Maroccana Fund'. Mr F says this advice was unsuitable for him. Mr P was a Registered Individual of Positive Solutions (Financial Services) Limited (PSL), now Quilter Financial Planning Solutions Limited, at the time and so Mr F believes PSL is responsible for the advice.

background

I issued a provisional decision on 11 December 2019. A copy is attached and forms part of this final decision. In the decision I explained why I believed this complaint would fall within my jurisdiction. I also set out why I believed the complaint should be upheld.

Mr F made no further submissions.

PSL said that it did not accept my provisional decision. I have read its response in full but, in summary, it said:

- I should not issue a final decision in this case as PSL is challenging a similar decision in a different case. This case should be delayed until that judicial review challenge has been concluded.

- The provisional decision is irrational, makes findings for which there is no evidence and also fails to take into account relevant evidence. The provisional decision was arrived at in a procedurally unfair way as no oral hearing was held and/or made a determination on a case which any rational decision maker would have concluded was not suitable for determination by an ombudsman and should have been left to a Court.

- The ombudsman can only have jurisdiction if PSL is liable for the acts or omissions about which Mr F complains and the ombudsman has to take account of the law when making that finding.

- It considers my provisional conclusions on jurisdiction are wrong as a matter of law, both in the matter of what the law is and how it applies to the facts of this complaint. As to the latter I have made findings for which there is no evidence and/or which no rational decision maker could have made.

- As the law in respect of the matters considered in this complaint is evolving and difficult the only rational decision the ombudsman could have come to would be to decline jurisdiction and leave the matter to the Court.

- Even if the ombudsman had jurisdiction, he could not fairly determine the complaint without holding an oral hearing. This is because reliance cannot be fairly determined without it. The decision not to hold such a hearing is irrational.

- As to vicarious liability, the *Cox* case quoted in the provisional decision is not applicable in the context of principal and agent – as confirmed in *Cox* itself and *Winter v Hickley Mint [2019]* and *Anderson v Sense.*

- Even if *Cox* is applicable the only rational conclusion is that the adviser (Mr P) was acting on his own, separate to PSL and PSL had no connection with his acts. This is because commission was not paid to PSL, no records of the investment were generated at PSL, the investment transaction was unknown to PSL and there was no reason it should have known about it.

- Therefore it cannot be rationally concluded, applying the correct law, that there was vicarious liability.

- Mr P was an agent of PSL for authorised purposes and the adviser was not an employee of, or a partner of, PSL. So the only potential relationship capable of giving rise to vicarious liability is an agency one.

- This is not an area in which the law has been authoritively set out. It is a developing area where the ombudsman has formed an opinion of the law - it is not fair to the parties for the ombudsman to consider it. The issues involved in this complaint are not best determined by an ombudsman.

my findings

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

Having done so I have reached the same conclusions as set out in my provisional decision of 11 December 2019 and would refer the parties to it. In brief, in that provisional decision I set out my findings that:

- Mr F had complained in time, within the three year time limit allowed under the DISP Rules.

- Mr F's complaint is about an act or omission in relation to carrying on regulated activities, which Mr P carried out for Mr F.

- The evidence indicated it was Mr P who undertook those regulated activities - it was Mr P who gave the material advice to switch the pension and make the investment and facilitated it.

- The advice Mr P gave fell within the express authority conferred by PSL.

- PSL represented to Mr F that Mr P had authority to conduct business of the same type as the business he did conduct. And Mr F relied on those representations. Apparent authority therefore operated and PSL is responsible for the acts Mr F complains about.

- In addition, PSL is vicariously liable for the investment advice Mr P gave to Mr F.

- Although Mr P was not an employee of PSL, he was an approved person with responsibility for carrying on PSL business of advising its customers and arranging the investments recommended. As such he carried on activities as an integral part of PSL's business and had a sufficiently close relationship to PSL for vicarious liability to arise. Mr P's advice was so closely connected to PSL's business activities that PSL is liable for it.

- PSL is also liable to Mr F under section 150 of the Financial Services and Markets Act 2000.
- Mr F's complaint therefore falls within my jurisdiction.
- Mr P's advice was unsuitable for Mr F.
- Mr F acted on the advice and suffered loss as a result of it.
- It is fair and reasonable for PSL to compensate Mr F for that loss.

PSL says I should wait to decide this complaint until after its judicial review challenge to a decision on a similar case has been resolved. I do not agree that it is appropriate to put this complaint on hold. While PSL argues that I have made the same mistakes of law as it alleges in another case, as I will explain below, I am not persuaded that I have made mistakes of law and each case does turn on its own particular facts. I would also note that PSL has been given sufficient time to make whatever submissions it wanted to make and so I am satisfied that it has had a fair opportunity to put its case.

actual authority

I discussed in the provisional decision my view that Mr P did have PSL's express authority to arrange the SIPP for Mr F. However, on reflection I believe that Mr P may not have had such authority because he did not abide by PSL's prescribed process in carrying out the regulated activity – such as routing such applications through PSL.

Having said that, as I set out in the provisional decision, there is also the matter of apparent authority, vicarious liability and s150 of FSMA.

apparent authority

PSL says my provisional decision contains, or is based on, errors of law. It has not said what errors it thinks I have made in relation to apparent authority, only vicarious liability.

However, although it has not specifically argued the point in this complaint, PSL says the question is not whether it gave Mr P authority to transact a general class of acts. The question is whether PSL gave Mr P authority in relation to this transaction.

I agree that the ultimate question is whether there was apparent authority in relation to this transaction. But in addressing that, I believe I should consider whether PSL placed Mr P in a position which would objectively carry PSL's authority for Mr P to conduct business of a *type* he did in fact conduct.

I note that the case law does not say that apparent authority operates only when a principal has represented that an agent has authority to carry out a specific act. Apparent authority also operates where a principal has represented that its agent has its authority to carry out a more general class of acts.

For example, Diplock LJ in *Freeman & Lockyer* referred to a representation 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*". And in *Armagas*, Lord Keith said that in the commonly encountered case

ostensible authority "*is general in character*" arising when the agent is placed in a position generally regarded as carrying, "*authority to enter into transactions of the kind in question*".

In *Hely-Hutchinson*, Lord Denning said that people who see a managing director acting as a managing director, "*are entitled to assume that he has the usual authority of a managing director*". I consider that, "*the usual authority of a managing director*" includes a wide variety of acts.

For the reasons I've given in my provisional decision I am satisfied that PSL represented to Mr F that Mr P had its authority to carry out the acts which an independent financial adviser would usually have authority to do – including giving investment advice on behalf of PSL.

PSL did not specifically mention the Maroccana investment in its representations, but that is not determinative. Mr P had PSL's apparent authority to act on its behalf in advising Mr F to switch/surrender existing investments (in this case a pension) so that an investment could be made in the Maroccana fund, because he had PSL's more general apparent authority to act on its behalf in giving him that kind of investment advice.

PSL's representations as to the authority of Mr P

The points made by PSL in other cases are largely framed by its view that representations must be specific rather than general. I do not agree with that view.

For example, PSL says in other cases procuring the adviser's registration with the FSA is not a representation to Mr F. The rules require such registration just as they require, *"status disclosure",* and that Jacobs J found in *Anderson v Sense* that a status disclosure could never be a representation and the same conclusion must apply to the register. However the judge's finding was that on the particular facts of that case, the status disclosure, "*was not a representation of any kind to the effect that [the agent] was running the [Ponzi] scheme with the authority of Sense or as the agent of the Defendant*" (emphasis added). Financial advisers are not usually authorised to run schemes and that is the context in which the finding was made.

Descriptions of an individual's status contained in business stationery can, as the courts have found, be relevant representations creating apparent authority. This was the finding in *Martin v Britannia Life*, by Jonathan Parker J on apparent authority based on the contents of a business card.

Obtaining approval from the Regulator for Mr P to advise PSL's customers about investments was part of the conduct by which PSL held him out to the world in general as authorised to do that.

PSL has said if this amounts to a representation it would make PSL liable for anything said or done by Mr P relating to anything which might broadly amount to financial advice. PSL has separately said this is, *"an absurd proposition"*. But that is not what I said or implied and the cases of *Martin v Britannia* and *Anderson v Sense* show how such matters can be applied (and limited) in practice.

I do not say in this case there was a holding out that *everything* Mr P might do was authorised. But, to the extent that he gave advice to PSL's customers such as Mr F about their investments, this was the type of business he was held out as carrying on for it.

It remains my finding that PSL did represent to Mr F through its conduct that Mr P had its authority to act on its behalf in carrying on the activities complained about.

reliance

PSL has not in its response disputed my finding on reliance. And my view is unchanged. This was a straightforward matter of a client dealing with their existing PSL adviser because he was a PSL adviser – Mr F has made comment to that effect. He said he accepted it was a PSL adviser who was recommending changes that he justified. There is no evidence to show that Mr F knew or should have known that Mr P was acting in any capacity other than a PSL adviser. Mr F proceeded on the basis that Mr P was acting in every respect as the agent of PSL with authority from PSL so to act.

should PSL bear the loss caused by the pension switch and investment in the Maroccana fund?

My assessment as to whether PSL should bear this loss was not intended to be read as part of the test for apparent authority. It is a point the courts consider as a check that they have reached the right conclusion. I regard the test for apparent authority as being satisfied on the facts in this complaint. The reference to the justice of the case was by way of such a cross check and was included as the courts often include such an explanation and to be helpful to the parties.

