complaint

Mr and Mrs M complain that in May 2009, a Mr B and a Mr E wrongly advised them to invest in a Harlequin property development.

Mr and Mrs M believe that Quilter Financial Planning Solutions Ltd (formerly known as Positive Solutions (Financial Services) Ltd) is responsible for the advice given by Mr B and Mr E. I will refer to this company as "Positive Solutions" throughout the rest of this decision.

background

Everyone accepts that Mr and Mrs M invested £49,500 into Harlequin in 2009, and that they suffered losses as a result. The dispute is about how they came to make that investment, and about who is responsible for their losses.

Mr and Mrs M's position is that Positive Solutions is responsible for the advice given by Mr B and Mr E, and therefore that Positive Solutions is also responsible for their losses.

Positive Solutions does not accept that Mr B or Mr E gave Mr and Mrs M any investment advice at all. Even if they did, Positive Solutions says it would not be responsible for that advice. Positive Solutions accepts that Mr B and Mr E were its agents, but it says it did not give them permission to give advice on Harlequin products – and therefore it says it is not responsible for the advice complained of.

Two of my colleagues explained why they thought Positive Solutions was not liable for the acts Mr and Mrs M complain about. Mr and Mrs M did not agree. Neither of those colleagues issued a "determination" under DISP 3.6 of our rules, meaning that the Financial Ombudsman Service has not yet determined Mr and Mrs M's complaint.

The matter was referred to me, and I issued my first provisional decision in March 2020. Briefly, I said that I was satisfied that Positive Solutions was responsible for the advice Mr and Mrs M had received, and I set out my initial proposals as to redress.

I issued a second provisional decision in December 2020, in light of additional representations and evidence from the parties, recent case law, and my own further reflections. I expanded my reasoning as to why I was provisionally satisfied that Mr B and Mr E had given advice to Mr and Mrs M, Positive Solutions was responsible for that advice, and that Positive Solutions should therefore pay compensation to Mr and Mrs M. I also changed my mind about certain aspects of redress, and explained why I thought Positive Solutions should – so far as possible – put Mr and Mrs M into the position they would have been in if they had purchased a buy-to-let property in 2009 instead of investing in Harlequin.

Mr and Mrs M broadly accepted my second provisional decision (subject to some concerns about how interest should be calculated if Positive Solutions did not immediately comply with any final decision I were to issue).

Positive Solutions did not accept my findings. It is still not persuaded that Mr B or Mr E gave Mr and Mrs M any advice about Harlequin at all, and in any event it says it would not be responsible for any advice that was given. It considers that I have misunderstood the law, and misapplied guidance.

In light of the parties' comments about redress, I asked our investigator to write to both parties setting out an alternative. He stressed that, at that stage, I had not made a final decision as to whether Positive Solutions was responsible for Mr B and Mr E's advice. But he also explained that – if my final decision as to responsibility was along the lines I had set out in my second provisional decision – I intended to order Positive Solutions to pay Mr and Mrs M the amount of A + B + C + D + E + F, where:

A. £1,000 to represent the original deposit Mr and Mrs M paid to Harlequin.

B. £48,500 to represent the additional borrowing Mr and Mrs M took in 2009.

C. The interest payments Mr and Mrs M have paid to service that £48,500.

D. 8% simple interest upon the amounts calculated at C above, from the date each payment was made until the date of my final decision.

E. £18,000 to represent lost capital growth.

F. £750 for distress and inconvenience.

Both parties have now had the opportunity to respond to my updated proposals as to redress. Briefly, Mr and Mrs M accept my findings, but Positive Solutions does not. It remains satisfied that it is not responsible for Mr B's and Mr E's actions. It also says that, even if it was responsible, it does not agree with the redress I suggested.

my findings - jurisdiction

I have reconsidered all the available evidence and arguments from the outset – including both parties' responses to my provisional decisions – in order to decide whether this complaint against Positive Solutions falls within my jurisdiction. I remain satisfied that it does.

Briefly, I am satisfied that:

- Mr and Mrs M's complaint is about an act or omission in relation to the carrying on of the regulated activity of giving investment advice.

- Positive Solutions did not give Mr B or Mr E its actual authority to recommend Harlequin products.

- Apparent authority did not operate such as to give rise to Positive Solutions' responsibility for the acts Mr and Mrs M complain about.

- Positive Solutions is vicariously liable for the advice Mr B and Mr E gave to Mr and Mrs M. That is because, first, Mr B and Mr E were carrying on Positive Solutions' business, as opposed to business on their own account, and their relationship with the firm was akin to employment. And, second, the investment advice complained of was so closely connected with the acts Mr B and Mr E were authorised to do such that, for the purposes of Positive Solutions' liability to Mr and Mrs M, that advice may fairly and properly be regarded as having been done by them in the ordinary course of their duties for Positive Solutions

- Positive Solutions is also liable to Mr and Mrs M under section 150 of the Financial Services and Markets Act 2000 (FSMA). That is because Mr B and Mr E gave the advice complained of for the purpose of carrying on Positive Solutions' business of giving regulated investment advice and in their capacity as Positive Solutions' "approved persons". So section 150 imposes liability on the firm for breaches of the regulatory rules about the giving of the advice.

- Mr and Mrs M's complaint therefore falls within the jurisdiction of the Financial Ombudsman Service.

I explain those findings in more detail below, after first setting out both the factual and the regulatory background to this complaint.

the factual background

I set out the factual background in both of my provisional decisions. Neither party raised any concerns about my description, so I repeat it here:

> *"**Positive Solutions' business model***
>
> *I think Positive Solutions' business model is relevant here, so I set out below my understanding of the position. If either party disagrees with my understanding – on this or any other aspect of the complaint – I would welcome their further comments.*
>
> *In 2009, firms providing investment advice were required to tell their retail customers whether that advice covered the whole of the market ("independent advice"), or whether the advice was restricted to one or a limited number of product providers ("tied" or "multi-tied" advice)*
>
> *Positive Solutions provided independent advice through its "Registered Individuals". That term is defined in its agency contracts, discussed below in the section about Mr B's and Mr E's relationships with Positive Solutions.*
>
> *I understand that Positive Solutions usually told its customers that it was independent by providing them with its Terms of Business. I have not seen the Terms of Business in force in May 2009, but I have seen an earlier version, in force as at October 2006.*
>
> *The October 2006 version of the Terms of Business said:*
>
> > *"Those who advise on life assurance, pensions or unit trust products are either: Independent Advisers or Representatives of one company. Your adviser is independent and will act on your behalf in advising you on life assurance, pensions or unit trust products. Because your adviser is independent he or she can advise you on the products of different companies."*
>
> *That document also included Positive Solutions' "partnership code", which explained that its purpose was to "help our clients understand, protect and increase their assets". It further said that Positive Solutions' "partners" would "give impartial, independent financial advice".*

I have also seen a later version of Positive Solutions' Terms of Business, which I believe was in force as at January 2012. The later version is materially different, particularly as to the types of products on which Positive Solutions would advise (and I note that the 2012 version said explicitly that Positive Solutions did not provide advice on the suitability of physical property transactions). But it still said that Positive Solutions provided independent advice as at 2012. My understanding is therefore that Positive Solutions did give independent advice in 2009, at the time of the events complained of.

the FSA Register

Throughout the relevant period, Positive Solutions was registered with the Financial Service Authority (FSA) as having permission under the Financial Services and Markets Act 2000 (FSMA) to carry on certain regulated activities, including those of advising on investments and arranging transactions in investments. As such, Positive Solutions was an 'authorised person' under FSMA.

Mr B and Mr E both appeared on the FSA Register with respect to Positive Solutions. Mr B's name appeared between July 2004 and November 2010, and Mr E's name appeared between December 2001 and December 2009. They were approved by the FSA to carry out the controlled functions "Investment Adviser (Trainee)", then "Investment Adviser", then "Customer" on behalf of Positive Solutions. The "Customer" function included "advising on investments other than a non-investment insurance contract … and performing other functions related to this such as dealing and arranging" (SUP 10.10.7A).

Mr B and Mr E therefore both had the status of 'approved persons' for the purposes of performing specific functions for Positive Solutions. But neither of them was an 'authorised person' or an 'exempt person' under FSMA – they were not authorised in their own right, and they were not appointed representatives of another firm.

Mr and Mrs M are now aware of the contents of the FSA Register, but I do not believe they were aware of the Register in 2008 or 2009.

Mr B's and Mr E's relationships with Positive Solutions

Positive Solutions did not initially provide us with copies of its contracts with Mr B or Mr E. However, it did say:

> *"[W]e wish to highlight the following excerpts from the contract …:*
>
> - *it is not a contract of employment but, as it says on its face, terms and conditions of agency. It is not an exclusive contract as there are no exclusivity provisions in it; it is therefore a non-exclusive contract and so, as we have previously said, did not prevent [Mr B] from acting as a representative of another firm at the same time.*
>
> - *Section 2.1 of Positive Solutions' Terms and Conditions of Agency states that: "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". We have no*

record of Harlequin ever being on the 'approved list', nor have I been able to uncover a record of an agency or agreement between Positive Solutions and Harlequin and thus [Mr B] was not authorised to act as our agent in the dealing with the complainant in this instance.

- *clause 2.4 specifically provides that [Mr B's] relationship with this firm "shall be strictly that of Principal and Registered Individual and not in any way that of employer and employee". It goes on to say that we will only be responsible for his acts, omissions and representations "to the extent that [we] would be so responsible at common law or by virtue of any statutory enactment or regulation, or by virtue of the Rules of any organisation (including the FSA) of which [we are] a member for the time being".*

- *clause 4.3 states that [Mr B] needed to provide the complainant with a copy of our terms of business if [Mr B] was acting on our behalf, but no evidence has been adduced by the complainant that [Mr B] did this.*

- *clause 4.4 states, among other things, that [Mr B] must remit all monies that he receives for doing business on our behalf to us "forthwith", but we received nothing from him (or anyone else) in respect of this investment.*

The contract accordingly supports our arguments as to why the complainant was not our customer because it clearly shows (in particular at clauses 4.3 and 4.4) the steps that [Mr B] had to take if he was dealing with someone on our behalf. However, [Mr B] did none of these things in his dealings with the complainant.

We would also highlight clause 2.4 and the fact that we can only be responsible for [Mr B's] actions to the extent that we would be so responsible for him at common law. We can therefore have no responsibility for [Mr B's] acts, omissions and representations to the complainant in this matter."

Positive Solutions has since provided a complete copy of the relevant contracts, but it has asked that I do not disclose them to the complainants.

I understand Positive Solutions' position in respect of Mr E's actions is identical to its position in respect of Mr B.

I am satisfied that Positive Solutions' description of the various clauses within its Registered Individual agreements is accurate. I note that the contracts also contain a provision for the Registered Individual to indemnify Positive Solutions in circumstances where the Registered Individual acted outside of their authority, and for Registered Individuals to pay over to Positive Solutions any monies (including commissions) that they received from financial institutions.

