summary of complaint

Mr S's complaint is that Positive Solutions (Financial Services) Limited gave him unsuitable advice to transfer his pensions to a self-invested personal pension (SIPP) in order to invest in an overseas property investment scheme with Harlequin Property. That scheme has failed and Mr S has lost the pension money he invested.

background to complaint

This complaint relates to events in 2010. The allegation is that Mr S was advised by an adviser I will call Mr H. Mr S says Mr H was acting for Positive Solutions and it's responsible for the advice Mr H gave. Mr S says that was advice to transfer existing pensions to a new SIPP in order to invest in a Harlequin Property investment. Positive Solutions says Mr H was not acting for it and it's not responsible.

I issued a provisional decision in November 2019. I said I thought we could consider the complaint against Positive Solutions, that it was responsible for the advice Mr H gave and that the advice was unsuitable. I also explained how I thought Positive Solutions should put things right.

Both parties are represented by lawyers. Mr S agreed with my provisional decision. Positive Solutions did not. Their lawyers said a number of things, including:

- It considers my provisional conclusions on jurisdiction are wrong as a matter of law. And the conclusions I drew from the case law dealing with principals and agents are wrong.
- My provisional decision *"fundamentally misses"* that Mr S was not and has never been a client of Positive Solutions. And to be an eligible complainant Mr S must have been a customer of Positive Solutions. But there is no evidence he ever was. Positive Solutions has no record of the earlier re-mortgage advice referred to in the provisional decision.
- My provisional decision *"fundamentally misses"* Mr H advised Mr S "*without Positive Solutions knowledge or authority, as he was operating on behalf of another company, Tailor Made, which had nothing to do with Positive Solutions. Further Positive Solutions gave no representation to Mr S in respect of either the pension transfer advice or the investment into Harlequin."*
- The provisional conclusion appears to wrongly ask whether Positive Solutions gave Mr H authority to transact a general class of acts and assuming that Positive Solutions did so, it has granted apparent authority. This is not the correct question. The correct question is whether there is ostensible authority in relation to this transaction. And in any event Positive Solutions had not given Mr H authority to advise on pension transfers of this type or the Harlequin investment.
- None of the alleged representations were relevant representations in the circumstances.
- As no relevant representations were made the issue of reliance is irrelevant.
- Mr S cannot credibly say he relied on Positive Solutions as there are no documents linking it to the advice. He was not even a client of Positive Solutions. He had no contract with it. He received no documents from Positive Solutions, but he did sign a form that said money would be paid to Tailor Made.
- It is not the case that there is a broad test of justice as a matter of law.
- The case of *Cox v Ministry of Justice* is not relevant to this complaint.

- It is clear Mr H was advising in the context of a recognisably independent business (Tailor Made).
- Mr H may have been giving investment advice and he may have filled in forms, but these were activities which Positive Solutions prohibited, and which were fraudulent.
- The analysis of the position, if Cox does not apply, is wrong. In a commercial agency case vicarious liability adds nothing to the concept of actual and apparent authority which are the governing principles.
- In any event the complaint the complaint is not suitable for determination by the Financial Ombudsman Service and is more appropriately dealt with by the court. It is impossible to make fair findings on the issue of reliance without cross examination and disclosure.
- Without prejudice to the above points, Positive Solutions does not agree that Mr S was not a high risk investor given that he invested without receiving any written advice or any engagement letter. The proposed redress is not clear.

my findings

I have considered all the evidence and arguments both parties have provided on this complaint. Having done so I have reached the same conclusions as I did in my provisional decision on 15 November 2019. Those conclusions were:

- Mr S's complaint is about an act or omission in relation to carrying on of the regulated activity of giving investment advice.
- Positive Solutions represented to Mr S that Mr H had authority to conduct business of the same type as the business he did conduct. And Mr S relied on those representations. Apparent authority therefore operated and Positive Solutions is responsible for the acts Mr S complains about.
- In addition, Positive Solutions is vicariously liable for the investment advice Mr H gave to Mr S. Although he was not an employee of Positive Solutions, he was an approved person with responsibility for carrying on Positive Solutions business of advising its customers and arranging the investments recommended. As such he carried on activities as an integral part of Positive Solutions' business and had a sufficient relationship to Positive Solutions for vicarious liability to arise. Mr H's advice was so closely connected to Positive Solutions' business activities as to make it just to hold Positive Solutions liable for it.
- Positive Solutions is also liable to Mr S under section 150 of the Financial Services and Markets Act 2000.
- Mr S's complaint is therefore within the jurisdiction of the Financial Ombudsman Service.
- Mr H's advice was unsuitable for Mr S. Mr S acted on the advice and suffered loss as a result of it.
- It is fair and reasonable for Positive Solutions to compensate Mr S for that loss.

My reasons for my conclusions are set out in my provisional decision and below. An anonymised version of my provisional decision (on which I have also corrected previous typing errors) is attached and forms part of this final decision.

***was Mr S a customer of Positive Solutions*?**

I accept there is no record of Mr S being a client for the advice complained about. Or the earlier re-mortgage.

On the re-mortgage, Mr S said he and his wife were introduced to the other Positive Solutions adviser (Mr W) by their daughter and that Mr W *"helped to remortgage our house".* He was not able to provide any documents relating to that matter when asked.

The earlier re-mortgage is not part of this complaint. So, whether advice was or was not given is not in itself relevant. It is the case that a lack of any record or other documentary evidence does not necessarily mean advice was not given. Nor does it mean that Mr S's evidence in relation to the pension and Harlequin investment advice is fatally undermined.

All the evidence has been considered and my view on the evidence was explained in my provisional decision. My view on the disputed advice was not dependent upon Mr S being an existing client based on the re-mortgage matter.

It is correct to say that the Financial Ombudsman Service may only consider complaints from eligible complainants. And that to be eligible a consumer such as Mr S must have a complaint that arises from matters relevant to one or more of the relationships specified in DISP 2.7.6R.

One of those relationships is where the consumer is or was a customer of the respondent firm.

The term customer is not defined in the DISP rule. The term should therefore have its ordinary meaning within the context in which the term is used. A consumer who is client of a regulated firm will be a customer in my view.

The nature of the relationship of agent and principal is that the agent acts on behalf of the principal so as to affect the principal's relationships with third parties. So in the normal course of things when someone deals with an agent (acting in that capacity) they are in effect dealing with the principal. So in a situation such as the present case, if the agent (acting in that capacity) agrees to give investment advice, and gives that advice, he is doing so on behalf of the principal, the regulated firm. And any person with whom a regulated firm agrees to give investment advice, and gives that advice, will be a client of the firm.

Investment advice can be given whether or not a formal client agreement has been entered into. Such a written agreement is not what determines whether such a person is a client. The issue is determined by whether the relevant service has been provided by or on behalf of the regulated firm in the course of it carrying on regulated activity.

As I said in my provisional decision:

> *"So when a client was doing business with a registered individual of Positive Solutions (acting in that capacity) they were doing business with Positive Solutions – they were a client of Positive Solutions."*

The issue of whether or not Mr S is a customer is bound up with the issue of whether or not advice was given on behalf of Positive Solutions. If it was, Mr S is a customer of Positive Solutions.

And whether or not advice was given on behalf of Positive Solutions – whether the complaint is about advice it was responsible for - was considered at length in my provisional decision. It was my finding that advice was given while Mr H was purporting to act for Positive Solutions and that Mr H was acting with apparent authority. This means Mr S was provided

with a service in the course of Positive Solutions carrying on a regulated activity and Mr H was a client of Positive Solutions. And so Mr S was a customer of Positive Solutions and he is an eligible complainant.