My views on this point are unchanged – though I should make it clear that my comment should be read as relating to the carrying on of the controlled function in this case, i.e. to the circumstances of this complaint and Mr F's losses from the advice he complains about - not all possible losses in any possible circumstance.

vicarious liability

I have considered what PSL has said in its response to the provisional decision but I remain satisfied that PSL is vicariously liable for the acts Mr F complains about, for the reasons I gave in my provisional decision – though on re-reading my provisional decision I see a point I was trying to make was possibly not made as clearly as I would like.

Under the heading *"the stage two test"* the first sentence in the second bullet point says:

> *"If PSL is not vicariously liable here, then Mr T's ability to obtain compensation would depend on whether the PSL Partner he dealt with was an employee of PSL."*

The above does not really help to introduce the point I was trying to make which is made in the rest of the paragraph - that in *Cox* the court suggested it would be unreasonable and unfair for the claimant's ability to receive compensation to depend on whether the relevant worker was an employee or not.

Moving from that specific clarification to the issue more generally, I remain of the view that the tests laid down by the Supreme Court in *Cox* and *Mohamud* are applicable. Those decisions make it very clear that non-employment relationships can give rise to vicarious liability.

The purpose of the guidance contained in *Cox* is to define the criteria by which a non-employment relationship can be judged as either capable or incapable of giving rise to

vicarious liability. In the present case, Mr P's relationship with PSL satisfies those criteria and had similarities to employment, as I explained in my provisional decision. It would seem very odd if that were to count for nothing just because he enjoyed powers of an agent to contract business. Many employees are given authority, as agent, to contract business on their employer's behalf and *Bowstead & Reynolds on Agency* (paragraph 1-004) says that the status of an agent will "*usually*" be either that of employee or independent contractor. So it cannot have been intended that the test in *Cox* is disapplied whenever there is an agency.

PSL says Lord Reed made it clear in Cox that the decision did not apply to principals and agents. But that is not what Lord Reed actually said, which was:

> *"15. Vicarious liability in tort is imposed upon a person in respect of the act or omission of another individual, because of his relationship with that individual, and the connection between that relationship and the act or omission in question. Leaving aside other areas of the law where vicarious liability can operate, such as partnership and agency (with which this judgment is not concerned), the relationship is classically one of employment, and the connection is that the employee committed the act or omission in the course of his employment: that is to say, within the field of activities assigned to him, as Lord Cullen put it in Central Motors (Glasgow) Ltd v Cessnock Garage and Motor Co 1925 SC 796 , 802, or, adapting the words of Diplock LJ in Ilkiw v Samuels [1963] 1 WLR 991 , 1004, in the course of his job, considered broadly. That aspect of vicarious liability is fully considered by Lord Toulson JSC in Mohamud v Wm Morrison Supermarkets plc [2016] AC 677.*
>
> *16. It has however long been recognised that a relationship can give rise to vicarious liability even in the absence of a contract of employment…"*

I think that Lord Reed is recognising that aside from cases where vicarious liability is imposed because there is a relationship of, or having similar features to, employment (which the *Cox* case considers), there exist categories of cases, such as partnership and agency, where vicarious liability can be imposed on different bases (which the *Cox* case does not consider). I don't think that he can be taken to have said that no principal can ever be vicariously liable for an agent under *Cox*, even though their relationship fulfils the *Cox* and *Mohamud* criteria for such liability.

PSL have also referred me to paragraph 63 of the Court of Appeal decision in *Winter v Hockley Mint*. But it does not address the point that the paragraph begins with the words:

> *"The analysis did not identify or address the essential ingredients of vicarious liability of a principal for the deceit of his agent as required by Armagas … "*

This is not a complaint about deceit. There is no finding that PSL is vicariously liable for the deceit of its agent. The complaint is - and the finding made against PSL for which it is liable is - that the advice was negligent and/or unsuitable and in breach of statutory duty.

I recognised in my provisional decision that *Cox* and *Mohamud* don't apply to torts of dishonesty, but I am not aware of any case which holds that they don't apply whenever the defendant has given the wrongdoer any authority to act as its agent. For the reasons I have given above I would not expect the courts to arrive at such a conclusion.

I also want to make clear that I do not say that the fact PSL put Mr P in a position which gave him the opportunity to make errors is in itself sufficient to make PSL vicariously liable for his conduct. But I am saying that, after taking the whole of the evidence into account, I am satisfied that PSL is vicariously liable for the actions of Mr P in this complaint.

I accept that Mr P gave some advice to Mr F without PSL's knowledge or actual authority and that it did not receive payments for it. But I do not agree that he was advising in the context of a recognisably independent business using his separate trading name as a separate business. It was clear he was acting as a representative of PSL.

If Mr P's conduct had been fraudulent, then much of the case law I have quoted in relation to vicarious liability would not apply. But there is no finding of fraud. And even if it was, or even if the test in *Cox* does not apply for some other reason, PSL would still be responsible for the acts complained of by reason of apparent authority and statutory responsibility.

statutory responsibility under section 150 FSMA

Taking everything into account, I remain satisfied that section 150 FSMA provides an alternative route by which PSL is responsible. This is a statutory responsibility, and I'm not persuaded that (if I'm wrong about apparent authority) the absence of actual or apparent authority would mean that responsibility wouldn't arise under section 150 FSMA:

- Section 150 FSMA is a consumer-protecting provision relating to regulatory rules which were themselves created to protect consumers. Together they create a statutory right to damages for breaches of the Regulator's rules and this can apply even where there's no relationship between the firm and the consumer, so I would not expect the absence of apparent authority to be decisive.

- Instead the way FSMA is framed and has been interpreted by the Regulator seems to analyse the question of a firm's responsibility for its personnel/contractors (if they aren't appointed representatives) according to the question of whose business is being carried on – the principal's or the individual's. This is essentially very similar to the *Cox v Ministry of Justice* test. It's not done according to the law of agency/apparent authority.

- The Perimeter Guidance Manual (PERG) is current Financial Conduct Authority (FCA) guidance which directly addresses the question of regulatory responsibility for an authorised person's delegated activities. It deals with the question of whether a delegated activity is carried on for regulatory purposes by an employer/principal or by their employee/agent. It explains that employees and agents won't breach the general prohibition if the employee/agent is doing no more than carrying on the business of their employer/principal – as opposed to carrying on their own business. And it describes relevant factors for deciding whose business is being carried on (PERG 2.3.5-2.3.7).

- FSA rules and now FCA rules control how firms carry on regulated and other activities, including delegated activities *"carried on"* by the firm. Deciding whether a firm has breached a rule (including for section 150 FSMA purposes) involves the same question as the PERG guidance – whether it was the firm which was carrying on the relevant activity as part of its business, as opposed to a delegate carrying on the activity as part of its own business.

- So the relevant question under section 150 FSMA is which party's business (i.e. PSL's or Mr P's) was being carried on. That question is similar to the test in *Cox v Ministry of Justice* but it isn't limited by whether there was actual or ostensible authority.

- To help understand the test, the FCA guidance explains how it applies, as an example, in the provision of home credit. This is a regulated business in which large firms often deal with their customers through self-employed agents, who call on customers at their homes to make loans and collect payments on which they earn commission. PERG 2.3.11 states:

  "Although the overall relationship between a home collected credit provider (the principal firm) and a person providing the services…(the individual) will need to be taken into account, meeting the following criteria is likely to mean that the individual is carrying on the business of the principal firm (as its agent) and not his own, meaning that the individual does not require authorisation or to be exempt:

  (1) the principal firm appoints the individual as an agent;

  (2) the individual only works for one principal firm;

  (3) the principal firm has a permission from the FCA for every activity the individual is carrying on for which the principal firm would need permission if it was carrying on the activity itself;

  (4) the contract sets out effective measures for the principal firm to control the individual;…

  (6) the principal firm accepts full responsibility for the conduct of the individual when the individual is acting on the principal firm's behalf in the course of its business; and

  (7) the individual makes clear to customers that it is representing a principal firm as its agent and the name of that principal firm."

The relationship described in PERG 2.3.11 has a lot of similarities to the relationship between Mr P and PSL:

- PSL had appointed Mr P as an agent.

- The FCA register suggests Mr P wasn't an approved person or appointed representative for any other firm at the relevant time.

- PSL had permission for the activities carried on by Mr P that needed permission.

- The agreement between PSL and Mr P set out a number of measures for PSL to control Mr P.

- Clause 2.4 of the agreement between PSL and Mr P said:

> *The Company shall be responsible for acts, omissions and representations of the Registered Individual in the course of carrying out the business of the Agency hereby created, or in the course of performance of the duties hereby contracted*

- I'm satisfied Mr P caused Mr F to believe he was representing PSL through his words and conduct as discussed in my provisional decision.

So, looking at whose business Mr P was carrying on in this case when he dealt with Mr F, I still think it was PSL's business and not his own. And I think my finding that PSL is liable under section 150 FSMA for the acts complained about is in line with how FSMA and the rules are intended to operate.

In the circumstances, I'm satisfied that under section 150 FSMA, PSL is responsible for the acts complained of.

suitability of this complaint for determination by an ombudsman

When Mr F referred his complaint to the ombudsman service, there wasn't a provision under the DISP Rules (in particular the 'dismissal provisions under DISP 3.3.4A (R)) that allowed an ombudsman to dismiss the complaint on the basis that it would be better dealt with by a court.

In any event I acknowledge that PSL believes that it would be more suitable for the subject matter of this complaint to be dealt with by a court. But I do not agree.

The Financial Ombudsman Service routinely deals with disputes about whether a respondent firm is responsible for the acts a consumer has complained about. Some of those disputes are more complex than others, and PSL is right to say that this particular complaint concerns a developing area of law. But I see no reason why that prevents me from considering the matter.