Mr and Mrs M's relationship with Mr B and Mr E before April 2009

Mr and Mrs M told us that in October 2008, they purchased a buy-to-let property using a mortgage arranged by Mr B of Positive Solutions. I am not aware of any contact between Mr and Mrs M and Mr B before that date.

Mr and Mrs M also told us that in January 2009 they contacted Mr B using his Positive Solutions email address in relation to insurance on a commercial property. He replied on 15 January 2009 to say "I have passed on this to a colleague of mine who deals in Commercial Insurance. I generally deal with Personal matters with the exception of Pension schemes."

I am not aware that Mr B (or any other agent of Positive Solutions) gave Mr and Mrs M investment advice about anything other than Harlequin at any point.

Mr and Mrs M do not appear to have had any contact with Mr E until Mr B introduced them to him May 2009.

Mr and Mrs M's interactions with Mr B and Mr E between April and December 2009

The chain of events that led to this complaint appears to have started in April 2009, when Mr and Mrs M were considering buying another buy-to-let property. They told us:

- *In April 2009, they approached Mr B to ask him to arrange a mortgage.*

- *In May 2009, Mr B introduced them to another financial adviser, Mr E, and:*

  > *"[Mr B] explained that he had a better investment opportunity to offer us and both he and [Mr E] from Positive Solutions came to our house and did a presentation via their laptop on Harlequin and the investments available in various Harlequin resorts. Until this point we had not heard of/had no knowledge of Harlequin. Neither Mr B nor Mr E explained the risk level of investing in Harlequin nor did they assess the risk we were prepared to take. They did not give us any terms of business paperwork etc."*

- *Mr B and Mr E told them:*

  > *"The [Harlequin] investment would have a better rate of return [than the UK property they were considering] with guaranteed rental income, a guaranteed mortgage upon completion and finance payments met until completion in late 2013 / early 2014 … Harlequin would fund the interest only mortgage repayments under the finance option and therefore the best way to fund the deposit would be to re-mortgage our own house and use some of the equity. They felt that because of this the investment was a 'no brainer'."*

- *They accepted Mr B's and Mr E's advice, and paid a £1,000 "deposit" for a Harlequin property. (I don't know the exact date of this payment, but I believe it is the "reservation fee" set out in the Harlequin contract described below. That fee was apparently due within seven days of 7 May 2009.)*

- *Between May and September 2009:*

  > *"We approached Britannia and re-mortgaged our home.*
  >
  > *[Mr B] contacted us several times by email (with the Positive Solutions footer on the email) to give further data about St Lucia and to enquire how our mortgage application was progressing."*

- *In September 2009, they received funds from Britannia and paid a further £48,500 to Harlequin (total payment £49,500).*

- *They believed that their Harlequin property would be completed by December 2013, and that at that point Harlequin would "guarantee a 100% mortgage on the purchase price". They would either be able to sell the property at a profit or receive "10% guaranteed returns".*

- *Between October 2009 and January 2013, Harlequin sent them monthly payments which covered the interest on their further advance from Britannia. Since February 2013, they have been funding the interest themselves.*

- *They are concerned that they have lost the whole of the £49,500 they invested, and they also have an ongoing liability to fund the interest on their mortgage.*

When we asked Mr and Mrs M a specific question about the advice they received from Mr B in 2009 – "was it only advice to invest into Harlequin or other type of advice, such as mortgage?" – they said:

> *"It was advice to invest in Harlequin although he [Mr B] did know that we would have to re-mortgage to finance the deposit. He further explained that our re-mortgage payments would be met by Harlequin's finance arrangement".*

We also asked Mr and Mrs M to send us all the correspondence they received from Mr B or Positive Solutions. That correspondence, all of which is in email form, shows that Mr B sometimes forwarded emails he'd received from other people to Mr and Mrs M. The original authors of the emails I've seen were:

- *Mrs M (from her personal email address);*
- *Mr B (from his Positive Solutions email address);*
- *Mr E (again, from his Positive Solutions email address);*
- *An account manager at Marcus James Professional, which I understand was a "distributor" of Harlequin products;*
- *A director of TailorMade Wealth Management Ltd, a company which (at the time) was an 'appointed representative' of another firm; and*
- *The Network Sales Director of Harlequin Property.*

I note:

- *On 23 April 2009, Mrs M sent Mr B some information about her and her husband's credit scores – and promised credit reports to follow.*

- *Mr B wrote to Mrs M on 8 May 2009, apparently after a meeting held on 7 May 2009, to say:*

> *"I hope you were happy with last night, and we [presumably himself and Mr E] answered all your questions. One thing that I forgot to mention, that really cemented my thoughts on Harlequin was that for a client to invest their Pension monies in a SIPP it has to be passed by the FSA who do study all angles thoroughly (probably not as much as you though) and apparently it is one of only a few that has been approved.*
>
> *Please find below the attachments as promised…Another E mail is to follow on the water levels".*

  I understand that Mr B attached some literature (originally provided by Harlequin) to this email.

- *On 8 May 2009, Mr B forwarded an email giving information about "environmental impact analysis and the effect of tidal erosion and global warning" on Harlequin's sites. It appears Mr and Mrs M had asked Mr B questions about water levels and/or flooding risk. Mr B forwarded that question to Mr E, who forwarded it to one of TailorMade's directors, who in turn passed it to Marcus James' account manager. She then forwarded the question to Harlequin's Network Sales Director, who answered it. Harlequin's answer also went through several people and businesses before reaching Mrs M.*

- *On 8 June 2009, Mr B sent Mrs M a Daily Mail [article] dated 22 April 2009, with the headline was "Hot plots of St Lucia". The email chain showed that he'd received the article from TailorMade, who in turn had received it from Marcus James.*

- *Mr B sent another email to Mrs M on 2 July 2009. I believe this was after they paid their £1,000 deposit/reservation fee but before they paid the balance of £48,500. Mr B said:*

> *"I have attached a copy of correspondence I have received from Harlequin last night. It is basically saying that at the end of July the prices are going up by 25% (page 2) meaning that a 2 bedder at £170,000 will be £212,500 therefore your purchase of £165,000 means you have already seen a rise in value of £47,500 nearly all of your deposit".*

- *On 28 July 2009, Mr B forwarded an email from Tailormade to Mrs M. That email contained a link to pictures from a Harlequin launch party.*

Mr B's and Mr E's emails all came from their Positive Solutions' email addresses, and described each of them as an "Independent Financial Adviser" of "Positive Solutions (Financial Services) Ltd". The email footers give Positive Solutions' address and company number, and explain:

> *"Any information contained in this message must not be construed as giving investment advice within or outside the United Kingdom. Please note that email passing through PS servers, may at any point be monitored or intercepted as part of the company's internal security policy".*

In addition to the emails, Mr and Mrs M have provided me with:

- *A 24 April 2009 article from City AM, headlined "Why Caribbean property is such a smart investment". The article said "Reliable returns at worst and major growth at best are reasons clever buyers are looking for a place in the sun". Mr and Mrs M's recollection is that they received the article by email, but I'm not clear about when (or from whom) they received the email.*

- *The "Preliminary Contract for the Sale of Off-plan Property" between Harlequin Resorts (St Lucia) Limited and Mr and M. The contract is dated 7 May 2009, but Mr and Mrs M did not sign it until 1 September 2009. Their signatures were witnessed by Mr B, but the contract does not identify Mr B, or say anything about the capacity in which he was acting. The copy of the contract I have seen is date stamped as received 8 September 2009, but I don't know who received it on that date. (Given Positive Solutions' comments, I think it highly unlikely that the document was received by Positive Solutions on that date – I think it much more likely that the date stamp belonged to Harlequin.)*

  The contract included the following features:

  - *It is a contract between Mr and Mrs M, as "Buyer", and Harlequin Resorts (St Lucia) Limited, the "Seller", entitled "Preliminary Contract for the Sale of Off-plan Property".*

  - *The property in question is the freehold of a ground floor unit in the development known as Marquis Estate, St Lucia. It will comprise two bedrooms, a living room, a bathroom and a terrace and have a built up area of approximately 1139 sq ft. However the Buyer has no claim if the property and the development, as built, differ from the layout plan in dimension or otherwise (clause 7).*

  - *The Buyer agrees to pay a purchase price of £165,000 in five stage payments, linked to the progress of construction.*

  - *On receipt of the purchase price the Seller agrees to sell the Property to the Buyer (clause 2) but the Buyer must first sign a management contract (clause 9.2).*

  - *The management contract will be between the Buyer and a company nominated by the Seller and will provide for the payment of management fees, for the Buyer to have the right to use the property 30 days per year*

and for the management company the balance of the year. The management company will pay the Buyer £16,500 per year in each of the first two years after completion, and thereafter at least 50% of the net income from the property.

- *The Buyer may only assign the property with the Seller's consent, for a price equal to or greater than the offering price for equivalent units in the development, and on terms that bind the assignee to the same obligations as the Buyer.*

- *Promotional material from Harlequin describing "Our Finance Option" (also described as Harlequin's "100% Finance Scheme"). Briefly, Harlequin described the scheme as "an excellent opportunity to invest in a brand new property with only £1,000 required upfront".*

- *The "Agreement for Payment of Interest on Deposit" between Harlequin Property (SVG) Limited and Mr and Mrs M. That contract is dated 5 October 2009, and provides that Harlequin will "pay the repayments due on any loan or other arrangement entered into by [Mr and Mrs M] for the purposes of financing (i) the Deposit (up to a maximum of 30% of the Purchase Price) and (ii) an amount equal to the Reservation Fee". In exchange, Mr and Mrs M agreed to "repay to [Harlequin] to aggregate amount of payments paid by [Harlequin] on [their] behalf" on completion of the sale and purchase of the off-plan property.*

Other than the documents described above, I have not seen any correspondence between Mr B (or Mr E) and Mr and Mrs M in respect of the purchase of their Harlequin investment. I have not seen a fact find or suitability letter, nor have I seen any other documentary evidence setting out why anybody believed that an investment in Harlequin was suitable for Mr and Mrs M in particular. (There is some evidence setting out the perceived benefits of a Harlequin investment in general, but I've seen nothing that linked those perceived benefits to Mr and Mrs M's individual needs.)

I have not seen anything to show whether commission was paid in respect of Mr and Mrs M's Harlequin investment, but I understand that Harlequin usually did pay commission. If either party has any knowledge on that point – even if only to say that they did not themselves receive commission / a commission rebate – I would be grateful for their further comments.

Mr and Mrs M's complaint

Mr and Mrs M complained to Positive Solutions in October 2013. They said they believed Positive Solutions was responsible for the advice they received from Mr B and Mr E. Positive Solutions did not uphold their complaint, and so they referred the matter to our service.

Positive Solutions said:

> *"Any advice [Mr and Mrs M] may have received from Mr B in respect of the Harlequin Property Investment was not provided in his capacity as an authorised individual and/or a representative of Positive Solutions (Financial Services) Ltd. It is likely that this may have been conducted by TailorMade Investments Ltd however this is separate from the adviser's agency with Positive Solutions (Financial Services) Ltd."*

In other words, Positive Solutions says the acts Mr and Mrs M complain about were not the acts of Positive Solutions. As a result, it says the Financial Ombudsman Service cannot consider their complaint.