As mentioned, whether or not there a documented agreement between Mr S and Positive Solutions is not in itself determinative. Nor is the absence of documents recording any advice. Whether or not advice was given and if so in what capacity must be decided on the basis of all the evidence. And my views on the evidence are set in my provisional decision.

apparent authority

Positive Solutions says the question is not whether it gave Mr H authority to transact a general class of acts. The question is whether Positive Solutions gave Mr H authority in relation to this transaction.

I agree that the ultimate question is whether there was apparent authority in relation to this transaction. But to answer that question, I think it is right for me to consider whether Positive Solutions placed Mr H in a position which would objectively carry Positive Solutions' authority for Mr H to conduct business of a *type* he did in fact conduct.

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

For example, Diplock LJ in *Freeman & Lockyer* referred to a representation that the agent has authority to enter on behalf of the principal into a contract "*of a kind within the scope of the 'apparent' authority*". And in *Armagas*, Lord Keith said that in the commonly encountered case ostensible authority "*is general in character*" arising when the agent is placed in a position generally regarded as carrying "*authority to enter into transactions of the kind in question*".

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

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

Positive Solutions did not specifically mention pension transfers or Harlequin in its representations, but that is not determinative. So too, and clearly so, is the point that Mr H did not have actual authority to give the advice he gave. Mr H had Positive Solutions' apparent authority to act on its behalf in recommending that Mr S transfer pensions to a SIPP and invest in the Harlequin investment, because he had Positive Solutions' more general apparent authority to act on its behalf in giving them that kind of investment advice.

who was Mr H acting for?

Positive Solutions' position is that Mr H was acting on behalf of another company, Tailor Made. In my provisional decision I considered this point and concluded Mr H acted throughout on behalf of Positive Solutions.

Positive Solutions says Mr H has confirmed he was acting for Tailor Made. Positive Solutions had previously referred to the points made by Mr H and I referred to them in my provisional decision.

It is the case that there is no recommendation letter on Positive Solutions note paper. But the absence of such a letter does not prove either that no advice was given (as the adviser says) or that if any advice was given it cannot have been given on behalf of Positive Solutions.

While Mr H told Positive Solutions that he did not give advice, and only acted as an introducer for Tailor Made, there is no evidence that supports this. There is no documentary evidence showing Mr H apparently acting on behalf of Tailor Made. The only reference to Tailor Made in the documents is on the Harlequin Property reservation form. It does show Tailor Made was an agent. It does not clearly show Mr H acted for Tailor Made.

And there is evidence that tends to contradict Mr H's version of events. I discussed the evidence in my provisional decision and made the finding that - contrary to Mr H's version of events – Mr H did advise Mr S to transfer his pensions to a SIPP to invest in Harlequin while purporting to be a Positive Solutions adviser.

Positive Solutions representations as to the authority of Mr S

The points made by Positive Solutions are largely framed by its view that representations must be specific rather than general. I do not agree with that view.

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

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

> *"Mr and Mrs Martin … have to establish a representation made by LAS, which was intended to be acted on and which was in fact acted on by them, that Mr Sherman was authorised by LAS to give them financial advice concerning a remortgage of The Brambles.*
>
> *In my judgment the business card which Mr Sherman proffered at the outset of the meeting on 9 May 1991 was the clearest representation that he was authorised by LAS to give such financial advice. It may well be the case that, as Mr Burrell submitted, the unqualified use of*

> *the expression "Financial Adviser" on the business card would not have led a reasonable person to believe that Mr Sherman was authorised to give financial advice on matters wholly unconnected with the sale of insurance, but that is nothing to the point. It plainly did represent, in my judgment, that Mr Sherman was authorised to give advice in relation to the sale of insurance, including advice concerning associated or ancillary transactions: in other words, to give "investment advice" in the sense in which that term is used in the 1986 Act… . In particular, it represented that Mr Sherman was authorised by LAS to advise on the package of transactions which, in the event, he recommended.*"

Jacobs J in *Anderson v Sense* applied *Martin* and endorsed the above approach. He said:

> "*As* Martin *shows, [ostensible authority] requires a representation that there was authority to give advice of the type that was given*."

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

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

This is not a case like *Anderson v Sense* where many claimants had never heard of the principal so were not aware of any representations from it. It is Mr S's claim that he knew Mr W as a Positive Solutions adviser and he was introduced to Mr H by Mr W as a Positive Solutions adviser. And despite the lack of a prior relationship with Positive Solutions, and the absence of an engagement letter, there is the use of other Positive Solutions stationery and business stamps some of which will have been seen by Mr S at the time. Positive Solutions placed Mr H in the position which would generally be regarded as having the authority to give the advice he gave. It authorised Mr H to give investment advice. It arranged for him to be registered with FSA so he was authorised to perform the controlled function of giving investment advice on behalf of Positive Solutions. Such representations are made to potential clients as well as to existing or to new formally engaged clients.

I do not say in this case there was a holding out that everything Mr H might do was authorised. But, to the extent that he gave advice to Positive Solutions' customers such as Mr S, about their pensions and investments in their pensions this was the type of business he was held out as carrying on for it.

It remains my finding that Positive Solutions did represent to Mr S through its conduct that Mr H had its authority to act on its behalf in carrying on the activities complained about.

reliance

Positive Solutions says there was no representation, so reliance is irrelevant. I disagree. It goes on to say that was no reliance. I also disagree for the reasons set out in my provisional decision. As I have mentioned, this is not a case like *Anderson v Sense*. Mr S did know that Mr H was authorised to give investment advice on behalf of Positive Solutions and relied upon Positive Solutions representations by its conduct discussed in my provisional decision and above. Mr S proceeded on the basis Mr H was acting in every respect as an agent of Positive Solutions with authority from Positive Solutions so to act.

just that Positive Solutions should bear the loss

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

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

fraud

Positive Solutions said the following when replying to my provisional decision:

> *"Mr [H] may have been giving investment advice and he may have filled in forms but these were activities which Positive Solution prohibited and which were fraudulent.*
> *…*
> *We also note that in terms of vicarious liability it is clearly insufficient that the principal put the agent in a position which gave him opportunity to behave fraudulently: See the authorities summarised and applied in Frederick at [76]."*

Positive Solutions has not previously raised fraud as an issue in this complaint. And the above is all it has said.

Fraud is a serious allegation. The more serious an allegation of misconduct the stronger the evidence is required to be to establish on the balance of probabilities that the misconduct occurred. In this case there is not even a specific allegation of fraud and I cannot see that there is evidence on which to make a finding of fraud.

This is not a case in which an adviser appropriated a customer's money for himself, nor is it a case in which the adviser recommended that the customer invest in a fund managed by or controlled by the adviser himself. Instead, this is simply a case in which a financial adviser recommended that a customer in effect surrender existing funds and transfer the cash to a SIPP to then reinvest into another investment. That is a very common activity for financial advisers. In this case the advice was careless. It was negligent. It was in breach of common law duty of care. It was in breach of conduct rules obliging advisers to give suitable advice. The advice was not suitable for Mr S – but unsuitability does not necessarily imply fraud. And I make no finding that there has been fraud.

vicarious liability

I remain satisfied that Positive Solutions is vicariously liable for the acts Mr S complains about, for the reasons I gave in my provisional decision – though on re-reading my provisional decision I see a point I was trying to make was not made as clearly as I would like.