Overall, I am satisfied that I can resolve this complaint justly, fairly, and within my jurisdiction.

oral hearing

Our rules allow for the possibility of an oral hearing (at DISP 3.5.5R):

> *"If the Ombudsman considers that the complaint can be fairly determined without convening a hearing, he will determine the complaint. If not, he will invite the parties to take part in a hearing."*

PSL hasn't requested a hearing as such in this complaint but it has said this complaint cannot be fairly determined without one.

I've therefore thought about this point in the specific circumstances of this complaint and I'm satisfied I can fairly determine the matter without a hearing. In particular, I note:

- Mr F was present at the advice meetings and he has been clear about what occurred. Furthermore there is a considerable amount of evidence (set out in the attached provisional decision) about the involvement and actions of Mr P in the pension switch and investment - which effectively corroborate what Mr F has said. Whilst the events

complained of happened some time ago and memories inevitably fade I'm satisfied, given the evidence, that I can reach a fair outcome using all the available evidence and I'm not persuaded hearing oral evidence would assist me.

- PSL clearly believes I've misunderstood the law and it set out its position clearly in writing.

- The Court of Appeal has adopted a very flexible approach to what's fair in this context (*Financial Ombudsman Service v Heather Moor & Edgecomb Ltd [2008] EWCA Civ 643*).

my findings as to the merits of the complaint

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

Neither party has made any further submissions on the merits of the complaint or the way I said things should be put right. My view remains as set out in the attached provisional decision.

how to put things right

I set out in the attached provisional decision why it was appropriate and fair for PSL to pay compensation in this case. And I also set out how compensation should be calculated. But, to confirm:

In assessing what would be fair compensation, I consider that my aim should be to put Mr F as close to the position he would probably now be in if he had not been given unsuitable advice.

I think if this unsuitable advice had not been given then Mr F would have kept his existing pension. But it's unlikely to be possible for PSL to reinstate Mr F into his previous pension scheme. Bearing that in mind what is set out below is in my view a fair way of compensating Mr F for the unsuitable advice.

The redress calculation is set out on the basis that the Maroccana Fund may still exist. If it does not then the parties should let me know

In summary, PSL should:

1.Obtain the notional transfer value of Mr F's previous pension plan, as at the date of my Final Decision, if it had not been transferred to the SIPP.

2. Obtain the transfer value, as at the date of my Final Decision, of Mr F's SIPP, including any outstanding charges.

3. And then pay an amount into Mr F's SIPP so that the transfer value is increased to the amount calculated in (1). This payment should take account of any available tax relief and the effect of charges.

In addition, PSL should:

4.Pay any future fees owed by Mr F to the SIPP, for the next five years (this will only be necessary if Mr F's investment in the Maroccana Fund still exists and cannot be encashed).

5.Pay Mr F £500 for the trouble and upset caused.

I have set out each point in further detail below.

1. *Obtain the notional transfer value of Mr F's previous pension plan if it had not been transferred to the SIPP. That should be the value at the date of my Final Decision.*

PSL should ask Mr F's former pension provider to calculate the notional transfer value that would have applied as at the date of my Final Decision had he not transferred his pension but instead remained invested.

If there are any difficulties in obtaining a notional valuation then the FTSE WMA Stock Market Income Total Return Index should be used. That is a reasonable proxy for the type of return that could have been achieved if suitable funds had been chosen.

PSL should assume that any contributions or withdrawals that have been made would still have been made, and on the same dates.

2. *Obtain the transfer value as at the date of my Final Decision of Mr F's SIPP, including any outstanding charges.*

This should be confirmed by the SIPP operator. If the operator has continued to take charges from the SIPP and there wasn't an adequate cash balance to meet them, it might be a negative figure.

3. *Pay an amount into Mr F's SIPP so that the transfer value is increased to equal the amount calculated in (1). This payment should take account of any available tax relief and the effect of charges.*

If it's not possible to pay the compensation into the SIPP, PSL should pay it as a cash sum to Mr F. But had it been possible to pay into the SIPP, it would have provided a taxable income. Therefore the total amount should be reduced to notionally allow for any income tax that would otherwise have been paid.

The notional allowance should be calculated using Mr F's marginal rate of tax in retirement.

4. *Pay any future fees owed to the SIPP for the next five years.*

Had PSL given suitable advice I don't think there would be a SIPP. It's not fair that Mr F continues to pay the annual SIPP fees if it can't be closed. This might be the case if the Maroccana fund still exists and cannot be encashed

Ideally, PSL should take over the investment to allow the SIPP to be closed. This is the fairest way of putting Mr F back in the position he would have been in. But it is possible that the ownership of the Marocanna Fund can't be transferred.

If it can't be transferred, to provide certainty to all parties, I think it's fair that PSL pays Mr F an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees), or undertakes to cover the fees that fall due during the next five years.

This should provide a reasonable period for things to be worked out so the SIPP can be closed.

In return for the compensation set out above, PSL may ask Mr F to provide an undertaking to give it the net amount of any payment he may receive from the Marocanna investment in that five year period, as well as any other payment he may receive from any party as a result of the investment. That undertaking should allow for the effect of any tax and charges on the amount he may receive. PSL will need to meet any costs in drawing up this undertaking. If it asks Mr F to provide an undertaking, payment of the compensation awarded by this decision may be dependent upon provision of that undertaking.

If, after five years, PSL wants to keep the SIPP open, and to maintain an undertaking for any future payments under the Marocanna investment, it must agree to pay any further future SIPP fees.

In addition, PSL is entitled to take, if it wishes, an assignment from Mr F of any claim Mr F may have against any third parties in relation to this pension switch and Marocanna investment. If PSL chooses to take an assignment of rights, it must be affected before payment of compensation is made. PSL must first provide a draft of the assignment to Mr F for her consideration and agreement.

5. *Pay Mr F £500 for the trouble and upset caused.*

I believe Mr F has been caused significant upset by the events this complaint relates to, and the apparent loss of pension benefits. I think that a payment of £500 is fair to compensate for that upset.

If PSL doesn't pay the compensation within 28 days of being informed that Mr F has accepted my decision, interest, at the rate of 8% simple a year on the fair compensation payable shall be paid from the date of my decision to the date of payment.

Income tax may be payable on any interest paid. If PSL deducts income tax from the interest it should tell Mr P how much has been taken off. PSL should give Mr F a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.

my final decision

For the reasons set out in this decision and the attached provisional decision, this complaint does fall within my jurisdiction.

My decision is that I uphold the complaint and order Quilter Financial Planning Solutions Limited to calculate and pay compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 18 April 2020.

David Bird
ombudsman

copy provisional decision

complaint

Mr F complains about advice he says he was given by Mr D P of Picton–Jones Independent Financial Services (PJ) to switch his personal pension to a SIPP and then invest in an unregulated collective investment scheme (UCIS). This was the 'Maroccana Fund'. Mr F says this advice was unsuitable for him. Mr P was a Registered Individual of Positive Solutions (Financial Services) Limited (PSL) at the time and so Mr F believes PSL is responsible for the advice.

background

Mr F met with Mr P in 2009. After he met with him Mr F switched a Pearl Assurance personal pension to a SIPP. Shortly after most of that pension value was invested in the Maroccana Fund.

Mr F complained to PSL about the advice he says he was given by Mr P. PSL said it was not responsible. It had no knowledge of any such pension switch or investment, had no records of that and did not receive any commission or fee in respect of it. It also said that Mr P did not give the advice to switch and invest, another adviser did - a Mr R of Advanced Wealth Management Ltd (AWM**).** It also said Mr F was out of time to bring a complaint.

Mr F then brought his complaint to this service. An investigator looked into the complaint but did not believe it would fall within our jurisdiction. He said that, in his view, the evidence indicated that AVM gave the advice.

Mr F did not agree and provided further evidence of the role played by Mr P. This did not change the investigator's view and so the complaint was passed to me for review.

my provisional findings - jurisdiction

We can't consider all complaints brought to this service. Before we can consider something, we need to check, by reference to the Financial Conduct Authority's DISP Rules and the legislation from which those rules are derived, whether the complaint is one we have the power to look at. In this case, PSL says that we don't have the power to look at this complaint on the basis that the complaint has been made too late and is out of time *and* it relates to acts PSL aren't responsible for. PSL says the advice was not given by PJ but by another business - so it is not responsible.

time limits

The time limits for making a complaint are contained within the DISP (Dispute Resolution) Rules. The specific time limits that are relevant to this complaint are contained in DISP 2.8:

"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

(1) more than six months after the date on which the respondent sent the complainant its final response or redress determination; or

(2) more than:

(a) six years after the event complained of; or (if later)
(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;

unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;"

The requirements that are particularly relevant here are that Mr F should have made his complaint within six years of the event complained of or three years from when he became aware, or ought reasonably to have become aware, that he had cause for complaint.

The event complained of is the advice Mr F says he was given to switch to the SIPP and then invest. This appears to have taken place in May or June 2009. I understand that Mr F made his complaint to PSL on 1 September 2016. So the six year time limit has expired.

Consequently I have considered the three year limit. Mr F would need to have been aware, or ought to have been aware, he had cause for complaint (about the issues he complains of now) more than three years prior to the date he complained to PSL, for this complaint to have been made too late.

Broadly speaking, the complaint that has been made is that the advice was unsuitable, the relevant rules and legislation was not adhered to when promoting the investment to Mr F, that he should not have been advised to transfer to the SIPP and that the *"highly speculative"* investment was not suitable for Mr F. It is said that Mr F's risk tolerance was *"cautious"* and the investment was much higher risk than this.