One of our adjudicators agreed that Mr and Mrs M's complaint was out of our jurisdiction, as did one of our ombudsmen. The matter was then passed to me, for me to make an independent decision about whether the Financial Ombudsman Service has jurisdiction to consider Mr and Mrs M's complaint."

the regulatory background

My provisional decisions also set out the regulatory background to this complaint. Neither party raised any concerns about my description, so again I repeat it here:

> "*I have taken into account the Financial Services and Markets Act 2000 (FSMA), the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ('the RAO'), and the Financial Services Authority's Handbook.*
>
> ***the general prohibition***
>
> *Section 19 of the Financial Services & Markets Act 2000 (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".*
>
> *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).*
>
> *At the time of the events complained about, Positive Solutions was an authorised person. Mr B and Mr E were not authorised persons, and I have seen nothing to suggest that either of them were exempt persons. "Appointed representatives" are exempt persons under FSMA, but Mr B and Mr E were not appointed representatives of Positive Solutions (or of anyone else).*
>
> *If either Mr B or Mr E had carried out a regulated activity on his own behalf by way of business, he would therefore have been in breach of the general prohibition. If Positive Solutions had carried out such activities – either directly or through an agent – its status as an authorised person means it would not have been in breach.*

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."*

Positive Solutions was an authorised person. The act of advising on investments was a controlled function. I consider that Mr B's and Mr E's Registered Individual contracts with Positive Solutions amounted to an arrangement entered into by Positive Solutions in relation to the carrying on by Positive Solutions of a regulated activity.

Positive Solutions was required to take reasonable care to ensure that neither Mr B nor Mr E gave investment advice unless they were acting in accordance with an approval given by the FSA. Positive Solutions therefore arranged for both Mr B and Mr E to be approved by the FSA to perform the controlled functions "Investment Adviser (Trainee)", "Investment Adviser" and then "Customer" in relation to regulated activities carried on by Positive Solutions.

At the time of the events Mr and Mr M complain about, neither Mr B nor Mr E were approved by the FSA to carry out any controlled functions on behalf of anyone other than Positive Solutions.

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

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."*

(The provisions of section 150(1) of FSMA are now substantially contained in section 138D of FSMA.)

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 and Mrs M complain about was COBS 9.2.1R, which said:

> *"A firm must take reasonable steps to ensure that a personal recommendation, or a decision to trade, is suitable for its client."*
>
> *A "personal recommendation" included advice given to a person in their capacity as investor on the merits of their buying a "security or relevant investment" as specified in article 53 of the RAO.*
>
> *Section 150(1) was a consumer protection provision, relating to regulatory rules which were themselves created for the purpose of consumer protection. Together they created a statutory right to damages for breaches of certain rules.*"

Having set out both the factual and the regulatory background, I have gone on to consider whether the complaint Mr and Mrs M have made falls within the jurisdiction of the Financial Ombudsman Service.

the compulsory jurisdiction

The Financial Ombudsman Service can consider a complaint under its compulsory jurisdiction "*if it relates to an act or omission by a firm in carrying on one or more of [a list of activities, including regulated activities], or any ancillary activities, including advice, carried on by the firm in connection with [those activities]*" (DISP2.3.1R).

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

Positive Solutions is clearly a "firm" under our rules. All parties now agree that Mr and Mrs M's investment in the Harlequin property development was an "*investment*" under the definition set out in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ('the RAO'). They also agree that, if Mr B and Mr E did give investment advice, then the act Mr and Mrs M complain about involved the carrying on of the regulated activity of advising on investments. The dispute here is about two things:

- Firstly, did Mr B and Mr E give any investment advice at all to Mr and Mrs M?
- Secondly, if Mr B and Mr E did give investment advice, is Positive Solutions responsible for that act?

Mr and Mrs M's recollection is that they were advised by Mr B and Mr E. They say Mr B and Mr E came to their house and showed them a presentation on a laptop.

The contemporaneous email evidence does not explicitly that say Mr B and Mr E advised Mr and Mrs M to invest in Harlequin, but I consider that it is consistent with that conclusion. In my view, Mr B's comment about the alleged actions of the FSA "*cementing [his] thoughts on Harlequin*" can only be read as Mr B endorsing Harlequin as a worthwhile investment for Mr and Mrs M.

I put very little weight on Positive Solutions' comments about whether it believes an investment advice process took place. Unlike Mr and Mrs M, the people now responding on Positive Solutions' behalf were not present at the time of the sale, and have no direct knowledge of the matter.

I acknowledge that Positive Solutions believes I have given undue weight to Mr and Mrs M's recollections. It says:

> "*The Ombudsman needs to account, in particular, for the fact that whilst Mr & Mrs M may have received a personal recommendation to invest in Harlequin it is quite possible that this recommendation came not from Mr B and Mr E but from others entirely unrelated to Positive Solutions such as from Marcus James Professional or TailorMade Wealth Management Ltd…*
>
> *If Mr B and Mr E had, in fact, provided Mr & Mrs M with investment advice it is fair and reasonable to assume they would have followed at least a semblance of the necessary process required not only by Positive Solutions but also by the FCA. Whilst we accept that the regulated activity of advising on investments can be done poorly or even very badly, the complete absence of any advice process (such as fact finds, reason why letters or any other documentation of any kind) is itself evidence that no advice was in fact given by Mr B and Mr E … That absence of contemporaneous evidence of itself contradicts the less reliable evidence put forward by Mr & Mrs M that they received a personal recommendation from Mr B or Mr E*."

Whilst I cannot completely exclude the possibility that Mr and Mrs M received advice from Marcus James or TailorMade, in the circumstances I consider that extremely unlikely.

I have seen no evidence to suggest that Mr and Mrs M were advised by anyone other than Mr B and Mr E. If Mr and Mrs M had been advised by another party, then it is difficult to see why Mr B or Mr E would have become involved with this transaction at all. I am aware that TailorMade advised a significant number of people to invest in Harlequin, and I believe it may have been the biggest single seller of Harlequin investments. But that does not mean that TailorMade or Marcus James gave advice to Mr and Mrs M in particular. I find Mr and Mrs M's recollections as to who advised them to be both plausible and persuasive.

I also note that when Mrs M had a question about water levels and flooding risk, she asked her question of Mr B. Mr B forwarded her question to Mr E, who forwarded it to TailorMade, who forwarded it to Marcus James, who forwarded it to Harlequin. Harlequin's answer went back to Mrs M broadly through the reverse route. If Mr and Mrs M had been advised by Marcus James or TailorMade, then it is difficult to see why she wouldn't have asked her question directly of the person who advised her.

Similarly, whilst I cannot completely exclude the possibility that Mr and Mrs M received no advice at all, again I consider that extremely unlikely.

I have seen nothing to suggest that Mr and Mrs M had any previous experience of unregulated investment schemes of any type. Even if they had decided entirely of their own volition to invest in Harlequin – which I think unlikely, given the evidence in this case – they discussed Harlequin with Mr B and Mr E before they made the investment. I think it exceptionally unlikely that those discussions, with people who described themselves as "*independent financial advisers*", would not have involved financial advice.

Put another way, if Mr and Mrs M had decided entirely of their own volition to invest in Harlequin, there would have been no need for the involvement of Mr B and Mr E.
Mr and Mrs M say they hadn't even heard of Harlequin until Mr B and Mr E recommended it to them, and I accept their evidence on that point.

Positive Solutions is right to say that I have not seen a copy of a fact find, suitability letter, or any other documentation explaining why Mr B and Mr E gave the advice they did. It is possible that Mr B and Mr E created some documentation, but I have not been able to ask them for evidence. But even if they didn't produce any documentation, that does not imply that they didn't provide advice. Providing investment advice by way of business is a regulated activity regardless of whether or not that advice is documented.

Taking into account the circumstances, the documentary evidence in the form of emails, and Mr and Mrs M's comments, I consider it much more likely than not that Mr B and Mr E did advise Mr and Mrs M to invest in Harlequin. That means the regulated activity of advising on investments took place.

I have gone on to consider whether Positive Solutions is responsible for Mr B and Mr E's investment advice.

In my provisional decisions, I identified four ways in which Positive Solutions might be responsible – actual authority, apparent authority, vicarious liability and statutory responsibility. I concluded that neither actual nor apparent authority operated such as to fix Positive Solutions with liability for the actions of its agents. But I was satisfied that Positive Solutions was vicariously liable for Mr B and Mr E's actions. Further, I was satisfied that Positive Solutions had statutory responsibility under s150 of FSMA.

I have reconsidered every aspect of this complaint, but my conclusions on responsibility remain as I set out in my second provisional decision. There is no longer a dispute on the issues of actual or apparent authority, but I will briefly repeat my findings on those issues. I will explain my reasoning on vicarious liability and s150 in more detail.

actual authority

Positive Solutions says it did not give Mr B and Mr E its actual authority to promote, advise, or do anything else in relation to Harlequin. I have seen nothing to suggest otherwise, and I accept Positive Solutions' evidence on that point.

I note Mr and Mrs M's representative's view that once a principal has given its agent actual authority to give advice on one investment product, that agent then has actual authority to advise on all investment products. But I see nothing in the case law or the regulations to support that view, and I do not agree with it.

apparent authority

In the particular circumstances of this complaint, I am satisfied that Positive Solutions did not represent to Mr or Mrs M that Mr B or Mr E had its authority to recommend Harlequin investments on its behalf, or that either Mr B or Mr E had Positive Solutions' authority to arrange for Mr and Mrs M to borrow from Harlequin. That means there is no need for me to consider whether Mr and Mrs M relied on such representations.

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, and neither Mr B nor Mr E were employees of Positive Solutions. However, the employment relationship is not the only relationship capable of giving rise to vicarious liability.

I acknowledge that Positive Solutions believes I should not be addressing the issue of vicarious liability at all. It has referred me to *Quinn v CC Automotive [2010] EWCA Civ 1412*, and suggested that case shows that "*in a commercial agency case, vicarious liability adds nothing to the concepts of actual and ostensible authority which are the governing principles*". I have considered that point carefully, but I do not agree with it. I note that in *Quinn*, the Court of Appeal saw no need to distinguish between the terms "*employer/employee*" and "*principal/agent*" when summarising the authorities. The case was one where an employer was held vicariously liable for the deceit of its employee, a salesman. It doesn't establish any special rule relating to commercial agencies.

I've not seen in the case law any decision holding that, whenever a relationship can be described as an agency or commercial agency, vicarious liability can only be established on the basis of actual or ostensible authority. Indeed, the relevant relationship in the leading case of *Dubai Aluminium v Salaam* (between partners in a professional firm) was described as "*essentially one of agency*" (see paragraph 122) yet lays down a general test for vicarious liability, recently reaffirmed by the Supreme Court, which is not based on actual or ostensible authority. Many commercial agents are of course set up and run as independent contractors and their principals won't be vicariously liable for that reason. But in a case where the agent is *not* an independent contractor but has a relationship with the principal akin to employment, I can't see why the courts would decline to apply the general test for vicarious liability.