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

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

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

Moving from that specific clarification to the issue more generally, I remain of the view that the tests laid down by the Supreme Court in *Cox* and *Mohamud* are applicable. Those decisions make it very clear that non-employment relationships can give rise to vicarious liability. The purpose of the guidance contained in *Cox* is to define the criteria by which a non-employment relationship can be judged as either capable or incapable of giving rise to vicarious liability. In the present case, Mr H's relationship with Positive Solutions satisfies those criteria and had similarities to employment, as I explain in my provisional decision. It would seem very odd if that were to count for nothing just because he enjoyed powers of an agent to contract business. Many employees are given authority, as agent, to contract business on their employer's behalf and *Bowstead & Reynolds on Agency* (paragraph 1-004) says that the status of an agent will "*usually*" be either that of employee or independent contractor. So it cannot have been intended that the test in *Cox* is disapplied whenever there is an agency.

Positive Solutions has referred to paragraph 15 of Lord Reed's judgment in *Cox*. It says,

> "*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*."

The argument seems to be that Mr H is Positive Solutions' agent, which is the opposite of Positive Solutions' position in relation to the relevant advice. So, I take it that Positive Solutions' position is that Mr H was not its agent, having no authority from it whether actual or apparent to give the relevant advice; but that I should not apply *Cox*, because he was its agent in other respects. That position seems to me to be illogical and probably wrong on its own terms.

Anyway, the basis for the argument seems to me to go well beyond what Lord Reed actually said, which was:

> *"15. Vicarious liability in tort is imposed upon a person in respect of the act or omission of another individual, because of his relationship with that individual, and the connection between that relationship and the act or omission in question. Leaving aside other areas of the law where vicarious liability can operate, such as partnership and agency (with which this judgment is not concerned), the relationship is classically one of employment, and the*

> *connection is that the employee committed the act or omission in the course of his employment: that is to say, within the field of activities assigned to him, as Lord Cullen put it in Central Motors (Glasgow) Ltd v Cessnock Garage and Motor Co 1925 SC 796 , 802, or, adapting the words of Diplock LJ in Ilkiw v Samuels [1963] 1 WLR 991 , 1004, in the course of his job, considered broadly. That aspect of vicarious liability is fully considered by Lord Toulson JSC in Mohamud v Wm Morrison Supermarkets plc [2016] AC 677.*
>
> *16. It has however long been recognised that a relationship can give rise to vicarious liability even in the absence of a contract of employment…"*

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

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

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

I accept that Mr H advised Mr S without Positive Solutions' knowledge or authority. But I do not agree that he was advising in the context of a recognisably independent business – Tailor Made. The evidence does not show that Mr H was acting for Tailor Made. The documentary evidence shows Mr H, while seemingly acting for Positive Solutions, recommended the transfer of pensions to a SIPP to invest in Harlequin for whom Tailor Made acted as agent.

If Mr H's conduct had been fraudulent, then much of the case law I have quoted in relation to vicarious liability would not apply. But for the reasons I've given above, I don't think it was fraudulent. And even if it was, or even if the test in *Cox* does not apply for some other reason, Positive Solutions would still be responsible for the acts complained of by reason of apparent authority and statutory responsibility.

statutory responsibility under section 150 FSMA

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

- Section 150 FSMA is a consumer-protecting provision relating to regulatory rules which were themselves created to protect consumers. Together they create a statutory right to damages for breaches of the Regulator's rules and this can apply

even where there's no relationship between the firm and the consumer, so I would not expect the absence of apparent authority to be decisive.

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

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

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

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

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

> *"Although the overall relationship between a home collected credit provider (the principal firm) and a person providing the services…(the individual) will need to be taken into account, meeting the following criteria is likely to mean that the individual is carrying on the business of the principal firm (as its agent) and not his own, meaning that the individual does not require authorisation or to be exempt:*
>
> *(1) the principal firm appoints the individual as an agent;*
>
> *(2) the individual only works for one principal firm;*
>
> *(3) the principal firm has a permission from the FCA for every activity the individual is carrying on for which the principal firm would need permission if it was carrying on the activity itself;*

> *(4) the contract sets out effective measures for the principal firm to control the individual;…*
>
> *(6) the principal firm accepts full responsibility for the conduct of the individual when the individual is acting on the principal firm's behalf in the course of its business; and*
>
> *(7) the individual makes clear to customers that it is representing a principal firm as its agent and the name of that principal firm."*

The relationship described in PERG 2.3.11 has a lot of similarities to the relationship between Mr H and Positive Solutions:

- Positive Solutions had appointed Mr H as an agent.
- The FCA register suggests Mr H wasn't an approved person or appointed representative for any other firm at the relevant time.
- Positive Solutions had permission for the activities carried on by Mr H that needed permission.
- The agreement between Positive Solutions and Mr H set out a number of measures for Positive Solutions to control Mr H.
- Clause 2.4 of the agreement between Positive Solutions and Mr H said:

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

- I'm satisfied Mr H caused Mr S to believe he was representing Positive Solutions through his words and conduct such as the use of Positive Solutions stationery and stamp and the completing of the SIPP application form on which he referred to Positive Solutions as the financial adviser.

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

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

suitability for determination by an ombudsman

When Mr S referred his complaint to the ombudsman service, our rules said (at DISP 3.3.4R):

> "*The Ombudsman may dismiss a complaint without considering its merits if [she] considers that: …*
>
> *(10) it would be more suitable for the subject matter of the complaint to be dealt with by a court, arbitration or another complaints scheme.*"

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

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

Positive Solutions has suggested that it would be impossible for me to make fair findings on the issue of reliance without disclosure. But it would be very unusual for any party to have contemporaneous documents which identified the statements on which they relied, and so I don't think the court's power to order disclosure of documents would be of any assistance here. In any event, I have no reason to suspect that either of the parties have failed to disclose relevant evidence.

Overall, I am satisfied that I can resolve this complaint justly, fairly, and within my jurisdiction. I therefore decline to exercise my discretion to dismiss this complaint.

oral hearing

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

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

Positive Solutions hasn't requested a hearing as such in this complaint but I'm aware it has on other similar complaints. I've therefore thought about this point in the specific circumstances of this complaint I'm satisfied I can fairly determine the matter without a hearing. In particular, I note:

- The events complained of happened around ten years ago and memories inevitably fade. I'm satisfied I can reach a fair outcome using all the available evidence and I'm not persuaded hearing oral evidence would assist me.

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

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

merits

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

Positive Solutions seems to suggest that Mr S had a disregard for normal processes and that this in turn means he has or is likely to have a high tolerance of investment risk. I do not agree.

A consumer's willingness to tolerate a level of informality in the advice process does not mean that an investment recommended under such a process will necessarily be suitable for them. The suitability of the investment for the consumer depends on factors such as whether:

- The investment meets the consumer's investment objectives.
- The consumer is able financially to bear the risks of the investment.
- The consumer has the necessary investment experience and knowledge in order to understand the risks involved.

It remains my view that the advice was unsuitable for Mr S as set out in my provisional decision. It also remains my view that with suitable advice Mr S would not have moved his pensions.

Positive Solutions says it requires evidence that Mr S lost the whole of the investment and received no returns from it. My conclusion that Mr S has lost the whole of the investment and received no returns from it is based on my knowledge of these investments and the fact building work was never completed.

The problems with Harlequin are well publicised. I think it's highly unlikely Mr S has received any returns or will receive a return.

Whether Mr S has or has not suffered a total loss, this will be accounted for in the redress formula below.

fair compensation

I'm satisfied that a fair outcome would be for Positive Solutions to put Mr S, as far as possible, into the position he would now be in but for the unsuitable advice. I'm satisfied it's most likely he wouldn't have moved his pensions if everything had happened as it should have.