PSL say that Olive Tree Property International Ltd went into liquidation in June 2012, which is more than three years before Mr F complained. It has also said losses on the fund revealed by annual valuations more than three years ago would have put Mr F on notice of cause for complaint, or ought to have done. So he should have known there was a cause for complaint more than three years ago.

Mr F is complaining about the switch to the SIPP and subsequent investment into the Maroccana Fund. He is not complaining about 'Olive Tree', which appears to be the investment provider and/or promoter or the Maroccana Fund. And, as I will discuss, Mr F's investment was not liquidated or seemingly affected by any liquidation of Olive Tree.

Although PSL has said that losses would have been clear from annual valuations, it seems to have said this without having any such valuations. Be that as it may, annual valuations from 2010 to 2017 have been obtained from the SIPP provider. They all record that the Maroccana fund had a similar valuation to the original investment (around £34,000). So the information Mr F was being given was that his investment still had full value. So there would have been no reason for him to question the advice he says he was given by virtue of the fund losing value or the investment being, for example, liquidated.

So I have not seen evidence that Mr F should have been aware of the issues he complains of now prior to 2016 and certainly not prior to September 2013 (that being three years prior to September 2016). I am therefore persuaded he has made his complaint in time.

the acts complained about

As discussed, PSL says the complaint relates to acts it isn't responsible for. PSL says the advice was not given by Mr P or PJ but by another business.

DISP Rule 2.3.1R says the ombudsman service can, *"consider a complaint under the Compulsory Jurisdiction if it relates to an act or omission by a firm in carrying on…regulated activities…or any ancillary activities, including advice, carried on by the firm in connection with them".*

Guidance for this rule at DISP 2.3.3G says that, *"complaints about acts or omissions include those in respect of activities for which the firm…is responsible (including business of any appointed representative or agent for which the firm…has accepted responsibility".*

So there are two points to consider in order to decide whether this complaint is one I can look at:

- Were the acts about which Mr F complains done in the carrying on of a regulated activity?

- Were those acts the acts of the authorised firm, (PSL)?

the regulatory background

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

regulated activities

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

Regulated activities are specified in Part II of the RAO and include advising on the merits of buying or selling a particular investment which is a security or a relevant investment (article 53 RAO), and making arrangements for another person to buy or sell or subscribe for a security or relevant investment (article 25 RAO).

the general prohibition

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

This is known as the "general prohibition".

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

Mr P was neither an authorised person nor exempt from authorisation. PJ was not a separate legal entity – it was just a trading name he used. That means that if Mr P had

carried out a regulated activity on his own behalf, whether in his own name or his trading name, by way of business, he would have been in breach of the general prohibition.

the approved persons regime

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

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

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

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

PSL arranged for Mr P to be was registered on the FSA register as *'CF30 Customer'* from 2007 to 2011.

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

breach of statutory duty

At the relevant time, section 150(1) of 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.*"

Rights of action under section 150(1) of FSMA were only available in relation to contravention of specific rules made by the FSA under FSMA.

One such rule in place at the time of the events Mr F complains about was COBS 9.2.1(1)R, which said:

> "A *firm* must take reasonable steps to ensure that a *personal recommendation*, … is suitable for its client."

Mr F was a private person under section 150(1) of FSMA and a private customer under COB 5.3.5R. Broadly, those terms covered all natural persons – subject to some exceptions. I am satisfied that no exceptions applied to Mr F – he was not a firm, and he was not carrying out any regulated activities by way of business. He was simply an ordinary consumer.

That means that if Mr F suffered a loss as a result of a rule breached by PSL, he would have a right of action against PSL for breach of statutory duty. He would have no such right against Mr P, because he was not a 'firm'.

were the acts complained of done in carrying out a regulated activity?

As discussed, regulated activities are specified in Part II of the FSMA 2000 (Regulated Activities) Order 2001 (“‘the RAO”) and include advising on the merits of buying or selling a particular investment which is a security or a relevant investment (article 53 RAO), and making arrangements for another person to buy or sell or subscribe for a security or relevant investment (article 25 RAO).

The SIPP and Mr F’s existing pension were a security or a relevant investment.

Mr F also complains about an investment he made through his SIPP. If that was an arrangement which qualified as a collective investment scheme (CIS) then advice to take it out, or arranging it, would be a regulated activity.

FSMA says that a CIS is an arrangement with respect to any kind of property whose purpose or effect is to enable the participants 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. For an arrangement to be a CIS the participants mustn’t have day to day control over the management of the property and either the contributions or the money from which they’re paid must be pooled and/or the property must be managed as a whole by or on behalf of the operator of the CIS.

The Maroccana investment is described in the fund managers’ report as an, *“unauthorised unit trust scheme under Section 243 of the Financial Services and Markets Act 2000 and is not regulated by the Financial Services Authority”.* It then goes on to say that investors have subscribed for units and the funds have been utilised by the trustee to subscribe to the Maroccana Fund Limited Partnership as a Limited partner.

In my view the Maroccana investment exhibits the qualities of a collective investment scheme, most likely an unregulated collective investment scheme. The fund itself appears to pool money from investors like Mr F to invest in commercial or residential property in the UK and abroad and any profits are distributed collectively to the investors. There is no sign of any day to day control by Mr F and the fund manager manages the scheme and investments on his behalf.

So I believe it is clear that regulated activities took place in relation to the pension schemes and the investment. I therefore need to consider whether those activities were the acts of PSL

were those acts the acts of the authorised firm, (PSL)?

PSL says it does not accept responsibility for the switch to the SIPP or the setting up of the SIPP or the investment made subsequently. It says that this was not carried out by Mr P but by another adviser – Mr R – who was representing AVM.

Mr P has provided a statement as to what happened when the SIPP and investment were taken out.

He has said that he went to see Mr F regarding mortgage and life cover advice. He says Mr F wanted to discuss his pension and so he provided a ‘lead’ to Mr R of, *“Olive Tree”* and AVM, - *“whereby he would do all the work and provide the advice.”*

He says:

"I remember completing an interim form for Olive Tree and they did the rest".

"I assumed that David R did all the advice and the recommendations/suitability reports".

He says he did not complete a separate fact find for the pension as, *"I just passed over the lead".*

He says he did visit Mr F on several occasions to chase updates and valuations.

Mr F has a very different account of events.

He says he only ever met with Mr P and he visited his home on 7 January 2009. He says Mr P told him he would be able to advise on his pension. He says Mr P obtained the 'money laundering' information (evidence of identity) to do so. Mr F says Mr P then began to advise him to switch his Pearl pension to another fund he would recommend. He then obtained a letter of authority to request information in order for him to do that.

Mr F says that Mr P provided all the advice as to the switch of his pension and where to invest it. He says Mr P dealt with the application. He says the only time he ever had contact with Mr R was in 2012 and that was a, *"4 second conversation"* in order to change the manager of the SIPP account to Mr P.

Mr F has supplied some evidence of the actions carried out by Mr P.

He has provided a record relating to obtaining 'proof of identity' – which shows his passport and proof of address. Both of these have a money laundering 'stamp' certifying their originality. The FCA adviser number code on this stamp relates to PSL.

He has also provided a PSL 'Keyfacts' document which he says he was given by Mr P – although it is unclear when he was given this and whether it was in relation to mortgage and life cover advice or the advice he says he was given about the SIPP and investment.

There is also a letter of 9 January 2009 from Mr P (on PSL headed paper) to Pearl.

"During a recent meeting with our mutual client, I have been asked to provide advice in relation to the above policies. In order to provide the highest standard of advice to Mr F I would be obliged if you could provide the following information:

1.Confirm the type of arrangement (RAC/PPP/SHP/EPP/(FS)AVC/OPS)

2. Projection of fund values (@ assumed growth rates of 5%, 7% and 9%) at SRD assuming contribution continues on the current basis.

3. Projection of fund values (@ assumed growth rates of 5%, 7% and 9%) at SRD assuming the contract is paid-up.

4. Confirmation of the Current Value and Transfer Value (please detail the MVA/R separately form (sic) *other costs)*

5. Confirmation of the death benefits available (with and with out

apportionment of Terminal Bonus if applicable).

6. Any guaranteed annuity rates or underlying annuities that apply to this/these arrangement(s)."

Accompanying that was a letter of authority allowing Mr P to request information about Mr F's plans and it included, *"This authority also includes the service rights and arrangements of my plans".*

It would appear that Pearl responded to that enquiry on 20 February 2009. It supplied a letter to, *"Picton-Jones Independent Financial Services"* enclosing the information requested.

There is an email from Mr P to Mr F dated 4 July 2009. The *"Subject*" of the email was *"Pension Transfer to Maroccano Fund".* The content of the email was:

"Just to confirm, I have provided you

- *Business card*
- *Terms of Business letter from Positive Solutions*
- *Key Features*

I can confirm I have sent the documentation for processing and will of course keep you updated.

Thank you for using "Picton Jones" as your independent financial advisor"

The 'footer' of that email was:

"Positive Solutions (Financial Services) Ltd,
Riverside House
The Waterfront
Newcastle upon Tyne,
NE15 SNY
Tel: 0871 700 1111
Fax: 0871 700 0010

Picton-Jones Independent Financial Services is a trading name of Positive Solutions (Financial Services) Ltd" who are authorised and regulated by the Financial Services Authority."

Mr F has supplied a PSL 'Terms of Business' document which he says was supplied to him at the time by Mr P.