I am therefore satisfied that the absence of apparent authority is not the end of the matter, and I have gone on to consider vicarious liability based on general principals, in detail. Having done so, I remain satisfied that Positive Solutions is vicariously liable for Mr B and Mr E's actions in recommending that Mr and Mrs M invest in Harlequin.

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

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

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

the stage one test

In my first provisional decision, I concluded that the stage one test was satisfied. I said:

> *"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 v Ministry of Justice [2016] UKSC 10], 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 do not have much information about Positive Solutions' relationships with Mr B and with Mr E. If Positive Solutions wishes to provide further information, I will of course consider it. But on the basis of the limited information I have, I am satisfied that in giving investment advice to Mr and Mrs M, Mr B and Mr E were carrying on activities as an integral part of the business activities carried on by Positive Solutions. I say that because:

- *I believe that at the time, Positive Solutions' stated purpose was "To 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.*

- *Positive Solutions' business model was that it gave financial advice itself, through its Registered Individuals (people like Mr B and Mr E).*

- *Positive Solutions' 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 Registered Individuals gave investment advice on behalf of Positive Solutions, carrying out Positive Solutions' business activities, those Registered Individuals were not in breach of the general prohibition either.*

- *Mr B and Mr E were both Positive Solutions Registered Individuals. Positive Solutions had given them permission to carry out the controlled function "Investment Adviser (Trainee)" and then "Investment Adviser", then "Customer" on behalf of Positive Solutions. Positive Solutions had therefore engaged Mr B and Mr E 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 and Mrs B complain of took place, 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".*

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

I am also satisfied that Mr B's and Mr E's activities were not entirely attributable to the conduct of a recognisably independent business of their own or of a third party. I note:

- *Mr B and Mr E were both agents of Positive Solutions, and that was the capacity in which both of them came into contact with – and dealt with – Mr and Mrs M.*

- *Mr and Mrs M told us that they understood they were dealing with Positive Solutions. In the circumstances, I am satisfied that their belief was reasonable. I have seen nothing that suggests Mr or Mrs M should have had any reason to suspect that Mr B or Mr E might be working for any other party.*

- *Positive Solutions had obtained regulatory approval for Mr B and Mr E to perform customer facing functions for Positive Solutions in relation to the conduct of Positive Solutions' investment advisory business.*

- *The matter complained of corresponds to that approval – it is a complaint about investment advice given to existing customers of Positive Solutions by Mr B and Mr E.*

- *Whilst it is possible that Mr B and/or Mr E might have had other agencies or businesses, I have not been provided with specific evidence that they did. So far as I am aware, the only business that they both carried on was Positive Solutions' business.*

Finally, I consider that in allowing Mr B and Mr E to give investment advice on its behalf, Positive Solutions was obviously creating the risk that they might make errors or act negligently in doing so. Positive Solutions assigned to Mr B and Mr E the customer facing task of giving regulated financial advice to Positive Solutions' customers, and it is always possible for that task to be carried out negligently.

My conclusions on vicarious liability may have been different if Mr B and Mr E had been appointed representatives of Positive Solutions. I note that in [Anderson v Sense Network Ltd [2018] EWHC 2834 (Comm)], a case involving a corporate appointed representative, Midas Financial Solutions (Scotland) Ltd, David Richards LJ said:

> *"In my judgment, there is no substance in the appeal on vicarious liability. The judge [at first instance] made clear findings that Midas was carrying on its own business and it is not open to the appellants to go behind those findings. Sense [the principal] also carried on its own business which comprised providing the regulatory umbrella for independent financial services firms. When Midas and its advisors provided financial advice, they were doing so as*

part of Midas' own recognisably independent business. In no sense could it be said that they were carrying out activities assigned to them by Sense as part of Sense's business and for Sense's benefit."

Here, Positive Solutions' business (in respect of Mr B and Mr E) was not to provide the regulatory umbrella for independent financial services firms. Instead, Positive Solutions was itself the independent financial services firm. Positive Solutions had arranged for Mr B and Mr E to be approved by the FSA to perform various controlled functions in relation to regulated activities carried on by Positive Solutions. Those controlled functions – which included the giving of regulated investment advice – were activities assigned to Mr B and Mr E by Positive Solutions as part of Positive Solutions' business and for Positive Solutions' benefit."

In my second provisional decision, I recorded Positive Solutions' response and made further comments on the stage one test. I said:

"Positive Solutions did not accept my provisional findings about the stage one test. It said:

"The FOS's provisional decision is framed on the apparent basis that the Cox line of authority applies. It is said that if it did not the Court of Appeal would have said so in [Frederick v Positive Solutions (Financial Services) Ltd [2018] EWCA Civ 431] (and presumably also in Anderson). This demonstrates a complete misunderstanding of the way in which the Court of Appeal decides appeals. In each of those cases the Court did not rule on the application of Cox because it was unnecessary to do so, since the appeals failed even if Cox applied. Nothing can be taken from this: and, pertinently, it is to be noted that in Cox itself Lord Reed specifically stated that nothing in his judgment applied to the law of principal and agent (paragraph 15). So, properly understood, the law is that Cox is not relevant to the present circumstances.

It is perfectly clear that [Mr B and Mr E] were not acting on behalf of Positive Solutions and therefore must have been acting independently. On the FOS's own findings there is no actual or apparent authority in this matter and there is nothing to show that Positive Solutions represented to Mr and Mrs M that [Mr B and Mr E] were acting on their behalf (as they were not) and Mr and Mrs M would have or should have understood that Positive Solutions was not involved:

(a) Mr and Mrs M have no documentation from Positive Solutions;

(b) The process was completely different from that they experienced when they were provided with remortgage advice in 2008 in which they received a recommendations letter and an illustration/ key facts documentation on Positive Solutions' headed paper;

(c) Mr and Mrs M arranged their own mortgage with their existing building society meaning neither [Mr B nor Mr E] filled in any documentation;

(d) Mr and Mrs M were in direct contact with Harlequin to arrange payments to cover their deposit, again showing that neither [Mr B nor Mr E] filled in any documentation; and

(e) Mr and Mrs M had holidays to the flag ship resort of Buccament Bay; something one would not expect with a regulated investment."

I do not agree that Cox is irrelevant to the present circumstances. But I do accept that it must now be read in light of the later Supreme Court decision in Barclays Bank plc v Various Claimants [2020] UKSC 13 (released after I issued my first provisional decision). In that case Lady Hale reiterated that, when faced with a case where vicariously liability may be imposed:

> *"The question therefore is, as it has always been, whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment with the defendant. In doubtful cases, the five "incidents" identified by Lord Phillips [in Various Claimants and Catholic Child Welfare Society and Others [2012] UKSC 56 ('the Christian Brothers case')] may be helpful in identifying a relationship which is sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability. Although they were enunciated in the context of non-commercial enterprises, they may be relevant in deciding whether workers who may be technically self-employed or agency workers are effectively part and parcel of the employer's business. But the key, as it was in Christian Brothers, Cox and Armes, will usually lie in understanding the details of the relationship. Where it is clear that the tortfeasor is carrying on his own independent business it is not necessary to consider the five incidents."*

As to Positive Solutions' point that Mr and Mrs M do not have anything on Positive Solutions' notepaper relating to the recommendation that they invest in Harlequin, I do not consider that is determinative. Nevertheless I accept it is relevant to the stage two test – and I discuss it further below. However, I do not consider it relevant to my analysis of the relationship between Mr B (and Mr E) and Positive Solutions. Similarly, I do not consider that the process Mr B and Mr E carried out in this individual case, or Mr and Mrs M's dealings with their mortgage lender or with Harlequin, has any bearing on my analysis of Positive Solutions' relationship with its agents for the purpose of stage one.

I am satisfied that this is a case in which Mr B and Mr E were not carrying on their own independent business. For the reasons I gave in my first provisional decision, Mr B and Mr E's activities were part and parcel of Positive Solutions' business. The controlled function of giving regulated investment advice was an activity assigned to Mr B and Mr E by Positive Solutions as part of Positive Solutions' own business and for Positive Solutions' benefit.

In my first provisional decision I cited the FCA guidance that a person must perform a role very similar to that of an employee to be carrying on the principal's business. That guidance fits very well with how the Supreme Court's framed the question, and in particular the distinction between "whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment with the defendant". In the present case, as I have said, I am satisfied the relationship between Mr B and Mr E and Positive Solutions was that they were carrying on Positive Solutions' business, as opposed to business on their own account, and I am also satisfied that in doing so their relationship was akin to employment.

In these circumstances, I have no doubt that a relationship existed between Mr B (and Mr E) and Positive Solutions such that Positive Solutions may be held vicariously liable for their actions. But even if this was one of the "doubtful cases" that Lady Hale referred to, I consider that the five incidents Lord Phillips identified would still point towards the relationship being one to which vicarious liability could apply. I note:

- *Positive Solutions is considerably more likely to have the means to compensate Mr and Mrs M than Mr B or Mr E. Positive Solutions can certainly be expected to have insured against that liability, and may even have been required to hold professional indemnity insurance as a condition of its authorisation by the Financial Services Authority.*

- *Positive Solutions had assigned to Mr B and Mr E the activity of giving investment advice. The act Mr and Mrs M complain of – the giving of unsuitable investment advice – was therefore carried out as a result of activity Mr B and Mr E undertook on Positive Solutions' behalf.*

- *Mr B and Mr E's activity was very much part of Positive Solutions' business activities. Positive Solutions' whole purpose was to "help our clients understand, protect and increase their assets" by giving "impartial, independent financial advice".*

- *In assigning to Mr B and Mr E the activity of giving investment advice on its behalf, Positive Solutions created the obvious risk that they would do so negligently.*

- *Mr B and Mr E were to a very large degree under the control of Positive Solutions. The FSA's rules required Positive Solutions to properly supervise all of its Approved Persons, including Mr B and Mr E. In addition, the Registered Individual Agreement between Mr B (and Mr E) and Positive Solutions gave Positive Solutions extensive rights to control their conduct. For example, the contracts allow Positive Solutions to specify how its Registered Individuals were to act, and to approve the content of their advertising. The contracts made clear that any act or omission of the Registered Individual "shall be treated as an act or omission of [Positive Solutions]" and explained that meant "it is therefore imperative that the Registered Individual adhere to the strict rules laid down by the FSA and the Company's Procedure manuals".*

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

I note that Positive Solutions has suggested that "*it is only where the worker is prevented from being an employee by some mere "technical" matter to do with their status that vicarious liability is imposed*". But I do not accept that the test involves a consideration of whether a worker is in some way prevented from being an employee. The test is simply

whether the relationship between the wrongdoer and the principal is one that is "*akin to employment*".

Positive Solutions has also suggested that I was wrong to take into account the contents of PERG. It says "*the regulator's guidance is something to be taken into account in dealing with the merits of a complaint which is within jurisdiction. It cannot be used to determine a question of law*".