Where I uphold a complaint (in full or part), I can make a money award requiring a financial business to pay compensation up to a maximum financial effect of £150,000, plus any interest and/or costs that I consider appropriate. If I consider that fair compensation exceeds £150,000, I may recommend the financial business to pay the balance.

This recommendation will not be part of my determination or award. It will not bind the financial business. It would be unlikely that Mr S could accept my decision and go to court to ask for the balance. He may want to consider getting independent advice before deciding whether to accept my decision.

In this case the advice was to transfer an occupational pension and two personal pensions to the SIPP to invest in Harlequin. And in my provisional decision I said Positive Solutions should put things right using the "revised methodology issued by the FCA in October 2017". (Though I did not make it completely clear that I was referring to the regulator's pension review guidance as updated by the FCA in 2017.) And that remains my view in relation to Mr S's pensions covered by that guidance but I understand that will only be the occupational pension and not the personal pensions.

So, in relation to Mr S's pension(s) covered by the guidance, to compensate Mr S fairly Positive Solutions should:

- Undertake a redress calculation in line with the Regulator's pension review guidance as updated by the FCA in October 2017.

  This calculation should be carried out as at the date of my final decision and use the most recent financial assumptions published at the date of that decision. The value of the Harlequin investment should be assumed to be nil. In accordance with the Regulator's expectations, this calculation should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr S's acceptance of the decision.

  If Positive Solutions needs to contact the Department for Work and Pensions (DWP) to obtain Mr C's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P) it should do so. These details should then be used to include a "SERPS adjustment" in the calculation, which will take into account the impact of leaving the occupational scheme on Mr S's SERPS/S2P entitlement.

- If the redress calculation demonstrates a loss, the compensation should if possible be paid into one of Mr S's pension plans. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into a pension plan if it would conflict with any existing protection or allowance.

- If it's unable to pay the total amount into Mr S's SIPP, Positive Solutions should pay the compensation as a cash sum to Mr S. But had it been possible to pay into the SIPP, it would have provided a taxable income. So the total amount should be reduced to *notionally* allow for any income tax that would otherwise have been paid. The *notional* allowance should be calculated using Mr S's marginal rate of tax at retirement. For example, if Mr S is a basic rate taxpayer in retirement, the *notional* allowance would equate to a reduction in the total amount equivalent to the current basic rate of tax. However, if Mr S had been able to take a tax free lump sum, the *notional* allowance should be applied to 75% of the total amount.

In relation to Mr S's pension(s) not covered by the above guidance methodology, to compensate Mr S fairly, Positive Solutions must:

1. Obtain the notional transfer values of Mr S's transferred pensions as at the date of my final decision had they not been transferred to the SIPP.

Positive Solutions should ask those pension providers to calculate the notional transfer values they would have applied as at the date of this decision had Mr S not transferred his pensions but instead remained invested in those pensions.

If there are any difficulties in obtaining notional values then the FTSE WMA Stock Market Income Total Return Index should be used instead. That is a mixed index that is likely to be a reasonable proxy for the type of return that could have been achieved from pension funds with the original providers or reasonable alternatives. But, as mentioned, this is a way of dealing with any difficulties not because I say the pensions would or should have been invested in, or exactly in line with, that index.

2. Obtain the notional transfer value of the appropriate proportion of Mr S's SIPP (attributable to the pensions transferred to it on Positive Solutions advice) at the date of my final decision.

This should be confirmed by the SIPP operator. If the operator has continued to take charges from the SIPP and there wasn't an adequate cash balance to meet them, it might be a negative figure. Credit should not be given in the calculation for the value in the pension attributable to the third pension transferred into the SIPP later.

3. And then pay an amount into Mr S's SIPP so that the transfer values are increased by the amount calculated in (2). This payment should take account of any available tax relief and the effect of charges.

If it's unable to pay the total amount into Mr S's SIPP, Positive Solutions should pay the compensation as a cash sum to Mr S. But had it been possible to pay into the SIPP, it would have provided a taxable income. So the total amount should be reduced to *notionally* allow for any income tax that would otherwise have been paid. The *notional* allowance should be calculated using Mr S's marginal rate of tax at retirement. For example, if Mr S is a basic rate taxpayer in retirement, the *notional* allowance would equate to a reduction in the total amount equivalent to the current basic rate of tax. However, if Mr S had been able to take a tax free lump sum, the *notional* allowance should be applied to 75% of the total amount.

Further, in relation to the redress generally:

Had Positive Solutions given suitable advice I don't think there would be a SIPP. It's not fair if Mr S has to pay the annual SIPP fees if it can't be closed.

Ideally, Positive Solutions should take over the Harlequin investment to allow the SIPP to be closed. This is the fairest way of putting Mr S back in the position he would have been in. But as I understand it, the ownership of the Harlequin investment can't currently be transferred. It's likely that will change at some point, but I don't know when that will be – there are a number of uncertainties.

So, to provide certainty to both parties, I think it's fair that Positive Solutions pays Mr S an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees) or undertakes to cover the fees that fall due during the next five years. This should provide a reasonable period for things to be worked out so the SIPP can be closed.

Subject to what I say about maximum awards below, in return for the compensation set out above, Positive Solutions may ask Mr S to provide an undertaking to give it the net amount of any payment he may receive from the investment in that five year period, as well as any other payment he may receive from any party as a result of the investment. That undertaking should allow for the effect of any tax and charges on the amount they may receive. Positive Solutions will need to meet any costs in drawing up this undertaking. If it asks Mr S to provide an undertaking, payment of the compensation awarded by my decision may be dependent upon provision of that undertaking.

If, after five years, Positive Solutions wants to keep the SIPP open, and to maintain an undertaking for any future payments under the investment, it must agree to pay any further future SIPP fees. If Positive Solutions fails to pay the SIPP fees, Mr S should then have the option of trying to cancel the investment to allow the SIPP to be closed.

Mr S will have been caused significant upset by the events this complaint relates to, and the

loss of a significant part of his pension fund. I think that a payment of £500 is fair to compensate for that upset.

If Positive Solutions doesn't pay the compensation within 90 days of being informed that Mr C has accepted my decision, interest, at the rate of 8% simple a year should be added from the date of my decision to the date of payment. But it's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement – and so any period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply.

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

Mr S's Harlequin investment was a deposit. There are therefore more parts of the contract for the remaining purchase price of the property that haven't been paid yet. No loss has been suffered yet for these parts of the contract, so it isn't being compensated for here. But the loss may still occur. If the property is completed, Harlequin could still require those payments to be made. I think it's unlikely there will be a further loss. But Mr S needs to understand that this is possible, and he won't be able to bring a further complaint to us if the contract is called upon.

my final decision

determination and award: my decision is that I uphold Mr S's complaint against Positive Solutions (Financial Services) Ltd and require Positive Solutions (Financial Services) Ltd to carry out the steps specified in the fair compensation section above – up to a maximum financial effect of £150,000, plus any interest.

If the loss does not exceed £150,000, or if Positive Solutions (Financial Services) Ltd accepts the recommendation to pay the full loss as calculated above, it should have the option of taking the undertaking referred to above. If the loss exceeds £150,000 and Positive Solutions (Financial Services) Ltd does not accept the recommendation to pay the full amount, any undertaking should allow Mr S to retain all rights to the difference between £150,000 and the full loss as calculated above.

recommendation: if the financial effect of the award exceeds £150,000, I recommend that Positive Solutions (Financial Services) Ltd still carry out in full the steps I've specified plus pay interest on the full fair compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 28 March 2020.