Mr F has also supplied an email to him from Mr P dated 21 December 2012. The 'footer' of the email says that Picton-Jones is a trading name of PSL.

"Hi Kelvin,
Hope you are well.

I can confirm that although the Investment is due to be paid out in December 2012,I can confirm that if this is delayed due to non-liquated assets (land and property purchases), this

term is ongoing until the fund is paid out. Olive Tree funds are run by David R where he is a director. There is no alarm or "Time Barred" as I believe it is in motion to be paid out shortly.

Kind Regards

Dean

Dean Picton IFS Dip FA
Independent Financial Adviser"

I also note that on the SIPP application form the *"Adviser Name"* is *"David Rist"* and the *"Adviser Details"* section is stamped AVM.

I have considered the submissions that have been made and the evidence carefully. I believe the evidence suggests that it is more likely that Mr P did more than simply introduce Mr F to Mr R. If that was all that happened then there wouldn't be evidence of Mr P obtaining an authority from Mr F in respect of his pension, information about his pension or proof of his identity. Furthermore in the letter from Mr P to Pearl he says he has been asked to provide advice to Mr F and that he requests the information so that the *"highest standard of advice"* can be provided to Mr F. And the email of 2009 I have referred to clearly indicates that Mr P was facilitating the pension switch for Mr F for the purposes of investing in the Maroccana Fund. He was doing so as a PSL adviser and representing PSL.

Mr F's version of events is persuasive and supported by the evidence. He says he only ever met Mr P and that is who gave him the advice to move his pension to the SIPP and invest in the Maroccana Fund. He says he never met with or spoke to Mr R when this was taking place – only some years later. I note there is no evidence of Mr R or AVM corresponding with Mr F (at any point) or evidence of it providing him with advice. The only evidence I have seen which relates to that business is the adviser details on the SIPP application.

It is not clear why AVM is recorded as the adviser on the SIPP application but there is comment about Mr R being closely involved with the investment itself and Olive Tree. It is possible that his details were included on the SIPP application so that the investment in the fund could take place.

In any event I believe that is more likely than not that Mr P gave the material advice to Mr F to switch his pension to the SIPP with a view to investing in the Maroccana fund. I think it likely he gave the advice to invest in that fund but, even if I am wrong in that finding, Mr P likely gave advice on, and facilitated, the SIPP with the knowledge that the money was to be invested in the Maroccana fund.

what did PSL authorise Mr P to do?

Agency is a relationship between two parties where they agree that one will act on behalf of the other so as to affect its relations with third parties. The one on whose behalf acts are to be done is called the principal. The one who is to act is called the agent. In other words the principal authorises the agent to act on its behalf.

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

The law recognises different forms of agency.

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

It is the case that an agent also has implied authority to do what is necessary for, or ordinarily incidental to, the effective execution of his express authority.

actual authority

Paragraph 2.1 of the agency agreement between PSL and Mr P said:

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

'Contracts' is defined as:

> *"The Contracts for the products entered into or to be entered into, by the client, with the Institutions."*

And 'Institution' is defined as:

> *"Any insurance or assurance company, life office, unit trust manager, fund manager, stockbroker, building society, bank, finance house or other financial institution."*

Taken in isolation paragraph 2.1 seems to say the agent is only appointed to introduce applications for new contracts for PSL approved products.

However the agency agreement is a contract and, as always, the whole contract has to be considered in order to interpret its meaning. Other relevant or potentially relevant clauses include:

Paragraph 2.4:

> *"The relationship between the Company and the Registered Individual shall be strictly that of principal and Registered Individual and not in any way that of employer and employee. The Company shall be responsible for acts, omissions and representations of the Registered Individual in the course of carrying out the business of the Agency hereby created, or in the course of performance of duties hereby contracted, but only to the extent that it would be responsible at common law or by virtue of any statutory enactment or regulation, or by virtue of the Rules of any organisation (including FSA) of which the Company is member for the time being. In particular, the Company shall not be bound by acts of the Registered Individual which exceed the authority granted under the provision of the Agreement or by fraudulent acts of the Registered Individual or the Registered Individual's staff."*

Paragraph 3.1:

> Required a Registered Individual to be registered with the FSA.

Paragraph 4.3:

> Required the Registered Individual to conduct business on PSL terms of business - which the Registered Individual must supply to every client.

Paragraph 10.1:

> Required the Registered Individual to conduct himself in adherence to the FSA rules.

Paragraph 10.4:

> Prohibited the Registered Individual from procuring persons to enter into agreements otherwise than through PSL agency.

Paragraph 10.7:

> *"Any act or omission of the Registered Individual shall be treated as an act or omission of the Company. It is therefore imperative that the Registered Individual adheres to the strict rules laid down by the FSA and the Company's procedures manuals."*

Paragraph 14.:

> The Registered Individual agreed to indemnify PSL if it incurred any claims or liability in respect of the Registered Individual's acts or omissions.

So amongst other things, it's the case that the agent is appointed to do business with clients in accordance with PSL terms of business and the registered individual is required to carry on the business in accordance with the FSA's rules and PSL's Compliance procedures.

As mentioned above, at the time of the events complained about in this case, as required by paragraph 3.1 of the Agency agreement, Mr P was registered on the FSA register. It shows that he was approved to perform the controlled function *"CF30 Customer"* with PSL from November 2007 to present.

The PSL Compliance manual recorded that PSL was authorised to advise on investments (amongst other things).

It is therefore clear to me, taking all the above into account, that, *subject to conditions*, Mr P was appointed to advise on investments on behalf of PSL and not just to introduce applications for new policies.

Registered individuals such as Mr P were appointed as, and held out by PSL, as independent financial advisers able to advise on investments as authorised and regulated by the FSA.

As discussed, advising a person in their capacity as an investor or potential investor on the merits of their buying or selling an investment covered by the FSMA 2000 is a regulated activity under Article 53 of the Regulated Activities Order 2000.

Agreeing to carry on certain regulated activities including advising on investments is itself a regulated activity (under Article 64).

And arranging deals in investments is a regulated activity under Article 25.

Carrying on such regulated activities by way of business is a criminal offence unless the person doing so is authorised (or exempt – but that is not relevant here). PSL was authorised by the FSA to carry on all of those activities at the time of the disputed advice. And it was subject to the FSA's rules when carrying on those activities.

Without going into too much detail giving compliant investment advice involves getting to know a client and reviewing their financial position, their objectives and attitude to risk and then giving advice that is suitable to those circumstances. In broad terms this process is set out in COBS 9.2 and the PSL Compliance Manual.

When PSL agrees to give investment advice (which it gives through its registered individuals) it cannot know at the outset what advice it will give. First PSL (through its registered individual) must assess the client's current financial position, objectives, attitude to risk and so on. When it has done that, suitable investment advice from PSL (given through its registered individual) might, depending on the circumstances discovered, be:

1. Invest money that is not currently invested in a new plan approved by PSL.

2. Sell an existing investment and buy a new plan approved by PSL because it is in the client's best interest to sell and to buy.

3. Do not sell an existing investment to buy a new plan approved by PSL because it is not in the client's interest to sell and to buy.

4. Do not buy a particular approved PSL investment the client is interested in because it is not suitable for the client (because it is too high risk or not currently affordable for example) and so not in the client's best interest to buy.

Each one of these possible scenarios involves regulated investment advice by PSL (given through the registered individual) and, as I have said, PSL does not know which of those or other possible scenarios will play out at the start of the advice process. And three of those scenarios involve more than introducing new applications for new plans. And the second and third might involve advising on the merits of selling plans PSL has not approved.

If a PSL registered individual was *only* authorised by PSL to introduce applications for new plans possible scenarios 2, 3 and 4 would seem to involve the registered individual acting unlawfully. So this possible restricted interpretation of the authority given by PSL to its registered individual can't be right.

In my view it must be the case that the registered individual's appointment is wider than only introducing applications for new approved contracts. In my view this is either:

- the meaning of clause 2.1 when read with clause 2.4, and the rest of the agreement, and/or
- or it is the actual or implied authority from all the processes set out in PSL own requirements on its registered individuals as result of the FSA conduct of business rules it is subject to.

In saying all that, I do not say that the appointment of the registered individual is unconditional. I only say at this point that the authority goes wider than *only* introducing

applications for new approved contracts. In my view the registered individual's authority does include giving advice on the merits of selling existing investments in some circumstances.

So it is my view, in this case, that PSL's authority to Mr P did potentially include advice on the merits of selling existing investments as well as the introduction of applications for new contracts.

did the agent's express authority cover the advice in this case?

As discussed, PSL placed requirements on its Registered Individuals when conducting investment business. It said:

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.

That means that applications must relate to investments PSL had approved. As I understand it PSL has confirmed that AJ Bell – whose SIPP Mr F transferred to - was an approved SIPP provider. In other words that was a SIPP provider that its RI's could use. However, Maroccana was not approved.

So Mr P did have express authority from PSL to advise on, and arrange, the AJ Bell SIPP. So Mr P's actions in that respect would fall within my jurisdiction.

Whilst the Maroccana Fund was not an approved institution in the applicable authority of *Martin v Britannia Life Limited* [1999] the judge took a broad approach. The appointed representative advised on a package of transactions including a mortgage. The judge held that the concept of investment advice will include all financial advice given to a prospective client with a view to or in connection with the purchase, sale or surrender of an investment including advice as to any associated or ancillary transaction.

So in *Martin v Britannia Life* a firm was held to be responsible for advice that extended beyond the products the representative was authorised to advise upon. That was on the basis that there was an activity that was part of the overall transaction that the adviser *was* authorised to advise on.