In my view, deciding whether Mr B's (and Mr E's) relationship with Positive Solutions was akin to employment requires me to consider the facts of the case – it is not solely a question of the law. But even if it was solely a question of law, I see no reason why I should not take into account the regulator's guidance. I am not bound by the guidance in PERG, and I am mindful that it was published after the events Mr and Mrs M complain of. But I do note that the guidance in PERG is consistent with my own conclusions as to the nature of Mr B's (and Mr E's) relationship with Positive Solutions. I also note that courts are not bound by the regulator's guidance either, but they nevertheless may choose to refer to it (see, for example, *FCA v Asset Land* 2016 UKSC 17 at [59] and *Personal Touch Financial Services v Simply Sure* 2016 EWCA Civ 461).

In any event, I would have reached the same findings on the stage one test even if the FCA had not published any guidance on this issue. I consider that the case law alone leads to the conclusion that Mr B's (and Mr E's) relationship with Positive Solutions was indeed "*akin to employment*". In my view, the regulator's guidance simply echoes the common law test. The common law test seems to me to be just as applicable in the context of financial services as it is elsewhere.

Having carefully considered Positive Solutions' further comments, I have very little to add to the explanation I gave in my provisional decisions. For the reasons I've already given, I remain satisfied Mr B and Mr E's relationship with Positive Solutions was akin to an employment relationship, and that the relationship in question was capable of giving rise to vicarious liability.

the stage two test

In my first provisional decision, I concluded that the stage two test was satisfied. I said:

> "*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 v WM Morrison Supermarkets plc [2016] UKSC 11], 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 the actions of Mr B and Mr E are so closely connected with the business activities of Positive Solutions as to make it just to hold Positive Solutions liable. I note:*

- *Mr B and Mr E were giving investment advice in relation to Harlequin. I consider that activity was clearly closely connected to the business activities of Positive Solutions, a firm which provided financial advice to its customers.*

- *In Cox, the court suggested it would have been unreasonable and unfair for Mrs Cox's ability to receive compensation for the injury she suffered 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 I see no way in which Mr and Mrs M could have discovered Mr B's or Mr E's employment status. (I am aware that Mr B's and Mr E's contracts said he had to make their status as a Registered Individual clear – but even if they had done that, the term 'Registered Individual' did not imply anything about their employment status).*

- *The agency contracts say Positive Solutions will not be responsible if Mr B or Mr E act outside their authority. But those contracts also say that any act or omission of the Registered Individual will be treated as an act of Positive Solutions. In my view, those two terms conflict. I do not consider it would be fair for Positive Solutions to be entitled to rely on one but ignore the other.*

- *So far as I am aware, Positive Solutions received no benefit from the acts Mr and Mrs M complain about. In particular, I have seen nothing to suggest that it received 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. In Frederick, Positive Solutions was found not to be vicariously liable despite having received commission. The commission issue is simply not determinative.*

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

However, the facts in Frederick are so different to the facts here that I do not believe that case assists me in determining whether Positive Solutions is vicariously liable for the acts Mr and Mrs M complain about. In particular, I note:

- *In Frederick, the claimants were approached by a Mr Qureshi – who was not a Registered Individual of Positive Solutions. 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 and Mrs M clearly had personal dealings with Mr B and Mr E, who were both Positive Solutions' Registered Individuals. They met with Mr B and Mr E and were provided with investment advice. Mr B and Mr E carried out business activities of a type that had been specifically assigned to them by Positive Solutions, and which they could only (lawfully) perform on behalf of Positive Solutions.*

- *Mr Warren submitted "dishonest and fraudulent" mortgage applications for loans on behalf of the claimants. Mr and Mrs M make no allegation of fraud. They simply complain about the mis-selling of an investment. I consider that their allegations are of negligence. They say that Mr B and Mr E were incompetent in respect of the investment advice given to them, but they do not say that Mr B or Mr E were dishonest. There is therefore no need for me to consider whether Positive Solutions would have been vicariously liable for Mr B's or Mr E's dishonest acts.*

- *Mr Warren was only able to submit the mortgage applications in the way he did because he was an agent of Positive Solutions. 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 and Mrs M say that they suffered losses as a direct result of the advice given to them by Mr B and Mr E, in their capacity as Positive Solutions independent financial advisers, to invest in Harlequin*."

Positive Solutions did not accept my conclusions about the stage two test. It said:

> "*As to the second stage of Cox the analysis again lacks any rational basis and misstates the effect of the authorities:*
>
> 1. *we would submit that no investment advice was actually given in this matter (Mr and Mrs M arranged their own mortgage and dealt directly with Harlequin regarding payments), but in any event such advice activities were prohibited by Positive Solutions and they were fraudulent;*
>
> 2. *the question of whether Mrs Cox could distinguish a prisoner from a fellow employee cannot possibly be relevant – it is entirely unclear to Positive Solutions what point the decision is trying to make, here;*
>
> 3. *contractual terms as between the agent and principal are not relevant – Frederick at paragraph [71]; and*
>
> 4. *as to commission, in Frederick Positive Solutions did not receive and retain commission. It placed the commission into a suspense account and released it only when induced to do so by further fraud (see paragraph [70]).*
>
> *Further this case substantially resembles Frederick in that there was no semblance of an advice process, and in particular no reasons why letter or fact find process and indeed no documentation at all.*"

In my second provisional decision, I added:

> *"I have carefully considered Positive Solutions' comments, but I remain satisfied that Mr B and Mr E did carry out an advice process. There were serious deficiencies in that advice process, but nevertheless I am satisfied that Mr B and Mr E made a personal recommendation that Mr and Mrs M should invest in Harlequin.*

As I recorded in my first provisional decision Positive Solutions' position is that it only authorised its registered individuals to give advice on products provided by institutions it had approved and it had not approved Harlequin and had no terms of business in place with Harlequin. I have not been provided with evidence that Positive Solutions had prohibited Mr B or Mr E from recommending Harlequin in any more specific way than that when they advised Mr and Mrs M. However, the fact a principal specifically prohibits its agent from carrying out a particular activity does not prevent the principal from being held vicariously liable for its agent's actions. As Lord Nicholls explained in Dubai Aluminium, "agents may exceed the bounds of their authority or even defy express instructions" and as a result, "the law has given the concept of 'ordinary course of employment' an extended scope". That does not mean that the contractual terms as between the agent and the principal are "irrelevant" – clearly they are part of the relevant considerations – but they are not the determining factor.

I do not consider this to be a case of fraud. Neither Mr nor Mr M allege dishonesty on the part of Mr B or Mr E. They say the advice they received was unsuitable, but they do not allege fraud. This is not a case where Mr B and Mr E simply pocketed Mr and Mrs M's money. Mr and Mrs M's money was invested – however unwisely – in the way Mr B and Mr E recommended.

However, I consider that Positive Solutions made a legitimate criticism when it questioned my comment that Mrs Cox could not reasonably have distinguished a prisoner from an employee. I was attempting to make a point about whether it was fair for Positive Solutions to be held vicariously liable in these circumstances. But, taking into account Lord Reed's comments in Morrisons, I consider that I may have misapplied the stage two test in my first provisional decision to the extent that it is now clear that my own sense of justice is not relevant when answering the stage two test.

I have therefore considered the stage two test afresh. In doing so, I must answer two questions:

- *What was the field of activities Positive Solutions had assigned to Mr B and Mr E?*

- *Was the act complained of so closely connected with the acts Mr B and Mr E were authorised to do such that, for the purposes of Positive Solutions' liability to Mr and Mrs M, that act may fairly and properly be regarded as having been done by Mr B and Mr E while acting in the ordinary course of their duties for Positive Solutions?*

In Group Seven Ltd v Notable Services [2019] EWCA Civ 614, the Court of Appeal considered the scope of the field of activities assigned to the wrongdoer in that case. It said:

> *"we agree, nevertheless, with [counsel for Notable Services LLB] that when deciding what a wrongdoer's field of activities is it is relevant, in general terms, to consider that person's contract of employment and any directives about the way in which he should carry out his functions which form part of the terms and conditions. However, this is only the beginning of the enquiry and cannot be determinative or prescriptive. If it were, the scope of vicarious*

> *liability would be narrow indeed and the majority of the central cases in this area of the law would have been decided differently. The question must be addressed broadly. As Lord Nicholls explained in the Dubai Aluminium case at [22] quoted by Lord Toulson in Mohamud at [41], "agents may exceed the bounds of their authority or even defy express instructions" and as a result, "the law has given the concept of 'ordinary course of employment' an extended scope. …*
>
> *Secondly, we agree … that the usual authority of someone in the role of the wrongdoer is of some relevance when reaching a conclusion about the nature of a job and the field of activities entrusted to him or her. However, it is not the complete answer any more than the precise terms of his contract of employment can be. Moreover, usual authority must not displace the approach described by Lord Toulson in Mohamud. The question must be addressed broadly in the light of all of the circumstances of the case. It is important not to seek to import a yardstick of authority into that broad enquiry. As Lord Nicholls stated in the Dubai Aluminium case at para [23], albeit in the context of actual authority, "authority is not the touchstone."*
>
> *Thirdly, we also agree that the nature of the job and whether there is sufficient connection between it and the wrongdoing must be considered from an objective standpoint, viewed in the light of all the circumstances. To put it another way, the question should be addressed from the perspective of the reasonable observer with knowledge of the relevant context. It seems to us that that is inherent in Lord Toulson's criticism and analysis of the Australian case of Deatons Pty Ltd v Flew (1949) 79 CLR 370 at [29] of his judgment in Mohamud."*

The above passage shows that, contrary to Positive Solutions' representations, contractual terms can be relevant, at least as the beginning of an enquiry, as to the field of a wrongdoer's activities; and similarly the usual authority of the wrongdoer; but that the nature of the agent's job and of the connection between it and wrongdoing is a wider enquiry, which depends on all the circumstances viewed objectively. I acknowledge that Group Seven was decided before [WM Morrisons Supermarkets plc v Various Claimants [2020] UKSC 12, and *Barclays Bank plc v Various Claimants [2020] UKSC 13], but I consider that I should similarly approach the question of the scope of the field of activities assigned to Mr B and Mr E in a broad, non-technical way.*

Here, Mr B and Mr E were contracted to give investment advice on behalf of Positive Solutions. They appeared on the Financial Services Authority's Register as 'approved persons' able to give such advice on Positive Solutions' behalf. For the purposes of the application of the stage two test to Mr and Mrs M's complaint, I consider that the field of activities assigned to Mr B and Mr E by Positive Solutions should be described as the giving of investment advice.