Philip Roberts
ombudsman

anonymised version of provisional decision

summary of complaint

Mr S's complaint is that Positive Solutions (Financial Services) Limited gave him unsuitable advice to transfer his pensions to a self-invested personal pension (SIPP) in order to invest in an overseas property investment scheme with Harlequin Property. That scheme has failed and Mr S has lost the pension money he invested.

background to complaint

This complaint relates to events in 2010. The allegation is that Mr S was advised by Mr H on behalf of Positive Solutions.

The business model followed by Positive Solutions is that it is an independent financial adviser firm authorised by the Financial Services Authority (FSA) (later the Financial Conduct Authority). It gave advice through registered individuals who were referred to as partners. The partners were self-employed agents of Positive Solutions not employees. Nor were partners appointed representatives under s.39 of the Financial Services and Markets Act 2000 (FSMA).

So when a client was doing business with a registered individual of Positive Solutions (acting in that capacity) they were doing business with Positive Solutions – they were a client of Positive Solutions.

Mr S says he was introduced to Mr H by a different adviser at Positive Solutions, Mr W.
Mr W had recently dealt with a re-mortgage for Mr and Mrs S. Mr S says Mr W said that Mr H also worked for Positive Solutions and could help with the investment of his frozen pensions. Mr S says he was contacted by Mr H and he advised him to invest in Harlequin. The investment was a £190,000 purchase of an apartment in a Harlequin investment scheme in the Dominican Republic with an initial deposit of £57,000 and further payments due as the building works progressed.

Mr S says Mr H invited him to a seminar which he attended with Mr H and Mr W. At that seminar the CEO of Harlequin and others gave presentations. Mr S says Mr H thought the investment was a great opportunity for Mr S and advised him to invest in Harlequin and transfer his pensions to a SIPP with Guardian in order to so.

In April 2010 Mr S applied for a SIPP with Guardian. Section 11 of the application form records details of the applicant's financial adviser. This was recorded as Positive Solutions with the contact named as Mr H and Mr W. And this part of the form was stamped with
Mr H's details at Positive Solutions and a separate stamp with Positive Solutions' head office address.

Section 14 of the Guardian form was to record the intended activity of the SIPP and the following was entered:

> *"PURCHASE OF OVERSEAS COMMERCIAL PROPERTY (HARLEQUIN)"*

The application included an Identity Verification document that was completed by
Mr H and stamped with a Positive Solutions stamp.

On 20 April 2010 Mr H, using Positive Solutions note paper, wrote to Guardian with the completed application form for the SIPP. His letter included:

> *"[Mr S] is a member of [name given] Scheme which is being wound-up by Mercers via a Deferred Annuity with Prudential which has a surrender value of just over £66,000.*
>
> *When transferred he wishes to buy a Harlequin Property, but until the money is transferred we can't determine which type as at present he does not have sufficient resources to pay the Reservation Fee.*

There is a document in amongst this that requires some input from yourselves – confirming that you are able to accept the transfer etc.

Once the money has moved over I will need a mandate for the Reservation Fee and the balance of deposit, once Contracts arrive. I suspect we will be going 30/70 SIPP/Personal on this.

Finally, he also has 2 other pension arrangements with Winterthur & Colonial Mutual (which is also Winterthur now) and I am in the process of gathering the information to switch these across. We expect the transfers to add another £15000 or so…"

As part of the application process Guardian required Mr S to complete a form entitled Harlequin Property Questionnaire & Guidance Notes. That form was countersigned by Mr H as Mr S's adviser. He stamped the form with a stamp that said Positive Solutions and Mr H's Positive Solutions business address.

That completed form was returned to Guardian by Mr H by letter using Positive Solutions note paper dated 24 May 2010. That letter included:

"[Mr S] – Harlequin Application

Please find enclosed a SIPP Property Questionnaire and mandate for payment in respect of the above. I am assuming that you have now received the money from Prudential and can send the Reservation Fee of £1000. There is to be a price increase on Tuesday 1 June 2010, which I am hoping we can avoid!

Would you please be kind enough to e-mail me once the money has been sent so I can warn my contact at Harlequin to look out for it."

The Harlequin Property Questionnaire recorded:

- The property investment was on the Two River development in the Dominican Republic
- The total purchase price was £190,000.
- The ownership was expected to be split 30% in the SIPP and 70 outside the SIPP.
- £57,000 was to be paid out of the SIPP for the investment.

Money received into the SIPP was used for the Harlequin investment in the SIPP. This was after Mr S had signed the Harlequin reservation form.

On the reservation form signed by Mr S, immediately under the place signed by Mr S is a box that includes:

"Agent name to Invoice and Pay: **Marcus James/Tailor Made** Agent: **1746** [the words in bold were printed in bold on the form]

Contact Name: [Mr H name and phone number]*"* [this was completed by hand]

Mr S says he was not given any in information regarding Tailor Made and it was never discussed with him. He says as far as he was concerned Mr H and Mr W both worked for Positive Solutions and stamped all documentation as such.

In August 2010 Mr H sent, using Positive Solutions note paper, discharge forms for the transfer of benefits held by Winterthur to Guardian. That suggests the funds were transferred soon after. On 24

September Guardian wrote to Mr H at Positive Solutions head office address to say the "transfers from previous arrangements" had been received.

Later Harlequin got into difficulties and the investment failed. Mr S complained to Positive Solutions and it did not uphold his complaint which he then referred to the ombudsman service.

Positive Solutions thinks the ombudsman service cannot consider Mr S's complaint. It says Mr H was acting outside his authority from it, that he was not acting for Positive Solutions if he gave the alleged advice. Positive Solutions says:

- Mr H was required to hand over a terms of business agreement and confirm his advice in writing when acting from Positive Solutions. He did not do so in this case.
- There is no documentary evidence to show that advice was given to Mr S by Mr H on behalf of Positive Solutions.
- Mr H was not an authorised pension transfer specialist. He was not therefore authorised to advise on pension transfers. Only authorised pensions specialists could give such advice and not all whole of market IFAs.
- There is no evidence that Positive Solutions represented to Mr S that he was authorised to give the alleged advice to him.
- Positive Solutions received no commission for the alleged advice.
- Positive Solutions has no record of Mr S ever being its client. Mr S is not therefore eligible to make a complaint against Positive Solutions.

my provisional findings - jurisdiction

I've considered all the evidence and arguments in order to decide whether the Financial Ombudsman Service can consider Mr S's complaint.

the basis for deciding jurisdiction:

I must decide whether we have jurisdiction to consider this complaint on the basis of our jurisdiction rules (referred to as the DISP rules), including the relevant law they are based on or incorporate, based on the relevant facts of the complaint which I must decide on the balance of probability when in dispute.

I cannot decide the issue on the basis of what I consider to be fair and reasonable in all the circumstances. That is the basis on which the merits of complaint will be determined if we have jurisdiction to consider it.

the compulsory jurisdiction

The Financial Ombudsman Service can consider a complaint under its compulsory jurisdiction if that complaint relates to an act or omission by a "firm" in the carrying on of one or more listed activities, including regulated activities (DISP2.3.1R). Positive Solutions is a "firm" under our rules, and it does not dispute that.

As 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)*".

So there are two questions to be determined before I can decide whether this complaint can be considered under the compulsory jurisdiction of this service:

1. Were the acts about which Mr S complains done in the carrying on of a regulated activity?

2. Was the principal firm, Positive Solutions (Financial Services) Ltd responsible for those acts?

the regulatory background

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

regulated activities

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

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

the general prohibition

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

This is known as the "general prohibition".