As discussed, Mr P gave advice as to, and arranged, the AJ Bell SIPP – a plan which he could give advice on, or arrange, under his agreement with PSL. PSL is therefore liable for that advice and the arrangement of the SIPP.

The advice as to the SIPP and the arrangement of it was inextricably linked to the purchase of the Maroccana investment in the sense that the latter could not proceed without the former.

I have referred to *Martin v Britannia Life* [1999] *Limited* and have also taken note of *TenetConnect v Financial Ombudsman Service* [2018]. Such set out that if the non-authorised activity is *"very closely connected to"* or *"inextricably linked to"* the activity which the principal authorised and permitted then the non-authorised activity can be considered to be part of the overall transaction that the principal permitted.

The switch to the SIPP was clearly linked to the advice to invest in the Maroccana Fund, they were part of the same 'transaction'. The advice to set up the SIPP was not given on a

'stand alone' basis but formed part of a process encompassing both the switch to the SIPP and the investment in the Maroccana Fund. They were part of the same transaction or piece of advice.

It follows that the arrangement of the Maroccana Fund falls within my jurisdiction as it was a linked transaction of the advice to switch to the SIPP and part of the same piece of advice.

apparent authority

Even if I am wrong that Mr P had express authority to give advice about the SIPP and investment, there is also the matter of apparent (or ostensible) authority.

In an agency relationship, a principal may limit the actual authority of his agent. But if the agent acts outside of that actual authority, a principal may still be liable to third parties for the agent's acts if those acts were within the agent's apparent authority. This is the case even if the agent was acting fraudulently and in furtherance of his own interest – provided the agent is acting within his apparent authority.

This type of authority was described by Diplock LJ in *Freeman & Lockyer v Buckhurst Properties (Mangal) Ltd* [1964] 2 QB 480:

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

Although Diplock LJ referred to *"contractors",* the law on apparent authority applies to any third party dealing with the agents of a principal – including a consumer such as Mr F.

what kinds of representation are capable of giving rise to apparent authority?

Apparent authority cannot arise on the basis of representations made by the agent alone. For apparent authority to operate, there must be a representation by the principal that the agent has its authority to act. As Diplock LJ said in *Freeman*,

> *"The representation which creates "apparent" authority may take a variety of forms of which the commonest is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal's business with other persons. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of his principal's business has usually "actual" authority to enter into.*"

In *Martin v Britannia Life Ltd* [1999], Parker J quoted the relevant principle as stated in Article 74 in Bowstead and Reynolds on Agency 16th edition:

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

In the more recent case of *Anderson v Sense Network [*2018], Jacobs J endorsed Parker J's approach:

> "*As far as apparent authority is concerned, it is clear from the decision in* Martin *(in particular paragraph 5.3.3) that, in order to establish apparent authority, it is necessary for the claimants to establish a representation made by Sense [the alleged principal], which was intended to be acted on and which was in fact acted on by the claimants, that MFSS [the alleged agent] was authorised by Sense to give advice in connection with the scheme…*
>
> *I also agree with Sense that there is nothing in the "status" disclosure – i.e. the compulsory wording relating to the status of MFSS and Sense appearing at the foot of the stationery and elsewhere – which can be read as containing any relevant representation as to MFSS's authority to do what they were doing in this case: i.e. running the scheme and advising in relation to it. The "status" disclosure did no more than identify the regulatory status of MFSS and Sense and the relationship between them. I did not consider that the Claimants had provided any persuasive reason as to how the statements on which they relied relating to "status disclosure" could lead to the conclusion that MFSS was authorised to provide advice on the scheme that was being promoted. In my view, a case of ostensible authority requires much more than an assertion that Sense conferred a "badge of respectability" on MFSS. As* Martin *shows, it requires a representation that there was authority to give advice of the type that was given…the relevant question is whether the firm has 'knowingly or even unwittingly led a customer to believe that an appointed representative or other agent is authorised to conduct business on its behalf of a type that he is not in fact authorised to conduct'. …*
>
> *Nor is there any analogy with the facts or conclusions in* Martin*. That case was not concerned with any representation alleged to arise from "status" disclosure. In* Martin*, the representation by the principal that the agent was a financial adviser acting for an insurance company was regarded as a sufficient representation that the adviser could advise on matters (the mortgage in that case) which were ancillary to insurance products. In the present case, there is nothing in the "status disclosure" which contains any representation that MFSS or its financial advisers could operate or advise in connection with a deposit scheme that MFSS was running.*"

The representation may be general in character. In *Armagas Ltd v Mundogas SA* [1985], Lord Keith said:

> "*In the commonly encountered case, the ostensible authority is general in character, arising when the principal has placed the agent in a position which in the outside world is generally regarded as carrying authority to enter into transactions of the kind in question. Ostensible general authority may also arise where the agent has had a course of dealing with a particular contractor and the principal has acquiesced in this course of dealing and honoured transactions arising out of it.*"

must the third party rely on the representation?

The principal's representation that its agent has its authority to act on its behalf will only fix the principal with liability to the third party (here Mr F) if the third party relied on that representation.

In *Anderson*, Jacobs J summarised the approach to be taken as to whether or not there is sufficient evidence of reliance on the representation as follows:

> "*a relevant ingredient of a case based on apparent authority is reliance on the faith of the representation alleged: see Bowstead and Reynolds on Agency 21st edition, paragraph [8-010] and [8-024];* Martin *paragraph 5.3.3. In* Martin*, Jonathan Parker J. held that the relevant representation in that case (namely that the adviser was authorised to give financial advice concerning a remortgage of the property) was acted on by the plaintiffs 'in that each of them proceeded throughout on the footing that in giving advice [the adviser] was acting in every respect as the agent of [the alleged principal] with authority from [the alleged principal] so to act'.*"

On the particular facts of that case, Jacobs J placed weight on the fact the majority of the claimants had never heard of the defendant, Sense Network, and that those who had heard of it made their decision to invest in the relevant scheme before they saw the stationery which they later said contained the representation on which they relied.

As the case law makes clear, whether or not a claimant has relied on a representation is dependent on the circumstances of that individual case.

In respect of apparent authority I have considered whether, on the facts of this individual case:

- PSL made a representation to Mr F that Mr P had PSL's authority to act on its behalf in carrying out the activities he now complains about, and

- Mr F relied on that representation in entering into the transactions he now complains about.

Having considered the law in this area, including Lord Keith's comments in *Armagas*, so far as representations are concerned I need to decide whether PSL placed Mr P in a position which would objectively generally be regarded as carrying its authority to enter into transactions such as the pension switch and investment in the Maroccana Fund. Put another way, did PSL knowingly – or even unwittingly – lead Mr F to believe that Mr P was authorised to conduct business on its behalf of a type (namely, carrying out the pension

switch and arranging the investment) that PSL argues he was not in fact authorised to conduct?

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

did PSL represent to Mr F that Mr P had the relevant authority?

As I have discussed, I am persuaded that Mr P did give advice to switch Mr F's pension and investment advice on behalf of PSL.

The evidence is that Mr F received a terms of business agreement in respect of the disputed advice. It is my view that in principle an agent of PSL was authorised to:

- advise on the setting up of investment such as the Maroccana Fund investments
- advise on the switch of the pension to the SIPP.

None of these activities were in themselves novel or exceptional or unexpected for an IFA. These are activities that fall within the class of activities that IFAs are usually authorised to do. Any restrictions on the authority to give such advice (such as set out by PSL) would not have been visible to Mr F. So for example he would not know that an adviser should only recommend approved investments, should obtain clearance from PSL before giving certain types of advice and should present the advice in certain ways.

PSL placed Mr P in a position which would, in the outside world, generally be regarded as having authority to carry out the acts Mr P complains about.

PSL authorised Mr P to give pensions and investment advice on its behalf.

PSL arranged for Mr P to appear on the FSA register in respect of PSL. And Mr P was approved to carry on the controlled function CF30 at the time of the disputed advice.

PSL held itself out as an independent financial adviser that gave advice and offered products from the whole of the market after assessing a client's needs. No information was provided to clients or potential clients about the agent being authorised in relation to approved products only.

It was in PSL's interest for the general public, including Mr F, to understand that it was taking responsibility for the advice given by its financial advisers. I am satisfied that PSL intended Mr F to act on its representation that Mr P was its financial adviser.

I further consider that the provision of financial advice was a key part of PSL's business. It said in its terms of business that its "*partners*" would give "*impartial, independent financial advice*". I do not see how PSL could have carried out its business activities at all if the general public had not treated registered individuals like Mr P as having authority to give investment advice on behalf of PSL.

did Mr F rely on PSL's representation?

Mr F has said clearly that he understood Mr P to be acting as PSL adviser when he gave the advice about the pension switch and Maroccana Fund investment. As discussed, in my view it is highly likely that Mr P did represent to Mr F that he was giving advice and providing his services as an adviser of PSL.

There is no persuasive evidence to show that Mr F knew or should have known that Mr P was acting in any capacity other than a PSL adviser.

In my view, on balance, the evidence does indicate that Mr F proceeded on the basis that Mr P was acting in every respect as the agent of PSL with authority from PSL so to act.

should PSL to be required to bear any losses caused by Mr P?