In considering the 'close connection' part of the test, bearing in mind the wide range of factors that have been considered relevant in the decided cases concerning liability for misadvice/misstatements such as Group Seven and Kooragang v Richardson & Wrench [1982] AC 462, I consider that there are factors in this case pointing both toward and against holding Positive Solutions vicariously liable for the actions of its agents. I note:

- *This complaint is about the investment advice Mr B and Mr E gave to Mr and Mrs M.*

- *The advice given was not authorised by Positive Solutions, nor (from the perspective of an expert in such matters) was it part of the usual authority of an IFA.*

- *Mr B and Mr E were outwardly purporting to act on behalf of Positive Solutions, and Mr B used his Positive Solutions email address to correspond with Mrs M.*

- *Mrs M told us that she approached Mr B because he had previously helped her with a mortgage. Everyone agrees that he was acting on behalf of Positive Solutions at the time. She did not approach him because he was a friend or a relative; she approached him because she was satisfied with the professional advice he had previously given on behalf of Positive Solutions. That means the existing relationship between Mrs M and Mr B was that of customer and Positive Solutions' adviser.*

- *Mr B and Mr E had agreed with Positive Solutions that they would take various steps when giving investment advice on behalf of Positive Solutions (including, but not limited to, providing consumers with Terms of Business and a written statement of the reasons for their advice). Mr B and Mr E did not follow that process. Nor did they generate documents for Mr and Mrs M on Positive Solutions headed notepaper.*

- *I would not expect an ordinary consumer in Mr and Mrs M's position to have noticed the deficiencies in the advice process. Mrs M already knew Mr B, because he'd given previously given her advice (on Positive Solutions' behalf) about an unregulated buy-to-let mortgage. I wouldn't expect Mr or Mrs M to have known that Mr B had to follow different rules and contractual agreements depending on whether the advice he gave was regulated or unregulated.*

- *I see no way in which Mr or Mrs M, or a reasonable consumer in their position, could possibly have known that the investment advice they received from Positive Solutions' investment advisers was not in fact authorised by Positive Solutions, or was outside an IFA's usual authority. Even if they had consulted the Financial Services Authority's Register, they would not have seen any limits on the scope of Mr B or Mr E's authority to give investment advice. Positive Solutions treated the contracts between itself and its Registered Individuals as confidential matters, so Mr and Mrs M would not have been aware of the contents of those agreements.*

- *So far as I am aware, Mr B and Mr E only had one principal – Positive Solutions. Certainly Positive Solutions was the only principal a reasonable consumer in the position of Mr and Mrs M would have seen if they had looked up Mr B and Mr E on the FSA's Register. This is not a case like Kooragang ,*

where the agent/employee had dual, conflicting, employments. Instead, it is a case where the only way Mr B and Mr E could have lawfully given advice at all was by acting on behalf of Positive Solutions. If they had given advice on their own behalf, or on behalf of another third party, they would have been in breach of the general prohibition.

- *I have considered the issue of commission carefully. I consider it very likely indeed that Mr B and Mr E received commission for Mr and Mrs M's Harlequin investment (because I am aware, in general, that Harlequin usually paid commission). Positive Solutions says it did not receive any commission for the investment, and I accept its evidence on that point. That means Mr B and Mr E benefitted financially from the advice they gave, but Positive Solutions did not. If Positive Solutions had benefitted financially, that would have been a factor pointing towards its being vicariously liable. But the absence of a benefit does not point the other way. In Kooragang, the Privy Council made clear that a principal may be vicariously liable even if an agent/employee committed a wrong solely for his own benefit.*

- *The Supreme Court considered the position of a wrongdoer's motive in Morrisons. It made clear that the wrongdoer's motive is a relevant consideration. Here, it is not possible for me to ask Mr B or Mr E what their motive was (and given the time that has passed it is unclear how much value their evidence would have even if I could ask them). But I can infer their motive from their actions. There is nothing here to suggest that Mr B or Mr E had any intention to harm Positive Solutions, Mr M, Mrs M, or anyone else. Whilst both financial advisers should have been aware of the high risk nature of the investment they recommended, they would not have known that it would ultimately fail. In the circumstances, I think it is most likely that Mr B and Mr E had a very simple motivation – they wanted to earn commission and make money, and they probably thought that the investment was a sound one.*

- *The commission Mr B and Mr E received did not follow the route contractually agreed between Positive Solutions and its agents. The commission should have been paid to Positive Solutions directly, and then passed on (at least in part) to Mr B and Mr E. Alternatively, if it had been paid to Mr B or Mr E directly, they should have declared it to Positive Solutions. This would not have been known to a reasonable consumer in Mr and Mrs M's position.*

Put simply, I consider that the field of activities Positive Solutions had assigned to Mr B and Mr E was that they should give investment advice to Positive Solutions' customers. What happened here is that Mr B and Mr E gave investment advice to Mr and Mrs M. Clearly there were irregularities with both the investment advice and the method of payment for the advice. But having taken all the evidence into account, I am satisfied that the investment advice complained of was indeed so closely connected with the acts Mr B and Mr E were authorised to do such that, for the purposes of Positive Solutions' liability to Mr and Mrs M, that advice may fairly and properly be regarded as having been done by Mr B and Mr E while acting in the ordinary course of their duties for Positive Solutions.

> *For the reasons given above, I am therefore satisfied that Positive Solutions is vicariously liable for the investment advice Mr B and Mr E gave to Mr and Mrs M about Harlequin.*"

Positive Solutions does not accept my findings about the stage two test. Briefly, it says:

- There is a "*clear and obvious*" conflict between two of my findings. It is not logical to say *both* that advice given on Harlequin fell outside the usual scope of a financial adviser's authority *and* that the same advice was so closely connected to the acts Mr B and Mr E were authorised to do that Positive Solutions should be held liable for it.

- Positive Solutions had no real control over any advice Mr B and Mr E might have given about Harlequin, and no means of controlling such advice.

- Positive Solutions did not "assign" the activity of giving investment advice to Mr B and Mr E. Instead, Mr B and Mr E approached Positive Solutions because they "*wished to set up in business in the provision of investment advice and elected to become agents of Positive Solutions in order to benefit from the regulatory authorisation that would provide*".

- It cannot reasonably be said that Mr B and Mr E were acting in the furtherance of Positive Solutions' business, given that: they knew they were acting outside of the activities they had been authorised to carry out; Positive Solutions would never receive any remuneration or other benefit in respect of the activities; and Positive Solutions could not control the advice and had no record of it.

I do not accept that there is a conflict between my findings on apparent authority and my findings on vicarious liability. The Court of Appeal has specifically stated in *Group Seven* (as cited above) that the usual authority of an agent, though relevant, is *not* a complete answer when it comes to vicarious liability and must not displace the test for vicarious liability in the case law.

I do acknowledge that Positive Solutions' position is that, in an agency relationship like this one, there can be no vicarious liability in the absence of authority. But for the reasons I've explained above, I am satisfied that Positive Solutions is wrong on that point. It is appropriate for me to consider vicarious liability even in a case where there is no authority of any kind.

There are of course situations where the same facts that led a judge (or an ombudsman) to the conclusion that a principal is liable by reason of apparent authority also led that judge (or ombudsman) to the conclusion that a principal is liable by reason of vicarious liability. But I do still need to consider the two issues separately. In this particular case, as I have said there are factors pointing both towards and against holding Positive Solutions liable for the acts of its agents. Mr B and Mr E's lack of authority to do what they did is only one relevant consideration amongst many.

The degree of control Positive Solutions had over Mr B and Mr E's work is clearly a relevant factor, but it is not determinative. Positive Solutions set out various steps for Mr B and Mr E to take when giving advice and receiving commission and it had the contractual right to hold them to its procedures. The steps it took to check and enforce compliance with those

procedures were matters for Positive Solutions. For instance, it could (as was noted in the footers to Mr B and Mr E's emails) have monitored their email correspondence. Anyway, the fact Mr B and Mr E failed to follow the correct procedure for advising or receiving commissions, whilst part of the relevant circumstances, does not necessarily prevent Positive Solutions from being vicariously liable for their actions.

I don't know precisely how Mr B or Mr E first came into contact with Positive Solutions. But regardless of who first approached whom, I note that Positive Solutions had established itself in business as a firm that gave investment advice to customers, and that it made arrangements for Mr B and Mr E (amongst others) to act as its investment advisers. In doing so, I consider that Positive Solutions did indeed assign the activity of giving investment advice to Mr B and Mr E.

Looking at the situation in the round, I remain satisfied that the field of activities Positive Solutions had assigned to Mr B and Mr E was that they should give investment advice to Positive Solutions' customers. Mr B and Mr E then gave investment advice to Mr and Mrs M. There are factors pointing both towards vicarious liability and against it, and amongst the latter were irregularities with both the investment advice and the method of payment for the advice. But having taken all the evidence into account, I remain satisfied that the investment advice complained of was indeed so closely connected with the acts Mr B and Mr E were authorised to do such that, for the purposes of Positive Solutions' liability to Mr and Mrs M, that advice may fairly and properly be regarded as having been done by Mr B and Mr E while acting in the ordinary course of their duties for Positive Solutions.

statutory responsibility under s150 of FSMA

In both my provisional decisions, I explained why I thought s150 of FSMA (now replaced by s138D) provided a further route to liability. I said:

> "*I consider that the guidance the FCA set out in PERG 2.3.5 to 2.3.11 (in respect of when the FCA considers a person to be carrying on a business in their own right) is also relevant to the issue of whether Positive Solutions had statutory responsibility under section 150 of FSMA for the actions of Mr B and Mr E. Again, I appreciate the guidance in PERG was published some years after the advice complained of here, but the relevant parts of the legislation had not changed substantively.*
>
> *In my view, the FCA's guidance suggests that the question of a firm's responsibility for agents who were not appointed representatives should be analysed according to whether the agent was carrying on the firm's business. The guidance directly concerns the question of whether the agent is in breach of the general prohibition for carrying on its own business instead of the firm's, but I think it is just as relevant to the question of whether the agent's acts and omissions count as acts and omissions of the firm under section150 of FSMA. The general prohibition applies to persons who carry on regulated activities by way of business and section 150 applies to persons who breach regulatory rules whilst carrying on those activities. In both cases, the question needs to be answered which party's business is carried on. If the agent was carrying on the firm's business, then the agent won't be in breach of the general prohibition, but the firm will nevertheless be liable under section 150 for its agent's breaches of rules such as the COBS suitability rules.*
>
> *For the reasons I've give above, I am satisfied that when Mr B and Mr E gave the advice complained of, they were both acting in their capacity as Positive Solutions'*

> *approved persons for the purpose of carrying on Positive Solutions' regulated business. They were not carrying on a business of their own. So, if their advice was not suitable, then (subject to the recognised defences) Positive Solutions is responsible in damages to Mr and Mrs M 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 Positive Solutions is responsible for the acts complained of.*"

Positive Solutions expressed some concern about my reference to FSMA. It said:

> "*Whilst not entirely clear, the Ombudsman appears to have reached the view that s138D could apply even if Positive Solutions was not responsible for Mr B or Mr E's actions under the law of agency or the law of vicarious liability. In so doing, the Ombudsman relied on the views of the regulator and on guidance published by the regulator. This is a clear error of law*."

In my view, responsibility established under the law of agency or vicarious liability is a sufficient, but not a necessary, condition for responsibility to attach in respect of breaches of FSA rules under s150 (and now for breaches of FCA rules under s138D, which is the equivalent provision today). I consider that the regulator's rules – and the purpose served by them – mean that a principal's liability for regulatory rule breaches may sometimes go wider than it might at common law. I have in mind, in particular, cases where a regulatory rule is dishonestly breached by the firm's employee or agent.