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

Mr H was neither an authorised persons nor exempt from authorisation. That means that if Mr H had carried out a regulated activity on his own behalf by way of business, he would have been in breach of the general prohibition.

the approved persons regime

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

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

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

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

Positive Solutions arranged for Mr H to be approved by the FSA to perform the controlled functions "*CF 22 Investment Adviser (Trainee)*" …, "*CF 21 Investment Adviser*" and *"CF30 Customer"* [between 2004 and 2011] in relation to regulated activities carried on by Positive Solutions. (CF30 is the function of advising on investments.)

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

breach of statutory duty

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

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

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

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

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

Mr S was a private person under section 150(1) of FSMA and private customers under COB 5.3.5R. Broadly, those terms covered all natural persons – subject to some exceptions. I am satisfied that none of the exceptions to general position applied to Mr S – he was not a firm, and he was not carrying out any regulated activities by way of business. He was simply an ordinary consumer.

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

what is the complaint?

In October 2014 solicitors acting for Mr S wrote to Positive Solutions. Their letter included:

> *"Basis of Claim*
> *Our client was advised by you to transfer various pensions to a SIPP to then invest in Harlequin.*
>
> *Suitability*
>
> 1. *There is no assessment of the suitability of the Harlequin property for our client.*
> 2. *There is no assessment of the risks of the Harlequin investment.*
> 3. *If the advice were suitable (which we believe it is not), the fund is over exposed to this type of investment in any event.*
> 4. *The benefits of the ceding scheme have not been replaced."*

Positive Solutions did not uphold the complaint and so it was referred to the ombudsman service.

In my view the complaint is therefore about the suitability of advice to transfer existing pensions to a SIPP in order to invest in the Harlequin Property investment.

were the acts Mr S complains about done in the carrying on of a regulated activity?

As I understand it Positive Solutions does not deny that a regulated activity took place. It objects to my consideration of this complaint because it says it was not responsible for any advice Mr S received – not because it says he did not receive advice at all. But I include this point, for completeness.

A SIPP is personal pension. Transferring existing pensions to a SIPP (even if the pensions are occupational pensions) is regulated investment advice. So too is advice on investing the funds within a SIPP. Arranging those deals is also a regulated activity.

was Positive Solutions responsible for the acts Mr S complains about?

Positive Solutions' position is that Mr H was its agent. But that he was not authorised to:

- advise on the SIPP as it was not an approved product
- advise on Harlequin as it was not an approved product
- advise on the transfer of occupational pensions as he was not an authorised pension transfer specialist.

Positive Solutions position is that the adviser was only authorised to introduce new approved contracts.

Positive Solutions has also said:

> *"The adviser has previously informed us that he made it very clear to clients, that he was personally unable to provide any advice on this type of investment and that there was no regulated sales process at Positive Solutions (Financial Services) Ltd which would accommodate this type of business. He furthermore informed the client that it was unlikely that an investment within this environment would [be] covered by the FSCS and highlighted that he was only able to act as an 'Introducer' via company entitled 'Overseas Property Angels' who in turn acted as a conduit to 'Tailor-Made Alternative Investments' who arranged the proposed property purchase."*

So Positive Solutions does therefore seem to dispute that there was any advice to invest in Harlequin. It is not clear that it disputes that any advice was given to transfer the pensions to a SIPP.

Mr S's position is that he was advised by Mr H on behalf of Positive Solutions to invest his pension funds in Harlequin and to transfer his pensions to a Guardian SIPP in order to do it.

Mr S says he was referred to Mr H by Mr W for pension investment advice. He says Mr H advised him to invest his pension in Harlequin and to transfer his pensions to a Guardian SIPP in order to do so.

It is the case that there is no documentary evidence recording such advice.

There is however documentary evidence to show Mr H was involved in the application for the SIPP and the transfer of pensions to the SIPP and the investment in Harlequin. And the evidence is clear in relation to the SIPP application that Mr H arranged that application while purporting to act for as a Positive Solutions adviser.

It is also clear that he arranged the transfer of pensions to the SIPP while purporting to act as a Positive Solution Partner.

And it is clear that the application for the Harlequin investment was all part of the same transaction as the SIPP application and the pension transfers.

I note that Mr H has said that he made it clear that he was unable to advise on Harlequin and that he was acting as an introducer for Tailor Made. However I have seen evidence in another complaint about Mr H which does tend to contradict this point and show that Mr H did refer to Positive Solutions having special discounts for Harlequin investments.

There is a reference to Tailor Made on the Harlequin Reservation form but that does not show Mr H made it clear he was acting for Tailor Made not Positive Solutions.

And there is the general point that Mr S does not seem to be an experienced or knowledgeable investor who would give instructions to open a SIPP and transfer his pensions to it without being advised to do so by a financial adviser.

So on balance it is my finding that Mr H advised Mr S to invest his pension in Harlequin and to open a SIPP to do so, while purporting to be a Positive Solutions financial adviser.

Positive Solutions says the agent was not authorised to give such advice on its behalf

The finding that Mr H gave the disputed advice is not the end of the matter. Positive Solution's point is that if Mr H did give advice he was not doing so in his capacity as a registered individual (or agent) of Positive Solutions.

what was the adviser authorised to do by Positive Solutions

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

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

The law recognises different forms of agency.

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

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

actual authority

Paragraph 2.1 of the agency agreement between Positive Solutions and Mr H said:

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

Contracts is defined as:

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

And Institution is defined as:

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

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

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

Paragraph 2.4:

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

Paragraph 3.1:

> This clause required a Registered Individual to be registered with the FSA.

Paragraph 4.3:

> This required the Registered Individual to conduct business on Positive Solutions terms of business.

Paragraph 10.1:

> This clause required the Registered Individual to conduct himself in adherence to the FSA rules.

Paragraph 10.4:

> This clause prohibited the Registered Induvial from procuring persons to enter into agreement otherwise than through Positive Solutions agency.

Paragraph 10.7:

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

Paragraph 14:

> Under this section the Registered Individual agreed to indemnify Positive Solutions if it incurred and claims or liability in respect of the Registered Individual's acts or omissions.

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

As mentioned above, at the time of the events complained about in this case, as required by paragraph 3.1 of the Agency agreement Mr H was registered on the FSA register. It showed that he was approved to perform the controlled function *"CF30 Customer"* with Positive Solutions from 2007 to 2011.

The Positive Solutions Compliance manual recorded that Positive Solutions was authorised to advise on investments and pension transfers (amongst other things).

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

Registered individuals such as Mr H were appointed as, and held out by Positive Solutions as, independent financial advisers able to advise on investments as authorised and regulated by the FSA. That advice process is, and is required to be, more than just a sales job.

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

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

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

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

Without going into too much detail giving compliant investment advice involves getting to know a client and reviewing their financial position, their objectives, attitude to risk etc and giving advice that is suitable to those circumstances. In broad terms this process is set out in COBS 9.2 and the Positive Solutions Compliance Manual and Pensions Handbook. And it might for example lead to advice not to invest into a Contract, or advice to surrender an existing investment that is not a Contract. And (depending on the precise facts) both would be regulated financial advice the adviser could not lawfully give unless authorised.

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

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

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

So it is my view, in this case, that Positive Solutions authority to Mr H did potentially include advice on the merits of transferring his existing investments as well as the introduction of applications for new Contracts.