The courts have taken into account whether it is just to require a principal to bear a loss caused by the wrongdoing of his agent. I have considered whether it is just to hold PSL responsible for any detriment Mr F has suffered as result of the advice he received from Mr P. I think it is just to hold PSL responsible for the consequences of its putting Mr P in the position where Mr F could suffer loss as a result of his actions. In particular, I note:

- PSL was in a position to monitor Mr P's behaviour.
- PSL did not tell Mr F it had put any of the limits on his authority that it says are relevant here.
- PSL's agency agreement acknowledges that it will be held responsible for the wrongs of its agents and includes and requires the agent to provide it with an indemnity it respect of any losses etc it suffers as result of such wrongs.

So overall I consider that it is just for PSL to be required to bear any losses caused by any wrong doing done by Mr P whilst carrying on the a controlled function assigned to him by PSL.

vicarious liability

It is also appropriate for me to consider whether PSL is vicariously liable for the actions of Mr P – independently of whether apparent authority also operated such as to fix PSL with liability for the actions of its agents.

what is vicarious liability?

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

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

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

- Stage one is to ask whether there is a sufficient relationship between the wrongdoer and the principal (*Cox v Ministry of Justice* [2016]).

- Stage two is to ask whether the wrongdoing itself was sufficiently connected to the wrongdoer's duties on behalf of the principal for it to be just for the principal to be held liable (*Mohamud v WM Morrison Supermarkets plc* [2016]*).*

There is some uncertainty in the law as to how widely the test in *Cox* should be applied. I note that in *Frederick v PSL* [2018] the Court of Appeal explicitly declined to decide whether the test in *Cox* applied to PSL's relationship with another of its registered individuals.

If it were the case that vicarious liability could never have anything to do with principals and agents then I consider it likely that the Court of Appeal would have simply said so. But in any event, the relationship between Mr P and PSL was not just an agency relationship. Mr P was registered with the FSA as an 'approved person' able to carry out regulated activities on PSL's behalf, and this complaint is about the regulated activities of advising on and arranging deals in investments. I consider that it would be wrong for me to simply ignore or set aside the regulatory background in reaching my decision.

I am not aware of any case law concerning the exact set of circumstances that Mr F complains about. But that does not prevent me from applying the law as I understand it to be. In *Cox*, Lord Reed said:

> "*the words used by judges are not to be treated as if they were the words of a statute. Where a case concerns circumstances which have not previously been the subject of an authoritative judicial decision, it may be valuable to stand back and consider whether the imposition of vicarious liability would be fair, just and reasonable.*"

Had Mr F referred this matter to a court instead of to the ombudsman service, I consider that the court is likely to have chosen to apply the approach suggested by Lord Reed. I will therefore do the same.

the 'stage one test'

It is now accepted that a variety of relationships, not just those of employer and employee, may be capable of giving rise to vicarious liability. In *Cox*, Lord Reed said:

> "*The result [of the approach adopted by Lord Phillips in Various Claimants v Catholic Child Welfare Society [2012] UKSC 56; [2013] 2 AC 1] is that 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.*"

I am satisfied that giving advice to Mr F to switch his pension and then invest in Maroccana Fund was carrying on activities as an integral part of the business activities carried on by PSL. I say that because:

- At the time, PSL's stated purpose was "…t*o help our clients, understand, protect and increase their assets*". I consider that the provision of, and subsequent implementation of, investment advice is an integral part of fulfilling that purpose.

- PSL's business model was that it gave financial advice itself, through its "*Partners*". As set out in its "*partnership code*", those Partners promised to give "*impartial, independent financial advice*".

- PSL's status as an authorised firm meant that it was not in breach of the general prohibition when it gave investment advice to members of the public. So, when its Partners gave investment advice on behalf of PSL, carrying out PSL's business activities, those Partners were not in breach of the general prohibition either.

- Mr P was a PSL Partner. PSL had given him permission to carry out the controlled function of '*CF 30 Customer'* on behalf of PSL. PSL had therefore engaged Mr P to carry out activities that were an integral part of its business.

I note that the FCA has issued guidance as to when it considers a person to be carrying on a business in their own right - set out in PERG 2.3.5 to 2.3.11. Although the guidance was published some time after the events Mr F complains about, the relevant parts of the legislation (in respect of permissions to give regulated financial advice) have not changed substantively. I therefore consider it appropriate for me to take into account the guidance in PERG, which says:

> "*In practice, a person is only likely to fall outside the general prohibition on the grounds that he is not carrying on his own business if he is an employee or performing a role very similar to an employee*".

PSL clearly intended Mr P to fall outside the general prohibition when acting on PSL's behalf in giving and implementing investment advice. As I've said, I consider that the only way in which Mr P could have fallen outside the general prohibition would be on the basis that he was carrying on PSL's business rather than his own. In my view, the guidance therefore provides support for the contention that Mr P's relationships with PSL were very similar to employment relationships.

Further, in allowing Mr P to give investment advice on its behalf, PSL was creating the risk that he might make errors or act negligently in doing so. PSL assigned to Mr P the customer facing task of giving regulated financial advice to PSL's customers, and it is always possible for that task to be carried out negligently.

PSL Solutions had arranged for Mr P to be approved by the FSA to perform various controlled functions in relation to regulated activities carried on by PSL. Those controlled functions – which included the giving of regulated investment advice – were activities assigned to Mr P by PSL as part of PSL's business.

the 'stage two test'

The stage two test asks whether the wrongdoer's action is so closely connected with the business activities of his principal as to make it just to hold the principal liable.

As Lord Dyson said in *Mohamud,* the test requires a court to, "*make an evaluative judgment in each case having regard to all the circumstances and having regard to the assistance provided by previous decisions on the facts of other cases*". That is not a precise test, but the courts have recognised the inevitability of imprecision given, "*the infinite range of circumstances where the issue of vicarious liability arises*".

In the particular circumstances of this complaint, I consider that it is just for PSL to be held responsible for the actions Mr F complains about. I note:

- Mr P was giving pension and investment advice, completing paperwork and making arrangements to put that advice into practice. I consider these activities are closely connected to the business activities of PSL, a firm which provided financial advice and arranged investment transactions for its customers.

- If PSL is not vicariously liable here, then Mr F's ability to obtain compensation would depend on whether the PSL Partner he dealt with was an employee of PSL. In *Cox*, the court suggested it would have been unreasonable and unfair for the claimant's ability to receive compensation for the injury she suffered while working in a prison kitchen to depend on whether the worker who injured her was an employee or a prisoner. I consider that argument has even more relevance here – at least Mrs Cox is likely to have either known or had the ability to find out who was an employee and who was a prisoner. But Mr F had no way of knowing Mr P's employment status (I am aware that Mr P's agency contract said he had to make his status as a registered individual clear – but even if he had done that, the term 'Registered Individual' did not imply anything about his employment status).

- The agency contracts say PSL will not be responsible if Mr P acts outside his authority. But the contract also says that *any* act or omission of the registered individual will be treated as an act of PSL. In my view, those two terms conflict. I do not consider it would be fair for PSL to be entitled to rely on one but ignore the other.

- PSL received no benefit from the acts Mr F complain about, and in particular it did not receive any commission. But as Lord Toulson explained in *Mohamud*, vicarious liability can apply even where an employee has abused his position in a way that cannot possibly have been of benefit to his employer – such as carrying out a private fraud or assaulting a customer. In *Frederick*, PSL was found not to be vicariously liable despite having received commission. The commission issue is not determinative.

I acknowledge that the conclusions I have reached are different to the conclusions reached by the court in *Frederick*. In that case, PSL was found not to be vicariously liable for the conduct of a named Mr Warren. I have not seen the whole of Mr Warren's agency contract with PSL, but from the sections quoted in the judgment the terms in his contract appear to be identical to the terms in Mr P's contract.

However, the facts in *Frederick* are so different to the facts here that I do not consider that the same outcome is inevitable in this complaint. In particular, I note:

- In *Frederick*, the claimants were approached by a Mr Qureshi – who was not a registered individual of PSL. Mr Qureshi induced them to invest in a property scheme, which he was running jointly with Mr Warren. The claimants, "*had no personal dealings with [Mr] Warren and did not meet him or receive any written communications from him…there was no semblance of an advice process*". Here, Mr F had personal dealings with Mr P, PSL's registered individual. He met with Mr P who provided him with advice. Mr P carried out business activities of a type that had been specifically assigned to him by PSL, and which he could only (lawfully) perform on behalf of PSL.

- Mr Warren submitted "*dishonest and fraudulent*" mortgage applications for loans on behalf of the claimants. Mr F has made no such allegation of fraud. He only complains about the suitability of the advice. Their allegation is one of negligence and/or breach of statutory duty. He does not say as such that Mr P was dishonest. There is therefore no need for me to consider whether PSL would have been vicariously liable for any dishonest acts by Mr P.

- Mr Warren was only able to submit the mortgage applications in the way he did because he was an agent of PSL. But the claimants in *Frederick* did not say they had "*suffer[ed] any loss through the actual re-mortgaging or their receipt of monies from [the lender]*". Instead, they suffered losses only when they handed the money over to Mr Warren (or to the company of which Mr Warren and Mr Qureshi were directors). In contrast, Mr F says he suffered losses as a direct result of the advice given to him by Mr P, in his capacity as a PSL financial adviser, to switch his pension and invest in Maroccana Fund.

what if the tests in Cox and Mohamud are not applicable to this complaint?

I recognise that a court might take the view that the specific tests set out in *Cox* and *Mohamud* are not applicable to Mr P, PSL, and the specific acts Mr F complains about. The applicability of those tests to agency relationships is unclear, as is their applicability to some or all of the reliance-based torts, possibly including negligent mis-statement.