I note that neither FSMA nor the FSA/FCA rules draw a distinction between dishonest and honest rule breaches when it comes to compensating consumers for those breaches; both are equally catered for on the same footing. This suggests that the presence of dishonest intent doesn't have the effect of narrowing the test for vicarious liability under s150 as it might at common law. And, given that those sections have a consumer-protection purpose, it would be unexpected if the employee or agent's dishonest intent when breaking a rule relieved firms from vicarious liability they would be under if the rule had been broken without dishonesty.

So, if Mr B or Mr E had acted dishonestly in advising Mr and Mrs M, Positive Solutions might still be responsible for their advice under s150 of FSMA – even if Positive Solutions would not have been vicariously liable for their advice under common law principles.

However, in the particular circumstances of this complaint, as I've said I am not persuaded that this is a case of fraud. I know Positive Solutions disagrees with me on this point, but I do not believe that Mr B or Mr E acted dishonestly. That means s150 of FSMA merely provides an additional route by which Positive Solutions is responsible for the advice given by Mr B and Mr E, and the fact that the section would in my view also have imposed liability on Positive Solutions for any FSA rule breaches committed *dishonestly* by Mr B and Mr E isn't directly relevant.

summary of my findings on jurisdiction

Having carefully considered all of the circumstances here, as well as the legal authorities, I remain satisfied that:

- Mr B and Mr E did not have Positive Solutions' actual authority to recommend that Mr and Mrs M invest in Harlequin.

- Positive Solutions did not represent to Mr and Mrs M that Mr B and Mr E had Positive Solutions' authority to advise on the Harlequin investment.

- Positive Solutions is vicariously liable for the acts Mr and Mrs M complain about.

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

I am therefore satisfied that Positive Solutions is responsible for the acts Mr and Mrs M complain about.

my findings - merits

Having concluded that Mr and Mrs M's complaint does fall within my jurisdiction, I have gone on to reach conclusions on the merits of their complaint. In doing so, I've considered all the available evidence to decide what's fair and reasonable in the circumstances of the case.

In my first provisional decision, I said:

> "*Briefly, my provisional findings on merits are:*
>
> - *Mr B's and Mr E's advice was unsuitable for Mr and Mrs M.*
>
> - *Mr and Mrs M acted on the unsuitable advice, and suffered a loss as a result.*
>
> - *The fair and reasonable outcome to this complaint is for Positive Solutions to compensate Mr and Mrs M for that loss.*
>
> *I go on to explain how I reached those conclusions.*
>
> *I consider that Harlequin was a high risk, esoteric investment that would only ever have been suitable for a small number of investors. I have very little information about Mr and Mrs M's circumstances, but I've seen nothing to suggest that they had any experience of – or, more importantly, understanding of – this type of investment.*
>
> *When Mr and Mrs M complained to Positive Solutions, it sent them a questionnaire asking about their circumstances at the time of the events they complain of. They told Positive Solutions that their savings and investments were made up of cash savings accounts, a cash ISA, some endowment policies, shares in banks and insurance companies, and commercial and residential property. They did not list a UCIS, or any other non-mainstream pooled investment.*
>
> *Mr and Mrs M also said their attitude to risk in 2009 was "low". That is consistent with their understanding that the Harlequin investment would be effectively self funding. They said Mr B and Mr E told them Harlequin would pay to maintain the mortgage interest, and once completed the value would be sufficient to either secure borrowing against the overseas property or to sell at a profit.*
>
> *Looking at Mr and Mrs M's circumstances, and their reliance on the investment to repay their mortgage, my opinion is that the strategy Mr B and Mr E recommended to*

them was far too risky. I consider that the advice they received was negligent, and in breach of the COBS rules on suitability.

Whilst I can't be certain what else Mr and Mrs M would have done, I consider it likely that if they had been suitably advised they wouldn't have borrowed any money to invest, and they wouldn't have made any investment into Harlequin.

I also note that Mr and Mrs M told us they agreed to go ahead with the Harlequin investment because it they were told it was a "no brainer". I understand this comment to mean that they found the decision to go ahead to be a very easy one – they thought the investment was simple and straightforward, and there was no need to spend time weighing up the pros and cons.

On the one hand, their "no brainer" comment strongly suggests that they did not understand the risks associated with the investment. Those risks included (amongst many others):

- *There might be cost overruns in the building of the overseas property;*
- *The overseas property might have dropped in value;*
- *The value of the pound might fall against the US dollar;*
- *They might not have been approved for a mortgage for the remainder of the finance – which they would have been contractually required to raise if they could not sell the property on.*

On the other hand, I note that at the time of the advice Mrs M held a senior position in a professional firm. Given her experience, I consider that if she had given serious thought to the matter, she would have realised that the arrangements here were complex – and that making an informed decision about whether to invest would take considerable time.

However, despite Mrs M's professional experience neither she nor her husband were investment advisers. They had approached Mr B for advice, and they were entitled to expect that that advice would be given with reasonable care and skill. I am satisfied that they relied on the advice they received from Mr B and Mr E, and it is therefore fair for Positive Solutions to be required to compensate Mr and Mrs M for that negligent advice."

In my second provisional decision, I went on to say:

"*I acknowledge that Mr and Mrs M went ahead with this investment despite not receiving a written statement explaining why that advice was given. But I consider that shows only that they trusted Mr B and Mr E – it does not say anything about the degree of risk they were prepared to accept.*

I also acknowledge that Mr and Mrs M were prepared to take some risks, particularly with respect to buy-to-let investment – an area familiar to them. But that does not mean they were prepared to take the risks associated with this Harlequin investment. I consider that they were led to believe the Harlequin investment was a "no-brainer", but it was in fact very far from that. Regardless of the exact level of risk Mr and Mrs M were prepared to take, I remain satisfied that if the risks associated with Harlequin had been explained to them they would never have chosen to invest in it."

I note Positive Solutions' belief that there is no "*contemporaneous (or any) evidence … that Harlequin was unsuitable*" for Mr and Mrs M. But I disagree. In my view, there is plenty of evidence from the time of the sale that I consider should have led any financial adviser in Mr B or Mr E's position to the conclusion that Harlequin was – as I have said – a high risk, esoteric investment that would only ever have been suitable for a small number of investors. I see nothing here to suggest that Harlequin was suitable for Mr and Mrs M.

I have carefully considered Positive Solutions' objections to my findings, but I remain satisfied that if Mr B and Mr E had taken reasonable steps to ensure their advice was suitable for Mr and Mrs M, they would not have recommended Harlequin to them as they did. My reasons are as set out in my first and second provisional decisions, quoted above.

what Positive Solutions needs to do to put things right

As I said in both of my provisional decisions, in considering compensation my aim is to put Mr and Mrs M in the position they would have been in if they hadn't invested in Harlequin.

In my first provisional decision, I said I thought that if Mr and Mrs M hadn't invested in Harlequin they wouldn't have done anything at all. But after considering both parties' responses to that first provisional decision, I changed my mind and explained why I thought they would have bought a terraced property in the North West on a buy-to-let basis instead. I said:

> "*I accept that it is more likely than not that Mr and Mrs M would indeed have expanded their buy-to-let portfolio if they hadn't invested in Harlequin. Their statement that they would have done so is strongly supported by the fact that Mrs M's original reason for approaching Mr B was for assistance in arranging a buy-to-let mortgage on a specific property. I also note that Mr and Mrs M were experienced landlords. The fact they were able to raise a mortgage of £48,500 against their own property suggests that they would have been able to fund the purchase of a buy-to-let if they hadn't spent that money on Harlequin.*
>
> *I note Mr and Mrs M's comment that if they hadn't invested in Harlequin, they would have made an offer on a specific terraced house in the North West. I can't be sure that they would have bought that specific property – their offer might not have been accepted, and the sale might have fallen through for any number of reasons – but on balance I think it more likely than not that they would have bought a similar terraced property in the same region. If they had done so:*
>
> - *They would have received rental income from the time they purchased the property until the time they sold it (subject to void periods and any bad debt);*
> - *They would have had to pay various expenses, including maintenance and mortgage interest;*
> - *The value of the house may have fallen or risen between purchase and today, or the date of any earlier sale.*
>
> *It isn't possible for me to obtain precise amounts for any of the above – I can't possibly know how much rent they would have received, what their expenses would have been, or even when (or whether) they would have sold the property. But I am*

required to reach an outcome that I consider fair and reasonable in all the circumstances, and so I think it is appropriate for me to make some assumptions.

For the purposes of redress I think it fair to assume that Mr and Mrs M would have paid £49,500 for a property. I acknowledge it's likely they would in fact have spent slightly more than that, but £49,500 is the amount they actually spent on Harlequin (their original £1,000 deposit plus the £48,500 they borrowed). The difference between £49,500 and the amount Mr and Mrs M would have spent on a buy-to-let property was still available to them, and they could have invested that difference – so it wouldn't be fair for me to order Positive Solutions to pay redress based on an assumption Mr and Mrs M had bought a property with a higher value.

capital appreciation

Looking first at the capital appreciation Mr and Mrs M have lost out on because they didn't buy a property, I note that Land Registry data (available from https://www.gov.uk/check-house-price-trends) suggests that the average price of a terraced house in the North West remained relatively flat between 2009 and 2014, then began to rise. As at September 2020, the latest date for which figures are available, the average price of a terraced house was around a third higher than the 2009 average price. I therefore think it would be fair for Positive Solutions to pay Mr and Mrs M ***£16,500*** *(one third of the £1,000 plus £48,500 they invested in Harlequin) as a proxy for that lost capital gain.*

Positive Solutions should also return the ***£49,500*** *Mr and Mrs M paid to Harlequin (£1,000 as a deposit from their own resources, and £48,500 funded by a mortgage).*

As in my first provisional decision, I intend to work on the basis that the Harlequin investment has a nil value. If this changes, or if any funds are distributed in relation to the Harlequin deposit at a later date, it would be fair for Positive Solutions to receive the benefit of those funds. Positive Solutions may request that Mr and Mrs M either assign the investment to it or give an undertaking that they will transfer any future benefit to it. Positive Solutions must pay the costs associated with any such assignment or undertaking.

I also want to remind Mr and Mrs M of the comment I made in my first provisional decision about the possibility that they may be required to make further payment to Harlequin:

> *"I also note that when Mr and Mrs M invested in Harlequin using the mortgage funds, they made the first in a series of payments under a contract to purchase the overseas property. If the property is ever completed, Harlequin could require the remaining balance to be paid under the investment contract. I think it's unlikely that the property will be completed, so I think it's unlikely there will be further loss – but there might be. Mr and Mrs M need to understand this, and that they will not be able to bring a further complaint to us if that contract is called upon in future."*

income and expenses

Turning now to Mr and Mrs M's likely income and expenditure if they had purchased a buy-to-let property, I should first say that I am not aware of any equivalent to the Land Registry data that would allow me to calculate the average income returns received by buy-to-let landlords. Whilst there are various sources for average rents, I am not aware of any sufficiently reliable sources for average expenses. If either party does have such a source – or has any other suggestions for how this aspect of redress should be calculated – I will of course take their further comments into account.