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

An agent is required to act in the interests of the principal. This principle is reflected in some of the terms in the agency agreement referred to above. It seems the agent is likely to have breached those terms in this case.

I also accept that Positive Solutions Pensions Handbook said pension transfer advice could only be given by pension transfer specialists. And that Mr H was not qualified or authorised as a pensions transfer specialist.

It is difficult to see that giving advice to:

- set up a SIPP (with a non-approved provider)
- and transfer pensions to it in order to invest in a non-approved investment
- when not qualified to give pensions transfer advice
- where no commission or fee was passed on to Positive Solutions

was acting in the interests of the principal, Positive Solutions.

It is therefore my view that the agent was not acting within the actual authority in relation to the disputed advice.

That is not however the end of the matter. There is also apparent (or ostensible) authority to consider.

apparent authority

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

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

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

Although Diplock LJ referred to "contractors", the law on apparent authority applies to any third party dealing with the agents of a principal – including consumers like Mr S.

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

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

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

In *Martin v Britannia Life Ltd* [1999]12 WLUK 726, Parker J quoted the relevant principle as stated in Article 74 in Bowstead and Reynolds on Agency 16th edition:

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

In the more recent case of *Anderson v Sense Network [*2018] EWHC 2834 Comm, Jacobs J endorsed Parker J's approach:

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

The representation may be general in character. In *Armagas Ltd v Mundogas SA* [1985] UKHL 11, Lord Keith said:

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

must the third party rely on the representation?

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

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

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

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

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

Here, I must consider whether, on the facts of this individual case:

- Positive Solutions made a representation to Mr S that Mr H had Positive Solutions' authority to act on its behalf in carrying out the activities he now complains about, and

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

Having considered the law in this area, including Lord Keith's comments in *Armagas*, so far as representations are concerned I need to decide whether Positive Solutions placed Mr H in a position which would objectively generally be regarded as carrying its authority to enter into transactions such as setting up of the SIPP to transfer existing personal pensions to it in order to invest in the Harlequin investment scheme. Put another way, did Positive Solutions knowingly – or even unwittingly – lead Mr S to believe that Mr H was authorised to conduct business on its behalf of a type (namely, advising and arranging investments) that he was not in fact authorised to conduct?

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

who was Mr H acting for when he carried out the acts complained of?

In this case Mr H advised Mr S on the merits of transferring his existing pensions to the SIPP to invest in Harlequin.

As I have said above Mr H was holding himself out as Positive Solutions adviser when he gave that advice.

Mr S has said he understood Mr H to be acting as Positive Solutions adviser when he gave that advice. I accept that is the case.

did Positive Solutions represent to Mr S that Mr H had the relevant authority?

I note that Mr S did not receive a terms of business agreement in respect of the disputed advice. Nevertheless it is my view that in principle an agent of Positive Solutions was authorised to:

- advise on the setting up of SIPPs
- advise on the transfer of existing pensions to SIPPs
- advise on the investment of funds within a SIPP.

These activities were provided for in Positive Solutions' procedures. None of these activities were in themselves novel or exceptional or unexpected for an IFA firm. These are activities that fall within the class of activities that IFAs are usually authorised to do. The transfer of occupational pensions is a specialist activity. Some IFA firms are permitted to carry out that activity. Some are not. I am not sure if this is a point that is known and understood by many consumers or by Mr S in particular. But in any event Positive Solutions was at the time a firm that was authorised to advise on pension transfers.

Any restrictions on the authority to give advice of the types I have listed above would not have been visible to Mr S. So for example he would not know that an adviser should only recommend approved investments, should obtain clearance from Positive Solutions before giving certain types of advice and should present the advice in certain ways.

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

Positive Solutions authorised Mr H to give investment advice on its behalf. It provided him with business stationery.

Positive Solutions arranged for Mr H to appear on the FSA register in respect of Positive Solutions. And Mr H was approved to carry on the controlled function CF30 at the time of the disputed advice. There is no separate or additional controlled function relating specifically to advising on pension transfers.

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

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

did Mr S rely on Positive Solutions' representation?

Mr S has said he understood Mr H to be acting as Positive Solutions adviser when he gave that advice.

There is no evidence to show that Mr S knew or should have known that Mr H was acting in any capacity other than a Positive Solutions adviser.

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

is it just for Positive Solutions to be required to bear any losses caused by Mr H?

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

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

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

vicarious liability

I think it is also appropriate for me to consider whether Positive Solutions is vicariously liable for the actions of Mr H – independently of whether apparent authority also operated such as to fix Positive Solutions with liability for the actions of its agents.

what is vicarious liability?

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

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

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

- Stage one is to ask whether there is a sufficient relationship between the wrongdoer and the principal (*Cox v Ministry of Justice* [2016] UKSC 10).

- Stage two is to ask whether the wrongdoing itself was sufficiently connected to the wrongdoer's duties on behalf of the principal for it to be just for the principal to be held liable (*Mohamud WM Morrison Supermarkets plc* [2016] UKSC 11*).*

There is some uncertainty in the law as to how widely the test in *Cox* should be applied. I note that in *Frederick v Positive Solutions* [2018] EWCA Civ 431 the Court of Appeal explicitly declined to decide whether the test in *Cox* applied to Positive Solutions' relationship with another of its registered individuals.

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

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

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

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

the 'stage one test'

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

> "*The result [of the approach adopted by Lord Phillips in Various Claimants v Catholic Child Welfare Society [2012] UKSC 56; [2013] 2 AC 1] is that a relationship other than one of employment is in principle capable of giving rise to vicarious liability where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party), and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question.*"

I am satisfied that in giving investment advice to Mr S to transfer pensions to a SIPP and in completing the SIPP application form, Mr H was carrying on activities as an integral part of the business activities carried on by Positive Solutions. I say that because:

- 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 "*Partners*". As set out in its "*partnership code*", those Partners promised to give "*impartial, independent financial advice*".

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

- Mr H was a Positive Solutions Partners. Positive Solutions had given him permission to carry out the controlled functions "*Investment Adviser (Trainee)*", then "*Investment Adviser*" and "*CF 30 Customer"* on behalf of Positive Solutions. Positive Solutions had therefore engaged Mr H 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 S complains 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 H to fall outside the general prohibition when acting on Positive Solutions' behalf in giving and implementing investment advice. As I've said, I consider that the only way in which Mr H could have fallen outside the general prohibition would be on the basis that he was carrying on Positive Solutions' business rather than his own. In my view, the guidance therefore provides support for the contention that
Mr H's relationships with Positive Solutions were very similar to employment relationships.

Further, in allowing Mr H to give investment advice on its behalf, Positive Solutions was creating the risk that he might make errors or act negligently in doing so. Positive Solutions assigned to Mr H 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.

the 'stage two test'

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

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

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

- Mr H was giving investment advice and filling in forms to put that advice into practice. I consider both of those activities are closely connected to the business activities of Positive Solutions, a firm which provided financial advice and arranged investment transactions for its customers (including Mr S).

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

- The agency contract says Positive Solutions will not be responsible if Mr H acts outside his authority. But the contract also says that *any* act or omission of the registered individual will be treated as an act of 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.

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

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

However, the facts in *Frederick* are so different to the facts here that I do not consider that the same outcome is inevitable in this complain. 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 S had personal dealings with Mr H, Positive Solutions' registered individual. He met with Mr H who provided him with advice. Mr H carried out business activities of a type that had been specifically assigned to him by Positive Solutions, and which he 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 S makes no allegation of fraud. He only complains about the suitability of the advice for him. His allegation is one of negligence and or breach of statutory duty. He does not say Mr H was dishonest. There is therefore no need for me to consider whether Positive Solutions would have been vicariously liable for Mr H'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 S says he suffered losses as a direct result of the advice given to him by Mr H, in his capacity as a Positive Solutions financial adviser, to transfer his pensions to a SIPP to invest in Harlequin.