Even if those specific tests are not applied, I still consider that it would be appropriate for a court to consider whether PSL is vicariously liable for the actions of Mr P. The earlier cases, including *Armagas* and the *Christian Brothers* case [2012], make clear that justice is the court's overriding concern in such matters. Where the claimant and the defendant are both innocent parties, the court will consider whether the circumstances under which the wrongdoer committed his wrong were such as to make it just for the defendant to bear the loss.

Bearing in mind the regulatory position, I consider that in the particular circumstances of this case it is just to require PSL to bear any loss caused by negligent investment advice provided by Mr P.

From a public policy point of view, one of the purposes of FSMA was to make provisions for the protection of consumers. The approved person regime was one of the ways in which both FSMA and the FSA gave effect to that protection. Mr P was a PSL approved person. In view of section 59(1) of FSMA, I consider that when Mr P carried out the regulated activity of a pension switch, advising on investments, and arranging deals in investments, those activities were the activities of PSL. PSL is clearly responsible for its own activities.

I see no support in FSMA – or anywhere else – for the belief that PSL's responsibility for its approved persons was dependent on the precise nature of its contracts with those people (agency/non-agency). Similarly, I do not see anything to suggest PSL's responsibility depends on whether the approved person's conduct is classified in terms of one type of tort ("reliance-based") or another. I would be surprised if a court were to take the view that such distinctions were relevant to the outcome of this complaint.

I therefore consider that PSL is vicariously liable for the acts Mr F complains about regardless of whether Mr P carried out those acts with apparent authority on behalf of PSL

(However, as I have said, I consider that Mr P did in fact act with PSL's apparent authority when they carried out the acts complained of.)

statutory responsibility under section 150 of FSMA

For the reasons I've given above, I am satisfied that when Mr P gave the advice complained of, and when Mr P arranged the associated pension switch and deals in investments, he was acting in his capacity as a PSL approved person for the purpose of carrying on PSL's regulated business. He was not carrying on a business of his own.

That means PSL is subject to the Conduct of Business (COBS) suitability rules in respect of Mr P's advice. If Mr P's advice was not suitable, then (subject to the recognised defences) PSL is responsible in damages to Mr F under the statutory cause of action provided by section 150 of FSMA. I therefore consider that section 150 of FSMA provides an alternative route by which PSL is responsible for the acts complained of.

In summary and having considered all of the circumstances here, as well as the legal authorities, I am provisionally satisfied that:

- Mr P had express authority to give advice as to, and arrange, the SIPP. The SIPP and the investment were part of one overall transaction and therefore PSL is responsible for the advice given about that transaction. The complaint would therefore fall within my jurisdiction and I can consider the merits of it.

- In addition – or in the alternative - PSL represented to Mr F that Mr P had PSL's authority both to advise on the pension switch and the investment in Maroccana Fund.

- In addition – or in the alternative – PSL is vicariously liable for the acts Mr F complains about.

- PSL also has statutory responsibility under section 150 of FSMA for the acts complained about.

I am therefore satisfied that PSL is responsible for the acts Mr F complains about.

my provisional findings on merits

Mr F says he was a maintenance fitter/welder at the time the advice was given and earned around £20,000 to £24,000 a year. He has confirmed that he did not have any experience of investing in the "Stock Market", had not made any investments prior to the pension switch and has not made any since. He has also confirmed that his assets consist of his home and personal possessions.

So Mr F didn't have any investments of an 'aggressive', high risk or unregulated nature. In fact it seems he had no experience of risk based investments at all apart from his pension. He has said he was 'cautious' in terms of risk acceptance.

The Maroccana Fund was an unregulated property investment. It was high risk and the investor faced the real possibility of losing all their money. Because it was unregulated Mr F did not benefit from the protection afforded by the Financial Services Compensation Scheme.

Mr F's circumstances do not indicate that he was prepared to lose all his money in the pension scheme or that he could do so. They also do not indicate that he was suited to the risks this investment presented.

Mr F's investment experience was very limited and does not suggest that he was an experienced investor who could appreciate all the risks of what he was doing or would not be reliant on the adviser to give him suitable advice and consider his best interests. I have not seen that the adviser gave Mr F any material advice about the Maroccana Fund investment itself and in particular that it was unregulated and therefore did not benefit from regulatory protections.

The value of Mr F's pension funds was modest at about £30,000 to £40,000**.** The material issue is that the majority of that money was designated for investing in the Maroccana fund. That put most of his pension savings at risk of total loss (which is what appears to have happened).

As discussed Mr P knew that Mr F was to invest his pension funds in the Maroccana Fund. He obtained very little detail about Mr F or his financial situation. There was no detail about his expenditure, assets, savings, investments or liabilities.

Clearly, the evidence indicates that Mr F was not the sophisticated and professional type of investor for which such an unregulated investment would be suitable; the risks of the investment are far higher than were suitable for him and they were of a nature that was not appropriate for him. In any event far too much of the pension money was invested in the Maroccana Fund – there was little, if any, diversification.

Bearing all this background in mind, I do not believe there is any persuasive evidence that it was appropriate for Mr F to take the risks of switching and invest in the Maroccana Fund, which put his retirement income and benefits at much greater risk.

calculating compensation

In assessing what would be fair compensation, I consider that my aim should be to put Mr F as close to the position he would probably now be in if he had not been given unsuitable advice.

I think if this unsuitable advice had not been given then Mr F would have kept his existing pension. But it's unlikely to be possible for PSL to reinstate Mr F into his previous pension scheme. Bearing that in mind what is set out below is in my view a fair way of compensating Mr F for the unsuitable advice.

The redress calculation is set out on the basis that the Maroccana Fund may still exist. If it does not then the parties should let me know

In summary, PSL should:

1.Obtain the notional transfer value of Mr F's previous pension plan, as at the date of my Final Decision, if it had not been transferred to the SIPP.

2. Obtain the transfer value, as at the date of my Final Decision, of Mr F's SIPP, including any outstanding charges.

3. And then pay an amount into Mr F's SIPP so that the transfer value is increased to the amount calculated in (1). This payment should take account of any available tax relief and the effect of charges.

In addition, PSL should:

4.Pay any future fees owed by Mr F to the SIPP, for the next five years (this will only be necessary if Mr F's investment in the Maroccana Fund still exists and cannot be encashed).

5.Pay Mr F £500 for the trouble and upset caused.

I have set out each point in further detail below.

6. *Obtain the notional transfer value of Mr F's previous pension plan if it had not been transferred to the SIPP. That should be the value at the date of my Final Decision.*

PSL should ask Mr F's former pension provider to calculate the notional transfer value that would have applied as at the date of my Final Decision had he not transferred his pension but instead remained invested.

If there are any difficulties in obtaining a notional valuation then the FTSE WMA Stock Market Income Total Return Index should be used. That is a reasonable proxy for the type of return that could have been achieved if suitable funds had been chosen.

PSL should assume that any contributions or withdrawals that have been made would still have been made, and on the same dates.

7. *Obtain the transfer value as at the date of my Final Decision of Mr F's SIPP, including any outstanding charges.*

This should be confirmed by the SIPP operator. If the operator has continued to take charges from the SIPP and there wasn't an adequate cash balance to meet them, it might be a negative figure.

8. *Pay an amount into Mr F's SIPP so that the transfer value is increased to equal the amount calculated in (1). This payment should take account of any available tax relief and the effect of charges.*

If it's not possible to pay the compensation into the SIPP, PSL should pay it as a cash sum to Mr F. But had it been possible to pay into the SIPP, it would have provided a taxable income. Therefore the total amount should be reduced to notionally allow for any income tax that would otherwise have been paid.

The notional allowance should be calculated using Mr F's marginal rate of tax in retirement.

9. *Pay any future fees owed to the SIPP for the next five years.*

Had PSL given suitable advice I don't think there would be a SIPP. It's not fair that Mr F continues to pay the annual SIPP fees if it can't be closed. This might be the case if the Maroccana fund still exists and cannot be encashed

Ideally, PSL should take over the investment to allow the SIPP to be closed. This is the fairest way of putting Mr F back in the position he would have been in. But it is possible that the ownership of the Marocanna Fund can't be transferred.

If it can't be transferred, to provide certainty to all parties, I think it's fair that PSL pays Mr F an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees), or undertakes to cover the fees that fall due during the next five years. This should provide a reasonable period for things to be worked out so the SIPP can be closed.

In return for the compensation set out above, PSL may ask Mr F to provide an undertaking to give it the net amount of any payment he may receive from the Marocanna investment in that five year period, as well as any other payment he may receive from any party as a result of the investment. That undertaking should allow for the effect of any tax and charges on the amount he may receive. PSL will need to meet any costs in drawing up this undertaking. If it asks Mr F to provide an undertaking, payment of the compensation awarded by this decision may be dependent upon provision of that undertaking.

If, after five years, PSL wants to keep the SIPP open, and to maintain an undertaking for any future payments under the Marocanna investment, it must agree to pay any further future SIPP fees.

In addition, PSL is entitled to take, if it wishes, an assignment from Mr F of any claim Mr F may have against any third parties in relation to this pension switch and Marocanna investment. If PSL chooses to take an assignment of rights, it must be affected before payment of compensation is made. PSL must first provide a draft of the assignment to Mr F for her consideration and agreement.

10. Pay Mr F £500 for the trouble and upset caused.

I believe Mr F has been caused significant upset by the events this complaint relates to, and the apparent loss of pension benefits. I think that a payment of £500 is fair to compensate for that upset.

my provisional decision

For the reasons given in this decision, I do believe Mr F's complaint against PSL would fall within my jurisdiction. I also believe it should be upheld and compensation calculated as set out above.

David Bird
ombudsman