I considered asking Mr and Mrs M for details of the actual costs of the other properties in their portfolio since 2009, and simply applying those costs to a hypothetical 2009 purchase of a £49,500 property. If Mr and Mrs M had owned hundreds of properties, I might have done that. But in this case I don't think that would be a fair approach. I understand Mr and Mrs M's property portfolio is relatively small – and so unusually high (or low) costs for one property would have a disproportionate effect on the average across their portfolio. I don't think I can fairly infer that expenses for any additional properties they purchased would have mirrored expenses on their existing portfolio.

However, the average rental yields I have seen are significantly higher than Mr and Mrs M's likely borrowing costs, which suggests a healthy margin for maintenance. So, as a minimum, I think it is fair for me to assume that the rental income Mr and Mrs M would have received if they'd purchased a property in the North West would have at least covered the interest and expenses relating to that property. That means it is fair for Positive Solutions to now return all the money Mr and Mrs M paid out-of-pocket to cover the mortgage. In other words, Positive Solutions should refund the mortgage interest payments Mr and Mrs M made from their own resources after Harlequin stopped funding the mortgage interest.

In my first provisional decision, I also suggested that Positive Solutions could deduct the payments Harlequin had made to Mr and Mrs M's mortgage. I apologise that I expressed myself poorly when I said that. To clarify, I meant only that Positive Solutions should not be required to refund money paid by Harlequin rather than Mr and Mrs M. I did not mean to say that Positive Solutions could deduct the interest payments Harlequin had made from the interest payments Mr and Mrs M had themselves made.

Positive Solutions should not be required to refund any of Mr and Mrs M's capital payments towards their mortgage (because those amounts are covered by the £49,500 above – if I were to require Positive Solutions to both pay the £49,500 and cover the capital repayment portion of their mortgage, I would be double compensating Mr and Mrs M). I understand Mr and Mrs M switched to a repayment mortgage in September 2012, so Positive Solutions is likely to need information from Mr and Mrs M or their mortgage lender in order to identify the interest portion of Mr and Mrs M's mortgage payments since then.

compensatory interest

So, comparing Mr and Mrs M's financial position having invested int Harlequin to the position they would have enjoyed if they had purchased a buy-to-let property, they have had to find from their own resources the interest on borrowing which the Harlequin investment failed to cover, and which a buy-to-let would most probably have covered. Positive Solutions should compensate them for their interest payments and also for the time Mr and Mrs M were out of pocket because of those payments.

In my first provisional decision, I suggested that Positive Solutions add interest at 8% per year simple to its refund of the (interest) payments Mr and Mrs M made to their mortgage and their £1,000 deposit. It is impossible to know how Mr and Mrs M would have used the interest payments they made if those amounts had been covered by the rent from the property they would otherwise have purchased, and 8% per year isn't a figure that comes from precisely modelling the cashflows Mr and Mrs M would have experienced if they had bought a property to let in 2009. It is possible that a return of 8% simple on the interest payments plus deposit will produce an income return that is either higher or lower than the actual income return Mr and Mrs M would have received. But given the impossibility of a precise model, I think a broad brush approach of 8% simple does produce a fair result."

I acknowledge that Positive Solutions considers it is unfair for me to award interest to date. It is right to say that I have taken too long to reach my findings, and I apologise to both parties for that. But Positive Solutions is wrong to say that the length of time taken to resolve this matter is solely due to the Financial Ombudsman Service. If Positive Solutions had upheld this complaint when Mr and Mrs M first contacted it – as I believe it should have done – Mr and Mrs M's money would have been returned to them many years ago. I see no reason why Mr and Mrs M should be disadvantaged by Positive Solutions' delay, and no reason not to award interest for the whole of the period Mr and Mrs M were kept out of their money."

In respect of distress and inconvenience, I said:

"*I have considered Positive Solutions' comments about my proposed award for distress and inconvenience, but I remain satisfied it is fair. I accept that Mr and Mrs M had other assets, but I am not satisfied that they were so wealthy that a £48,500 mortgage debt was insignificant to them. I consider it very likely indeed that the existence of the debt – and the knowledge they had to keep making payments towards it – had an impact on their decisions about how to spend their money. Whilst I haven't seen anything to suggest that the debt was the sole reason for Mrs M to delay her retirement, I do accept that it was a factor in her thinking*."

Our investigator then wrote to both parties to say I was intending to award compensation of:

A. £1,000 to represent the original deposit Mr and Mrs M paid to Harlequin. (No interest should be paid on this amount, because the payment at 'E' below is intended to represent capital growth on both the original £1,000 deposit and the additional borrowing.)

B. £48,500 to represent the additional borrowing Mr and Mrs M took in 2009.

C. The interest payments Mr and Mrs M have paid to service that £48,500.

D. 8% simple interest upon the amounts calculated at C above, from the date each payment was made until the date of my final decision. (I previously said interest on 'D' should be calculated up until the date of settlement; I now consider that Positive Solutions should only have to pay interest beyond the date of my final decision if it delays making payment – see below.)

E. £18,000 to represent lost capital growth. (I previously said this figure should be £16,500; the increase is to reflect recent changes in Land Registry price data.)

F. £750 for distress and inconvenience.

Our investigator also said that I intended to order Positive Solutions to pay interest on the above amounts if Positive Solutions did not settle this complaint within 28 days of receiving *both* Mr and Mrs M's acceptance of my final decision *and* sufficient information from Mr and Mrs M to enable it to calculate 'C' above. He said that I intended to order that interest be calculated at a rate of 8% per year simple, on the amount of (A + B + C + D + E + F), from the date of my final decision until the date Positive Solutions settles this complaint.

Mr and Mrs M's representatives accepted my provisional conclusions.

Positive Solutions did not. Whilst it remains satisfied that it is not responsible for Mr and Mrs M's losses, it also made some comments on redress. Briefly, it said:

- It does not understand why I changed my mind on redress after issuing my first provisional decision. It believes my conclusion that it is more likely than not that Mr and Mrs M would have bought a buy-to-let property is "*based on little more than broad assumptions*".

- It does not believe it should have to refund the interest payments Mr and Mrs M received from Harlequin.

- It considers that the delays in Mr and Mrs M receiving compensation (if indeed they should receive compensation at all) were primarily the fault of the Financial Ombudsman Service. It says it should not have to pay interest at 8% for the whole of the period Mr and Mrs M were out of their money – or at all, bearing in mind that Mr and Mrs M were unlikely to have been able to achieve a return of 8% over that period.

- Given my conclusion that Mr and Mrs M always intended to take out a mortgage of around £48,500, it is not reasonable to make an award for distress and inconvenience on the basis that debt was significant to them.

I have reconsidered the issue of compensation, taking into account both parties' responses to my provisional decisions.

I acknowledge Positive Solutions' concern that I changed my mind on redress after issuing my first provisional decision. I did so after reflecting on the evidence and arguments, including Mr and Mrs M's response to that first provisional decision. One of the purposes of a provisional decision is to allow the parties to make further comments – and it is only fair that

I consider those comments, and alter my findings if those comments cause me to change my mind. I set out my reasons for changing my mind in my second provisional decision (quoted above). For those reasons, I remain satisfied that the fair and reasonable outcome here is – so far as possible – for Positive Solutions to put Mr and Mrs M into the position they would be in now if they had bought a buy-to-let property in the North West rather than investing in Harlequin.

I agree with Positive Solutions that it should not have to refund the mortgage interest payments Mr and Mrs M paid with money they received from Harlequin. My intention is that they should only receive a refund of the interest payments they funded *from their own resources* to service the £48,500 mortgage debt.

My understanding is that all of Harlequin's payments in respect of mortgage interest were made to Mr and Mrs M (£300.62 per month up to January 2011, then £268.13 per month until early 2013), rather than being paid directly by Harlequin to their mortgage lender. It is therefore fair for Positive Solutions to be allowed to deduct the payments Harlequin made in computing the compensation payable in respect of Mr and Mrs M's costs of financing their mortgage loan. If I were to require Positive Solutions to pay Mr and Mrs M all the interest payments they made on their mortgage without taking account of the fact that Harlequin put Mr and Mrs M in funds to make many of those payments, Mr and Mrs M would in effect be receiving the same money twice – once from Harlequin and then again from Positive Solutions.

I have not changed my mind about the period compensation should cover. I know there have been significant delays at the Financial Ombudsman Service, and I am very sorry for that. But I remain satisfied that Positive Solutions is responsible for the losses Mr and Mrs M suffered, and it is therefore fair for Positive Solutions to reimburse them for the whole of the period they were kept out of their money.

I also remain satisfied that a payment of £750 for distress and inconvenience is fair. That payment is not because I believe Mr and Mrs M were somehow distressed by the size of their mortgage – as Positive Solutions notes, I consider it likely they would have had a mortgage of around that size in any event. But if Mr and Mrs M had purchased a buy-to-let property, they would have received rental income (subject to void periods), and they would have been able to use that income to service the mortgage. If they had wanted to repay the mortgage, they would have been able to sell the property. But instead, the advice Mr B and Mr E gave led to Mr and Mrs M having to service the £48,500 debt from their own resources. I accept their evidence that the costs of doing so reduced their opportunities to pay for family activities, and that it had an impact on Mrs M's retirement plans, causing them to suffer distress and inconvenience.

my final decision

My final decision is that I uphold this complaint against Quilter Financial Planning Solutions Limited (formerly known as Positive Solutions (Financial Services) Ltd).

I order Quilter Financial Planning Solutions Limited to pay Mr and Mrs M:

A. £1,000 to represent the original deposit Mr and Mrs M paid to Harlequin.

B. £48,500 to represent the additional borrowing Mr and Mrs M took in 2009.

C. The interest payments Mr and Mrs M have paid to service that £48,500, but excluding the payments of interest insofar as they were funded by money Mr and Mrs M received from Harlequin ("the Unfunded Mortgage Interest Payments").

D. 8% simple interest upon the amounts of the Unfunded Mortgage Interest Payments, from the date each payment was made until the date of my final decision.

E. £18,000 to represent lost capital growth.

F. £750 for distress and inconvenience.

Positive Solutions may request that Mr and Mrs M either assign their Harlequin investment to it or give an undertaking that they will transfer any future benefit to it. Quilter Financial Planning Solutions Limited must pay the costs associated with any such assignment or undertaking.

If Quilter Financial Planning Solutions Limited does not settle this complaint within 28 days of receiving *both* Mr and Mrs M's acceptance of my final decision *and* sufficient information from Mr and Mrs M to enable it to calculate 'C' above, it must also pay interest on the above amounts. That interest should be calculated at a rate of 8% per year simple, from the date of this final decision until the date Quilter Financial Planning Solutions Limited settles this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs M to accept or reject my decision before 12 April 2021.

Laura Colman
ombudsman