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

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

Even if those specific tests are not applied, I still consider that it would be appropriate for a court to consider whether Positive Solutions is vicariously liable for the actions of Mr H. The earlier cases, including *Armagas* and the *Christian Brothers* case [2012] UKSC 56, make clear that justice is the court's overriding concern in such matters. Where the claimant and the defendant are both innocent parties, the court will consider whether the circumstances under which the wrongdoer committed his wrong were such as to make it just for the defendant to bear the loss.

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

From a public policy point of view, one of the purposes of FSMA was to make provisions for the protection of consumers. The approved person regime was one of the ways in which both FSMA and the FSA gave effect to that protection. Mr H was a Positive Solutions' approved persons. In view of section 59(1) of FSMA, I consider that when Mr H carried out the regulated activity of advising on investments, and arranging deals in investments, those activities were the activities of Positive Solutions. Positive Solutions is clearly responsible for its own activities. I see no support in FSMA – or anywhere else – for the belief that Positive Solutions' responsibility for its approved persons was dependent on the precise nature of its contracts with those people (agency/non-agency). Similarly, I do not see anything to suggest Positive Solutions' responsibility depends on whether the approved person's conduct is classified in terms of one type of tort ("reliance-based") or another. I would be surprised if a court were to take the view that such distinctions were relevant to the outcome of this complaint.

I therefore consider that Positive Solutions is vicariously liable for the acts Mr S complains about regardless of whether Mr H carried out those acts with apparent authority on behalf of Positive Solutions. (However, as I have said I consider that Mr H did in fact act with Positive Solutions' apparent authority when they carried out the acts complained of.)

statutory responsibility under section 150 of FSMA

For the reasons I've give above, I am satisfied that when Mr H gave the advice complained of, and when he arranged the associated deals in investments, he was acting in his capacity as Positive Solutions' approved persons for the purpose of carrying on Positive Solutions' regulated business. He was not carrying on a business of his own.

That means Positive Solutions is subject to the Conduct of Business (COBS) suitability rules in respect of Mr H's advice. If Mr H's advice was not suitable, then (subject to the recognised defences) Positive Solutions is responsible in damages to Mr S 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.

summary of my provisional findings on jurisdiction

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

- Positive Solutions represented to Mr S that Mr H had Positive Solutions' authority both to advise on the transfer of Mr H's pensions to a SIPP, Mr S relied on Positive Solutions' representations, and apparent authority therefore operated such as to give rise to Positive Solutions' responsibility for the acts Mr S complains about.

- In addition – or in the alternative – Positive Solutions is vicariously liable for the acts Mr S complains 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 S complains about. Even if I am wrong about one or two of the above three conclusions, I still consider that the third means that Mr S's complaint about Positive Solutions falls within my jurisdiction.

my provisional findings on merits

When considering all the evidence and arguments in order to decide whether we can consider this complaint I have also formed a provisional view about what is fair and reasonable in all the circumstances of the complaint.

Mr S was advised to transfer his pensions to invest in a SIPP. That first step in the overall transaction necessarily involves considering the suitability of the SIPP and the suitability of the known replacement investment. It is not possible to give suitable advice on the merits of the sale of the pensions without also considering the suitability of the replacement.

Mr S has complaint is that the Harlequin investment involved too much risk for him.

I note that Positive Solutions Pension Handbook says that its advisers should not recommend a SIPP for a pension fund of less that £75,000. And in this complaint less than £75,000 was transferred to the SIPP.

I also note the following comments made by the Upper Tribunal Tax and Chancery Chamber in the case *Alistair Burns v Financial Conduct Authority* [2018] UKUT 0246 (TCC) – a case involving a Director of Tailor Made:

> *"273 It would be readily apparent to any competent financial adviser that for an unsophisticated retail investor with a relatively small pension pot represented either by interests in a defined benefit scheme or in a personal pension invested in a spread of traditional investments, to switch his benefits into a SIPP which was to be wholly invested in either a single or very small number of inherently risky overseas property investments was a wholly unsuitable course of action for that investor to take… "*

I agree with that view. The investment in Harlequin was relatively high risk and there is no evidence that the investment was suitable for Mr S. In my view investing in an unregulated off-plan overseas property investment scheme involved a high degree of risk which was not suitable for Mr S. There is no evidence he was a high risk investor. He does not present as such and he does not hold other high risk investments. He should not have been advised to transfer pensions to transfer to a SIPP in order to invest in Harlequin. He should have been advised not to transfer his pensions at all.

There is no evidence to suggest Mr S would have transferred his pensions to invest in Harlequin if Positive Solution had advised him that it was unsuitable for him to transfer his personal pensions to a SIPP and then invest those pension funds in Harlequin. (Or if he had been so advised by another IFA if Positive Solutions had refused to advise on the Harlequin investment scheme.) It is therefore my present view that he if had been given suitable advice Mr S would have left his pensions as they were with the existing pension providers.

Mr S has lost the money he invested in Harlequin which he thought was a legitimate and worthwhile investment that he thought involved little or no risk. He will have suffered a considerable trouble and upset as a result.

how to put things right

Positive Solutions should, as far as possible, put Mr S into the position he would now be in but for the unsuitable advice to transfer his occupational pensions to a SIPP to invest I the scheme.

Positive Solutions should undertake a redress calculation in line with the revised methodology issued by the Financial Conduct Authority in October 2017.

If this demonstrates a loss, the compensation amount should if possible be paid into Mr S's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If the payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr S as a lump sum after making a deduction to reflect the rate of income tax Mr S is likely to pay in retirement. This is because the payment would otherwise have been used to provide pension benefits, which would have been taxed according to his likely tax paying status in retirement. So the total amount should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

The *notional* allowance should be calculated using Mr S's marginal rate of tax at retirement. For example, if Mr S is a basic rate taxpayer in retirement, the *notional* allowance would equate to a reduction in the total amount equivalent to the current basic rate of tax. However, if Mr S had been able to take a tax free lump sum, the *notional* allowance should be applied to 75% of the total amount.

Had Positive Solutions given suitable advice I don't think there would be a SIPP. It's not fair if Mr S has to pay the annual SIPP fees if it can't be closed.

Ideally, Positive Solutions should take over the investment to allow the SIPP to be closed. This is the fairest way of putting Mr S back in the position he would have been in.

So, to provide certainty to both parties, I think it's fair that Positive Solutions pays Mr S an upfront lump sum equivalent to five years' worth of SIPP fees (calculated using the previous year's fees), or undertakes to cover the fees that fall due during the next five years. This should provide a reasonable period for things to be worked out so the SIPP can be closed.

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

If, after five years, Positive Solutions wants to keep the SIPP open, and to maintain an undertaking for any future payments under the investment, it must agree to pay any further future SIPP fees. If Positive Solutions fails to pay the SIPP fees, Mr S should then have the option of trying to cancel the investment to allow the SIPP to be closed.

Mr S will have been caused significant upset by the events this complaint relates to, and the loss of a significant part of his pension fund. I think that a payment of £500 is fair to compensate for that upset.

my provisional decision

For the reasons given above, my provisional decision is that:

- we can consider this complaint
- the complaint should be upheld
- and Positive solutions should pay fair compensation as set out above.

Philip Roberts
ombudsman